



**[2025] JMFC Full 2**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE FULL COURT**

**CLAIM NO. SU 2023CV00736**

**CORAM:           THE HONOURABLE MR. JUSTICE B. MORRISON  
                      THE HONOURABLE MRS. JUSTICE A. PETTIGREW-COLLINS  
                      THE HONOURABLE MRS. JUSTICE S. WOLFE-REECE**

**IN THE MATTER** of the Charter of Fundamental Rights and  
Freedoms of the Constitution of Jamaica.

**AND**

**IN THE MATTER** Section 13, 19 & 20 of the Charter of  
Fundamental Rights and Freedoms of the Constitution of  
Jamaica

<b>BETWEEN</b>	<b>DAYTON CAMPBELL</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT</b>

**Mr. B St. Michael Hylton K.C., Mr. Duane Allen, Ms Alexis Robinson & Ms. Daynia L. Allen  
Instructed by Hylton Powell for the Claimant**

**Ms. Faith Hall & Mr. Matthew Gabbadon instructed by the Director of State Proceedings  
for the Defendant**

**Heard: November 25 and 26, 2024 & May 16, 2025**

**CONSTITUTIONAL LAW – The Constitution of Jamaica – Section 13, 19, & 20 of The  
Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 –**

**Whether the Claimant has locus standi – Whether the States of Public Emergency were imposed for a proper purpose within the meaning of Section 20 of the Constitution – Whether the imposition of States of Public Emergency was reasonably justifiable – Whether the imposition of States of Public Emergency was demonstrably justifiable in a free and democratic society – Whether the imposition of States of Public Emergency breached the doctrine of separation of powers.**

**MORRISON, J, PETTIGREW-COLLINS, J & WOLFE-REECE, J**

This is the Joint Judgment of the Court.

## **INTRODUCTION**

**[1]** The Claimant, who is the General Secretary of the People's National Party alleges that the Governor-General of Jamaica passed a series of proclamations<sup>1</sup> declaring that States of Public Emergency (SOPE) existed in specified communities in various parishes. This was the Government's response to a surge in crime and violence in communities that were deemed high risk communities. The Claimant challenges the constitutionality of the SOPE passed by the Governor-General at the instance of the Cabinet. The Claimant contends that Section 20(1) of the Jamaican Constitution (the Constitution) permits the Governor-General to make a proclamation declaring that a SOPE exists. Further that section 20(2) sets out the circumstances that must exist before the Governor-General can declare a SOPE. Based on the interpretation of section 20(1), a proclamation therefore, shall not be valid unless it is made in accordance with one of the circumstances outlined in section 20(2). It is contended that the declarations were not made for any purpose specified in section 20 of the Constitution and are therefore inconsistent with the Constitution and void.

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<sup>1</sup> January 18, March 18, September 23, 2018, April 30, July 7, September 15, 2019, January 26, June 14, 2020, November 14, 2021, June 17, November 15, December 6, December 28, 2023, February 13, 2023,

- [2] The Claimant also asserts that the non-compliance with Section 20 was not demonstrably justified and the extension of the SOPE by the executive was not in accordance with the Constitution and usurped a power reserved for the Parliament. In essence, the argument is that the executive breached the doctrine of the separation of powers.
- [3] The Claimant argues that during the first 55 years since the Constitution was established, there had been only three SOPE declared pursuant to Section 20(2)(b) of the Constitution; that being West Kingston in 1967, various parts of Jamaica in 1976 and West Kingston in 2010. However, since January 2018, the Governor-General acting in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet declared a total of 17 SOPE which were made in response to an increased surge in crime and violence within specific parishes.

## **BACKGROUND**

- [4] The Claimant asserts that there were two SOPE that were declared on the 15<sup>th</sup> of November 2022. On the 25<sup>th</sup> of November 2022 the Government attempted to secure a resolution of a two-thirds majority of all members of the Senate to obtain an extension of those SOPE. None of the opposition Senators voted in favour of the extension and the extension therefore failed. As such both SOPE expired on the 29<sup>th</sup> of November 2022.
- [5] On the 6<sup>th</sup> of December 2022 the Governor-General acting on the advice of the Cabinet or a Minister acting under the general authority of the Cabinet made a proclamation declaring a SOPE for the entire parishes of St. Ann, Clarendon, St. Catherine and the same areas of the parishes of Kingston and St. Andrew where the second SOPE was declared on the 15<sup>th</sup> of November 2022.
- [6] Further, the Governor-General acting on the advice of the Cabinet or a Minister acting on the general authority of Cabinet passed a proclamation declaring a SOPE for the entire parishes of St. James, Westmoreland and Hanover. The government did not seek an extension from parliament in securing the SOPE in the latter part of 2022 and as such the

SOPE expired on or about the 20<sup>th</sup> of December 2022. The Governor-General again on the 28<sup>th</sup> of December 2022, passed a proclamation declaring a SOPE in the same parishes as the SOPE declared on the 15<sup>th</sup> of November 2022.

- [7]** Section 20(3) of the Constitution states that a SOPE shall remain in force for 14 days unless both houses of Parliament by a two-thirds majority of both houses agree to extend it. The Claimant argues that the effect of this provision is that the power to extend SOPE is vested in Parliament and not the executive. The Claimant contends that the fourth, fifth, sixth and seventh SOPE passed in the latter part of 2022 constitute a breach of the separation of powers, in that the executive effectively purported to exercise a power that the Constitution reserved for Parliament; that is, the power to extend a SOPE. It is the Claimant's contention that this is contrary to both the letter and spirit of section 20 and indeed, of the whole Charter.
- [8]** As a precursor to the gravamen of the claim, it is to be observed that under the original Chapter III of the Constitution of Jamaica, the Senate had no involvement in extending a SOPE. All that was required was the vote of a majority of all the members of the House of Representatives. Under the Charter of Fundamental Rights and Freedoms (the Charter), the higher threshold of a two-thirds majority of each House is required. This ensures that an extension would require the support of at least one opposition senator as the structure of the Constitution permits.
- [9]** In its wide signification it is to be noted that the last two (2) subsections of section 26 of the old Constitution focused on insulating pre-existing laws from being "held to be inconsistent with or in contravention of", the original Chapter III, regardless of what those pre-existing laws may have provided for. By contrast, in place of these last two (2) subsections, the Charter merely has subsection (5) which empowers the Court to enquire into whether a proclamation or resolution was truly for the purpose it is purported to have been for. The original Chapter III had no equivalent to subsection (5) of the Charter.

[10] The Claimant takes issue with the vehicle used and method of the declaration of SOPE over a specified period and filed a claim before the Court. The Amended Fixed Date Claim form filed on June 24, 2024, seeks the following substantive orders:

a) *A Declaration that Proclamations made by the Governor General on and after the following dates:*

*January 18, March 18 and September 23, 2018,*

*April 30, July 7 and September 5, 2019,*

*January 26 and June 14, 2020,*

*November 14, 2021,*

*June 17, November 15, December 6 and December 28, 2022; and*

*February 15, 2023.*

*by which he declared that states of public emergency existed in various specified communities in Jamaica, were not made for any purpose specified in section 20 of the Constitution and were not “**demonstrably justified in a free and democratic society**” and were therefore inconsistent with the Constitution and are void.*

b) *A Declaration that the Proclamations made by the Governor General on November 15, 2022, December 6, 2022 and December 28, 2022 by which he declared that states of public emergency existed in various specified communities in Jamaica constituted a breach of the separation of powers principle in that the Executive effectively purported to exercise a power that the Constitution reserved to the Parliament, viz, the power to extend a state of public emergency for longer than 14 days were therefore inconsistent with the Constitution and are void.*

## ISSUES

[11] The issues raised in this case are –

- a) Whether the Claimant has the necessary legal standing to bring this claim?
- b) Whether the Declarations of States of Public Emergency made between January 18, 2018 and February 15, 2023 were made for a purpose as specified in Section 20 of the Constitution?

- c) Whether the Declarations of States of Public Emergency made between the period of January 18, 2018 and February 15, 2023 were demonstrably justifiable in a free and democratic society?
- d) Whether the proclamations breach the doctrine of the separation of powers?

## **LAW & ANALYSIS**

### **Issue #1: Whether the Claimant has the necessary legal standing to bring this claim?**

- [12] The Defendant has raised the preliminary issue that the Claimant has not demonstrated that he had the requisite legal standing to bring this claim before the Constitutional Court. The argument posited is that not just anyone is entitled to invoke the Court's jurisdiction to review the actions of the Government or to raise Constitutional issues. Counsel for the Defendant contends that the Claimant by his evidence, has not demonstrated or established any breach or likely breach of his rights under the Constitution, as required by section 19(1). Therefore, it is submitted that this Court should decline to entertain the Claim or grant the orders as sought.
- [13] Miss Hall submitted that locus standi generally turns upon the nature of the Applicant's interest in a matter. If the evidence fails to establish that the Applicant has standing, then despite the merits of the claim, the Court should decline to adjudicate on same.
- [14] Counsel supported her submission by asserting that there was no evidence that the Claimant resided within the geographical area of any of the SOPE, or that any of his fundamental rights had been breached or was likely to be breached as a result of the imposition of the SOPE. She urged that the Claimant had failed to provide any evidence that he was directly affected by the Proclamations being challenged.
- [15] Miss Hall submitted that where it is being alleged that an executive action is not in keeping with the Constitution, it is a challenge pursuant to Section 19 and the Claimant must therefore establish that he is directly affected. Counsel drew our attention to the pre-

Charter authority of **Banton and Others v Alcoa Minerals of Jamaica and Others**<sup>2</sup>, and she submitted that it is imperative for the Court to ascertain the nature of the Claimant's interest. She opined that having analysed the affidavit evidence of the Claimant, he has not stated that he has any public interest or concern or that he was a member of the Parliament.

[16] The Claimant in response submitted that the Defendant has misconstrued the substance of the claim as an invocation of Section 19 of the Charter. His contention is that the claim is brought pursuant to Section 20 of the Charter which does not have the same requirements as set out in Section 19.

[17] In determining this issue, the relevant provisions of The Charter of Fundamental Rights and Freedoms to be considered are sections 13, 19, & 20.

Section 13 provides as follows

*"13. - (1) Whereas-*

*(a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;*

*(b) **all persons** in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and*

*(c) **all persons** are under a responsibility to respect and uphold the rights of others recognized in this Chapter,*

*the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others."*

Section 19 provides:

*"19. – (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without*

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<sup>2</sup> (1971) 17 WIR 275

*prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

*(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter."*

Section 20 provides as follows:

*(1) In this Chapter –*

*...*

***"period of public disaster"** means any period during which there is in force Proclamation by the Governor-General declaring that a period of public disaster exists;*

***"period of public emergency"** means any period during which*

*(a) Jamaica is engaged in any war;*

*(b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or*

*(c) there is in force a resolution of each House of Parliament supported by the votes of a two-thirds majority of all the members of each House declaring that democratic institutions in Jamaica are threatened by subversion;*

***"service law"** means the law regulating the discipline of a defence force or police officers.*

*(2) A Proclamation made by the Governor General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor General is satisfied –*

*(a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;*

*(b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;*

*(c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.*



***(3) A Proclamation made by the Governor General for the purposes of and in accordance with this section (a) shall~ unless previously revoked, remain in force for fourteen days or for such longer period, not exceeding three months, as both Houses of Parliament may determine by a resolution supported by a two-thirds majority of all the members of each House;***

...

*(b) may be extended from time to time by a resolution passed in like manner as is prescribed in paragraph (a) for further periods, not exceeding in respect of each such extension a period of three months;'*

*(c) may be revoked at any time by a resolution supported by the votes of a two-thirds majority of all the members of each House.*

*(4) A resolution passed by a House for the purpose of paragraph (c) of the definition of "period of public emergency" in subsection (1) may be revoked at any time by a resolution of that House supported by the votes of a majority of all the members thereof.*

*(5) The court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose"* (emphasis added)

[18] The word "Standing" is the capacity of a party to bring a claim before the Court; in this instance, the Constitutional Court. To have standing, a party must demonstrate sufficient connection to any infringement of a right or the unconstitutionality of an act or action of a state or private entity.

[19] The Defendant hinged their submission on the dicta of Parnell J in **Banton v Alcoa Mineral** (supra) where he stated that:

*"The mere allegation that a fundamental right or freedom has been or is likely to be contravened is not enough. There must be facts to support it. The Framers of the Constitution appear to have had a careful and long look on several systems operating in other countries before they finally agreed to Chapter III as it now stands."*

The court found that for a party to succeed before a constitutional court he should be able to show:

*a) that he has a justiciable complaint that is to say a right personal to him and guaranteed under Chapter III of the Constitution has been or is likely to be contravened...*

- b) that he has standing to bring the action; that is to say, he is the proper person to bring it and that he is not being used as the tool of another who is unable or unwilling to appear as the litigant.*
- c) That his complaint is substantial and adequate and has not been waived or otherwise weakened by consent, compromise or lapse of time.*
- d) That there is no other avenue available whereby adequate means of redress may be available...*
- e) That the controversy or dispute which has prompted the proceeding is real and that which is sought is redress for contravention of the guaranteed right and not merely seeking the advisory opinion of the court on some controversial, arid, or spent dispute.<sup>3</sup>*

[20] We find that Miss Hall's reliance on the excerpt from the **Banton** case is misplaced because **Banton** predates the Charter. The pre-Charter Constitution had no equivalent to section 20(5) of the Charter. Section 20(5) permits the court to enquire into whether a proclamation or resolution was made or passed for a purpose stated in that section, or whether measures taken pursuant thereto are reasonably justified for the purpose. If reliance were to be placed on **Banton**, it would mean that someone with a legitimate concern to uphold the Constitution and the rule of law would have no avenue by which to do so unless his constitutional rights were personally affected.

[21] It is accepted in law that entitlement to bring a claim forms part of the foundation to invoke the Court's jurisdiction. The Claimant's evidence is that he is a citizen and resident of Jamaica and the General Secretary of the People's National Party. The People's National Party is a political party which forms the opposition in the Parliament of Jamaica. It is Mr Campbell's contention that the SOPE have breached constitutional provisions and that the breach grounds the claim and the orders being sought.

[22] Section 13 of the Charter sets out clearly that all persons are under a responsibility to uphold the rights of others under the Charter. Section 19 (1) permits a person who is aggrieved to invoke the provisions of the Charter. Section 20 broadens the scope and the implication is that anyone seeking redress for a perceived breach or breaches of the

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<sup>3</sup> (1971) 17 WIR 275 at page 305

provisions of the Charter can seek to invoke the Court's jurisdiction. This Court therefore does not accept that the only basis of standing is where a Claimant is personally affected by the issue. He can also be found to have standing if he is likely to be sufficiently affected by the action of the government or has a legitimate public interest in the matter.

[23] In essence, the Claimant argues, that the Court is being asked to consider whether the utilization of Section 20 by the Government was in accordance with how it was intended to be used. It was further submitted, that section 19 of the Constitution would not be applicable or beneficial to the Claimant because section 19 limits the circumstances in which the provision can be invoked. Section 20(5) does not limit the bringing of a claim to circumstances where a claimant is personally affected.

[24] Counsel for the Claimant in support of their position relies on the authority of **The Attorney General (Of Trinidad & Tobago) v Dumas**<sup>4</sup>. The case concerned an action brought by the claimant for an interpretation of section 122 of the Trinidad & Tobago Constitution regarding the qualification for appointment to the Police Service Commission. The claimant argued that the proposed appointees did not possess the necessary qualification and experience based on the wording of section 122(1) of the Constitution, therefore, the Police Service Commission was not properly constituted in accordance with section 122(3) of the Constitution. The issue of standing was forcefully argued by the Attorney General. It was asserted that the claimant's claim ought to be refused as he could not show that he would be directly affected by any of the appointments of the applicants to the Police Service Commission. The claimant submitted that he had the right as a citizen to seek the assistance of the court in upholding the constitution. At first instance, the claimant's application was refused. He appealed. The Court of Appeal found that he had locus standi to bring the claim. The Attorney General appealed.

[25] The Judicial Committee of the Privy Council accepted the Court of Appeal's finding that Mr. Dumas had standing to bring the claim on a matter of public importance, that he was

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<sup>4</sup> [2017] UKPC 12

not a busybody and that it was the citizens who had a legitimate interest in upholding the constitution and the rule of law. The Privy Council in paragraph 13 of its judgment, agreed with the finding of the Court of Appeal as reflected at paragraph 133 of that judgment, which stated as follows:

*“In our opinion, barring any specific legislative prohibition, the court, in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action; provided the litigation is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous, vexatious or otherwise an abuse of the court’s process. The approach to be taken to this issue of standing is a flexible and generous approach, bearing in mind all of the circumstances of the case, including in particular, the need to exclude busybody litigants and those who have no genuine interest in the issues raised and have not demonstrated credible engagement in relation to them. The public importance of the issues raised and of vindicating the rule of law are significant considerations.”* (emphasis added)

- [26] On our assessment, we find that a citizen can seek to maintain the Rule of Law and where necessary to seek to uphold the Constitution by invoking the supervisory jurisdiction of the court on matters of public importance. The kernel of the Claimant's case is that he is a Jamaican citizen who is subject to the Constitution and as such he has a legitimate interest in the way in which the government invokes the provisions of section 20(1) of the Constitution. Though the Claimant may not necessarily be directly affected by the executive’s use of the SOPE, the broader society is invariably affected. Therefore, it is reasonable to conclude that the claim is initiated by the Claimant in the interest of the public.
- [27] Public interest litigation is a common law principle. When considering public interest litigation, it must be borne in mind that the beneficiary of public interest litigation is not just the person who has taken the trouble to challenge the decision, it is the wider public who will benefit from the outcome.
- [28] This Court finds that the Claimant, as a citizen of Jamaica and the General Secretary of the People’s National Party, the political party that forms the opposition in the Jamaican

Parliament, has the necessary standing to approach the Court to determine the constitutionality of the use of the SOPE.

**Issue #2: Whether the Declarations of States of Public Emergency made between the period January 18, 2018 and February 15, 2023 were made for a purpose as specified in Section 20 of the Constitution?**

- [29] In seeking to demonstrate that the various SOPE were declared for a proper purpose, the Defendant relies on the provision that there was in force, a Proclamation by the Governor-General declaring that a SOPE exists. Clearly, none of the other criteria set out in section 20(1) as constituting a period of public emergency has been met.
- [30] The Defendant contends that the basis for declaring each of the SOPE is the provision of section 20(2)(b). The Governor-General in accordance with section 20(2)(b), in each instance that he issued a proclamation, declared that he was “*satisfied that action has been taken or is immediately threatened by persons or bodies of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety of the community specified in the schedule*”. He also in each instance, declared that a SOPE existed in the specified community.
- [31] Miss Hall urged the court to give credence to the perspective of the Governor-General. She contends that there is nothing in the provision of section 20(2)(b) which requires that there be immediacy of the circumstances which would lead the Governor-General to declare a SOPE because the relevant provision requires that the Governor-General be satisfied that “action has been taken”. She also submitted that, there is nothing in the section that limits how long an emergency can continue.

- [32] This court accepts the dicta of Lord Hamblen in the case of **Suraj and others v Attorney General of Trinidad and Tobago**<sup>5</sup> to the effect that much weight was to be given to the judgment of Parliament in relation to the public interest which is sought to be promoted. The court was in that case concerned with legislation passed using a super majority procedure.
- [33] It is in the same vein accepted by this Court that weight is to be given to the pronouncement by the Governor-General that a SOPE exists. That does not mean, however, that since it has been so declared, the court must blindly accept that in each instance, a public emergency in fact existed. There must be reasonable grounds for saying that a state of public emergency exists.
- [34] In the case of **St Christopher, Nevis and Anguilla v Reynolds**<sup>6</sup> the Claimant, a retired Inspector of Police of St Christopher, Nevis and Anguilla and a member of the opposition party in 1967, challenged the lawfulness of his detention, and claimed damages for false imprisonment and compensation for the unlawful arrest and detention. The Claimant was detained during a SOPE pursuant to regulations which provided for the detention of persons without trial *“if the governor is satisfied”* that such persons were recently *“concerned in acts prejudicial to the public safety, or to public order in the preparation or instigation of such acts, or in impeding the maintenance of supplies and services essential to the life of the community and that by reason thereof, it is necessary to exercise control over him, he may make an order against that person directing that he be detained”*. The challenge was to the validity of the law pursuant to which the regulations were passed.
- [35] The Judicial Committee of the Privy Council determined that the law pursuant to which the regulations were made was valid but was to be “modified, adapted, qualified or excepted” as required by section 103 (1) of the Constitution. This was so that the law would conform with other provisions of the constitution which guaranteed the protection

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<sup>5</sup> [2022] UKPC 26

<sup>6</sup> [1979] 3 All ER 129

of fundamental rights and freedoms. Thus, in interpreting the provision in the regulation which permitted the arrest of persons, it meant that the Governor must be satisfied **on reasonable grounds** that persons detained had recently been involved in the specified conduct and it was reasonably justifiable and necessary to exercise control over them.

- [36] Their Lordships thought that it was impossible that a regulation could be properly construed as conferring dictatorial powers on the Governor; and that is what the Regulations would purport to do if the words "*if the Governor is satisfied*" meant "if the Governor thinks etc."

Lord Salmon expressed the opinion in these terms:

*"Their validity [of the Emergency Powers Regulations] depends on the proper construction of the following crucial words in reg 3(1): 'If the Governor is satisfied ...' These words can and should be given a meaning which is consistent with ss 3 and 14 of the Constitution and with the construction which their Lordships have put on the Order in Council under which the regulation was made. Accordingly 'is satisfied', which might otherwise mean 'thinks' or 'believes', does mean 'If the Governor is satisfied on reasonable grounds that any person has recently been concerned in acts prejudicial to the public safety, or to public order ... and that by reason thereof it is reasonably justifiable and necessary to exercise control over him, he may make an order against that person directing that he be detained'"<sup>7</sup>*

- [37] The House of Lords in **Secretary of State for Education and Science v Metropolitan Borough of Tameside**<sup>8</sup> decided that the opening words... "*If the Secretary of State is satisfied*" did not confer an absolute discretion on him, and that accordingly the court should exercise its judgment as to (a) whether grounds existed which were capable of supporting the Secretary of State's decision and (b) whether he had misdirected himself on the law in arriving at his decision. The House of Lords also held that, if no such grounds existed or the Secretary of State had misdirected himself, his decision, however bona fide it was, should be overruled."

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<sup>7</sup> [1979] 3 All ER 129 at 137

<sup>8</sup> [1976] 3 All ER 665. Discussed in *The Attorney General of St Kitts, Nevis and Anguilla v Reynolds* [1980] AC 637

[38] It is the Defendant's case that there is context for the declaration of each SOPE imposed during the relevant period. The Defendant relies on the affidavit evidence of Deputy Commissioner of Police Clifford Blake. In his first affidavit<sup>9</sup> DCP Blake explained the increase in crime and the emergence of new types of criminal activities which he said has led to an increase in the murder rate in most parishes. He stated that it has become increasingly difficult for the security forces to "*suppress or contain crime using existing legislation and/or normal policing methods*" mainly because of lack of human resources within the police force. He highlighted the need for what he referred to as a "*more nuanced and distinct approach*" to fighting the escalating crime. He referenced "*persistent violent criminal activities within the identified police divisions and parishes*" which needed measures outside of traditional policing. He stated that:

*"The security forces viewed the utilizing of the SOE as the most viable response that would give the kind of impact that was needed to contain the high-level of criminal activities in the subject areas which were of such a nature and on such extensive scale as to endanger public safety."*<sup>10</sup>

[39] The Defendant's attorney contends that there is evidence to the effect that the Governor-General declared the proclamations for the purpose of securing the essentials of life in the communities affected. There is, in our view, no such evidence.

[40] DCP Blake's affidavits do not purport to set out the action which satisfied the Governor-General that each state of public emergency had arisen; nor does it purport to identify "the person or bodies of persons" who had taken any such action that merited the imposition. Instead, it described in very general terms the high rate of crime in various areas and outlined the circumstances which led the security forces to request the declaration of SOPE.

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<sup>9</sup> Affidavit filed February 12, 2024, paragraph 6

<sup>10</sup> DCP Blake's Affidavit filed February 12, 2024, paragraph 6



- [41] DCP Blake's evidence makes no reference at all to the first ten (10) declarations that are the subject of these proceedings, and when it refers to the circumstances that preceded a specific SOPE, it does so in very general terms.
- [42] DCP Blake relies on statistical data which in essence indicates that in most cases there was a sharp decrease in murders and shootings during a period in which a SOPE was in force, compared to an earlier period when there was no SOPE. This amounts to an attempt at ex post facto justification or, to put it another way, an assertion that "the end justifies the means". Such approach is not within the spirit of the requirement for demonstrable justification, or even reasonable justification.
- [43] The rule of law requires that the means by which an end is pursued be inherently justifiable. So, at the time when the decision was taken to use those means, was there a basis for their use that is permissible in law? Clifford Blake's final paragraph<sup>11</sup> is as follows:

*"The security forces' requests the respective state of Public Emergency were (sic) the levels of crime in the subject areas were of nature and such an extensive scale as to endanger public safety. Further, the States of Public Emergency were necessary to assist security forces in eradicating the threat to democratic governance, posed by organized crime, systematically dislodging gangs from communities, conducting searches for arms and ammunition, creating a condition for community policing, creating the environment for social intervention, and restoring peace and stability in the areas, plagued by high levels of crime so that Jamaica could experience economic growth and prosperity."*

- [44] Without citing details from DCP Blake's evidence of the crime statistics for the various police divisions and parishes, or the existence of gangs and gang activities in the various parishes, it seems clear enough that what is being described is an ongoing state of affairs that the police have had difficulty managing over an extended period. There is logic and good sense in the assertion that a state of affairs which persist over a period of years cannot properly be described as an emergency.

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<sup>11</sup> DCP Blake's Affidavit filed February 12, 2024

- [45] The Claimant's attorney says that the various scenarios described by DCP Blake do not constitute an emergency, or a series of emergencies, as the definition of an emergency denote a sudden and unexpected occurrence.
- [46] The Defendant placed some reliance on the fact that the SOPE declared in the parishes of St James, Hanover, Westmoreland, Kingston and St Andrew Clarendon and St Catherine between the periods April 30, 2019 and January 26, 2020, were extended. Those extensions of course, necessarily meant that there was support in each instance by at least one opposition senator. Miss Colleen Lowe, in her affidavit, deponed to the extensions as well as the resolutions passed by both Houses of Parliament.
- [47] The Claimant exhibited to his affidavit several excerpts from statements made by the Prime Minister, the Minister of National Security, the Commissioner of Police and Deputy Commissioner of Police at press conferences wherein they explained the rationale for recommending the declaration of SOPE. They expressed views to the effect that a climate of lawlessness prevailed, that gangs featured prominently in criminal activities and that there were various hotbeds of crime. For example, in a January 18, 2019 press briefing, the then Commissioner of Police Mr George Quallo spoke of the challenges being experienced by the police in St James and Clarendon and cited the high rate of murder in those parishes. He also noted that many of those murders were committed with the use of high-powered rifles. He stated that the police would be going after wanted men, seizing weapons and taking back the communities, presumably from a state of lawlessness.
- [48] The Defendant relied on the posture of the Prime Minister at multiple press conferences when SOPES were declared. The Prime Minister was of the view that the conditions were such that a SOPE was necessary. His speeches are replete with references to the need to preserve and protect life.
- [49] Section 20(2) provides that a proclamation by the Governor-General shall not be effective unless the Governor-General is satisfied that one of three (3) circumstances exists. In

each of the proclamations, the Governor-General referenced the relevant provisions in section 20 (2). He stated that he was satisfied that:

(a) *“action has been taken or is immediately threatened by persons or bodies of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety of the community specified in the Schedule”*; and

(b) *a state of public emergency exists in the community specified in the Schedule as a result of the aforementioned circumstances”*

**[50]** While the Charter does not expressly say so, it is the case as was posited by King’s Counsel, that the Governor-General’s ratification is valid only to the extent that it reflects the reality on the ground. The Governor-General is not given an open licence or discretion that would require his declaration to be treated as infallible. This is confirmed by section 20(5) of the Charter which empowers the court *“to enquire into and determine”* whether, inter alia, a proclamation *“was made for any purpose specified in”* section 20.

**[51]** The perception of both Houses of Parliament on the occasions between May 2019 and October 2020 when the SOPE were extended by the passage of resolutions of both Houses should also reflect the reality on the ground. The evidence that members of the opposition supported the extension of these SOPE does not mean that an actual period of emergency existed in each or in any of the instances. Actions taken by Parliament may be a matter of expediency, and such actions may not necessarily survive constitutional challenge.

**[52]** We disagree with the Defendant’s assertion that there is nothing in section 20(2)(b) which requires immediacy of circumstances. She posited that this is so because the section refers to where “action has been taken”. The section, in fact, speaks to where “action has been taken or is immediately threatened”. The use of the word “immediately” implies a sense of urgency, proximity or closeness in time. From a purely grammatical viewpoint, the use of the word “immediately” does not affect the meaning of the phrase which precedes it, but modifies the verb “threatened”. However, context should nevertheless influence how we interpret the phrase. In other words, the section could not conceivably be concerned with actions taken in the distant past but in the recent past.

- [53] The question in this case is whether the Government has proven that the circumstances that existed on each occasion that the Governor-General declared a SOPE constituted a "state of public emergency" such that the proclamations were valid.
- [54] In order to begin to answer the question, 'what is an emergency?', recourse is had by observing that the court should prefer a strict, narrow definition of the word "emergency" as used in the Charter. As Sykes CJ observed in **Julian J Robinson v Attorney General of Jamaica**<sup>12</sup> at para 203, that *"the starting point for the court is always that the fundamental rights and freedoms are not to be restricted and are to be given their fullest meaning having regard to the words used"*.<sup>13</sup> A SOPE inevitably involves significant restrictions on those rights and freedoms, and the Court should therefore seek to limit and not extend the circumstances in which a SOPE can be imposed.
- [55] It is observed that the Constitution does not define "emergency". The Concise Oxford English Law Dictionary<sup>14</sup> defines "emergency" as:
- "A serious, unexpected, and potentially dangerous situation requiring immediate action".*
- As the definition indicates, in its ordinary and usual meaning, an emergency is something unexpected or unforeseen. It is also usually sudden and requires an immediate response. The use of the word "emergency" in the Constitution also supports that interpretation.
- [56] A declaration of an emergency would also be justified if a state of war is imminent, if there has been an earthquake or hurricane, or if Jamaica's democratic institutions are threatened by subversion. The Constitution routinely uses the word in conjunction with the preceding qualifier "public", which clearly indicates how widespread the unexpected or unforeseen event is required to be.
- [57] It is also of great significance that the Constitution limits the period to fourteen (14) days for which a SOPE can remain in force without Parliament's intervention. Accordingly, we

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<sup>12</sup> [2019] JMFC Full 04

<sup>13</sup> [2019] JMFC Full 04

<sup>14</sup> Concise Oxford English Dictionary, 12<sup>th</sup> Edn, Oxford University Press, 2011

conclude that for the purposes of section 20 of the Constitution, a public emergency is a sudden, unexpected action or event that negatively impacts an entire community.

[58] This Court finds that on analysing the Constitutional provisions, the Governor-General's Proclamation of a SOPE requires him to be satisfied that a sudden, unexpected action of such a nature and on so extensive a scale as to be likely to endanger the public safety of the community has been taken or is immediately threatened by any person or body of persons.

[59] The evidence of DCP Blake makes it plain, in our view, that the SOPE are being utilized as a method of policing over an extended, albeit not continuous, period of time. He describes a scenario where the policing arm of the state has for many years not been able to utilize standard law enforcement methods to cauterize an intolerably high level of crime.

[60] We adopt the posture of the court in **Everton Douglas, Nicholas Heath Courtney Hall, Courtney Thompson & Gavin Noble v The Minister of National Security, The Commissioner of Police & the Attorney General of Jamaica**<sup>15</sup> where it was stated that:

*[145] This court is empowered and bound to enquire into and determine the existence of an emergency by virtue of section 20 (5) of the Constitution. In carrying out this function the court is not bound by the doctrine of 'deference' to the executive branch or 'marginal appreciation' to the executive.*

*In the final analysis, I am unhesitant in holding that:*

1. ...

2. *The situation which led to the detention of the objector does not qualify as an emergency or satisfy the situation in sections 20 (2), 20 (5) of the Constitution.*

[61] The scenario giving rise to that pronouncement was an application for writs of habeas corpus made on behalf of certain individuals, one of whom was being held in the Negril

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<sup>15</sup> [2020] JMSC Civ 267

Police station lock up and the others at the Tamarind Farm Correctional Centre. These persons were being detained under SOPE in different parts of the island between 2019 and 2020.

- [62] We are not of the view that the SOPE declared by the Governor-General between the period January 2018 to February 2023 were declared for a purpose specified in section 20 of the Constitution. They are consequently inconsistent with the constitution and are void.

**Issue #3: Whether the Declarations of States of Emergency made between January 18, 2018 & February 15, 2023 were demonstrably justifiable in a free and democratic society?**

- [63] It is convenient to commence this aspect of the discussion by examining the provisions of sections 13(2), (3) and (9) as well as sections 14 and 16(3) of the Constitution.

*Section 13(2) of the Constitution provides that:*

*Subject to sections 18 and 49 and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –*

*(a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*

*(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.*

- [64] Subsection (3) delineates several of the rights referred to in subsection (2). Among those rights guaranteed are the right to liberty<sup>16</sup>, the right to freedom of peaceful assembly and association,<sup>17</sup>, the right to freedom of movement<sup>18</sup>, which includes the right of every

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<sup>16</sup> The Charter of Fundamental Rights & Freedoms S. 13 (3) (a)

<sup>17</sup> Section 13 (3)(e)

<sup>18</sup> Section 13(3)(f)

person lawfully in Jamaica, to move around freely throughout Jamaica and to reside in any part of Jamaica<sup>19</sup>, and the right to protection from search of the person and property<sup>20</sup>.

**[65]** Subsection (9) of section 13 is important to this discussion. It states as follows:

*Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of (3)(f) of this section and sections 14 and 16(3), to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster.*

**[66]** Section 14 states that no person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law and sets out the circumstances when an individual may be deprived of his liberty.

**[67]** Section 16(3) guarantees the right to a public hearing in determining a person's civil rights. As earlier indicated, section 13(3)(f) of the Constitution guarantees the right to freedom of movement. Section 14 speaks to the deprivation of liberty, and section 16(3) speaks to the right to a public hearing. These rights, as well as those others set out in subsection (3) of section 13, are qualified rights in that the Constitution permits the abrogation, abridgment or infringement of one's constitutional rights in so far as there is justification.

**[68]** Based on section 13(9), to the extent that the three rights mentioned in subsection (9) are curtailed during a state of public emergency, the question to be answered in determining the constitutionality of the action amounting to the abrogation, abridgment or infringement, is whether the measures taken are reasonably justifiable for dealing with the situation that exists. In so far as the other rights in section 13(3) are concerned, the test is whether the abrogation, abridgment or infringement, is demonstrably justifiable in a free and democratic society.

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<sup>19</sup> Section 13 (3)(f)(i)

<sup>20</sup> Section 13 (3)(j)(i)

- [69] The Defendant has argued that the Claimant did not indicate in his evidence that any of his guaranteed rights has been breached. The Claimant's position of course is that it is not necessary, based on his complaint, to show that any of his rights has been breached. The further argument is that there was no need to address the unconstitutionality of the regulations because the Court has already determined that issue in the case of **Roshaine Clarke v The Attorney General of Jamaica**<sup>21</sup> that states of public emergency, by their very nature, involve infringement of citizens' rights.
- [70] The Claimant further argued that some of the regulations that were in force during much of the period under consideration were struck down as being unconstitutional. It was also the submission that even the more recent regulations infringe on citizens' rights. Regulations 30(1), 30(4), and 31(a) of the **Emergency Powers Regulations**<sup>22</sup> were cited as examples.
- [71] This court has determined that the SOPE were not imposed for any of the purposes contemplated by section 20(1)(a) to (c). Thus, there can be no justification for any abrogation, abridgment or infringement of one's constitutional rights as a consequence of the existence of a SOPE that ought not to have been imposed in the first place.
- [72] Nevertheless, an assessment will be undertaken utilizing the appropriate test, which was laid down in **Oakes**<sup>23</sup>. This test was expounded and applied in **Julian Robinson v The Attorney General of Jamaica** (supra) and somewhat modified in **R v Edwards Brooks and Art Ltd**<sup>24</sup>, which modification was applied in **Jamaica Bar Association v The Attorney General and The General Legal Council**<sup>25</sup>.

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<sup>21</sup> [2022] JMFC Full 3

<sup>22</sup> Emergency Powers (Parish of St. James) Regulations, 2023

<sup>23</sup> [1986] 1 S.C.R.103

<sup>24</sup> [1986] 2 SCR 713

<sup>25</sup> [2020] JMCA Civ 37



[73] The test of constitutionality, as stated by Batts J at paragraph 268 of the **Julian Robinson** judgment, although expressed in terms of its applicability to legislation, is as follows:

*a) A determination as to whether the law abrogates, abridges or infringes a guaranteed right; and*

*b) Secondly, if it does, is the abrogation, abridgement or infringement demonstrably justified in a free and democratic society.”*

[74] It was also clarified by Sykes CJ in **Julian Robinson** that the burden and standard of proof is on the Claimant to establish on a balance of probabilities the action of the State which infringes the fundamental right or rights. Upon meeting that burden, the onus shifts to the Defendant to establish that the act which amounts to an infringement is demonstrably justified in a free and democratic society. That this is the applicable test was reiterated by the Judicial Committee of the Privy Council<sup>26</sup> in **The Attorney General v The Jamaican Bar Association & The General Legal Council v The Jamaican Bar Association** <sup>27</sup>

[75] It is therefore the state that is required to put forth evidence which justifies the imposition of a SOPE, since it is the state that wishes to uphold the SOPE which has the potential to violate established rights of citizens. The standard of proof is on the preponderance of the evidence. It has been said that the preponderance of probability test must be rigorously applied in order to satisfy that conduct is demonstrably justified: see **R v Oakes** (supra). If the state fails to discharge the burden and standard of proof, then the state would have failed to demonstrate that there is justification to interfere with the vested right.

[76] There is no reason to think, and it has not been suggested that the test as to whether a measure taken pursuant to a SOPE is reasonably justified as required by section 20(5), is different from that for whether it is demonstrably justifiable. The difference may be in

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<sup>26</sup> Per Lord Briggs and Lord Hamblen at paragraph 26 of the judgment.

<sup>27</sup> [2023] UKPC 6

the cogency of the evidence required in support of justification to establish one or the other. It is reasonable to say that the evidence in proof of reasonably justifiable in a free and democratic society may require greater cogency. It was said in **Oakes** that though the test should meet the civil standard, that test must be rigorously applied, that is, a high degree of probability will be required to justify the violation of a constitutionally protected right. The justification for this is that fundamental rights must be enjoyed to the fullest extent, subject only to necessary limitations. These rights and freedoms must never be lightly curtailed, infringed, or abrogated.

- [77] It is now well established that any action of the state which violates a constitutional right must be tested by the principle of proportionality. This means that the state's interference with one's constitutional right must go no further than is necessary to achieve the desired goal.
- [78] The first element of the proportionality test is that *"the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to override a constitutionally protected right or freedom".* **R v Big M Drug Mart Ltd** *supra* at p.352. *The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.*"<sup>28</sup> *"It is necessary at a minimum, that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important."*<sup>29</sup>
- [79] The second element is that *"once a sufficiently significant objective is recognized, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified"*<sup>30</sup>.

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<sup>28</sup> The section in the Canadian Charter which allows for rights to be subject to limits which can be demonstrably justified in a free and democratic society

<sup>29</sup> R v. Oakes [1986] 1 S.C.R. 103 Paragraph 69

<sup>30</sup> R v. Oakes [1986] 1 S.C.R. 103 Paragraph 70.

- [80] In establishing that second element of the test, the state is required to show firstly, that *“the measures adopted must be carefully designed to achieve the objectives in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective”*.<sup>31</sup>
- [81] The second limb to this second component of the test is that *“the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question: R v Big M Drug Mart Ltd*<sup>32</sup> *supra* at p. 352.
- [82] The third aspect is that *there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of “sufficient importance”*.<sup>33</sup>
- [83] It was also recognized in **Oakes** that *“some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the deleterious effects of the measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.”*<sup>34</sup>
- [84] In **Jamaica Bar Association v The Attorney General and The General Legal Council**<sup>35</sup> McDonald-Bishop JA, as she then was, observed that in **R v Edwards Brooks and Art Ltd** (*supra*) the requirement in **Oakes** that in order to be proportionate, the limiting measure must impair the right or freedom as least as possible, was regarded as too stringent and too demanding a standard and that aspect of the test was consequently

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<sup>31</sup> R v. Oakes [1986] 1 S.C.R. 103 Paragraph 70

<sup>32</sup> [1985] 1 SCR 295 at paragraph 139

<sup>33</sup> R v. Oakes [1986] 1 S.C.R. 103 Paragraph 70

<sup>34</sup> R v. Oakes [1986] 1 S.C.R. 103 Paragraph 71

<sup>35</sup> [2020] JMCA Civ 37

modified. McDonald-Bishop JA took the view that in the Jamaican context, where *“the essence of the proportionality test involves a balancing exercise between the rights of Parliament to make laws for the peace, good order and government [sic] of the country and the rights of the individual to protection from state intrusion, it seems justified that some latitude is accorded to the exercise of Parliamentary discretion.”*<sup>36</sup>. McDonald-Bishop JA adopted the *“least as is reasonably possible test”* as the better option.

**[85]** In applying the test to the facts of this case, it is beyond dispute that the ultimate aim of the government in imposing the SOPE is to curb the level of criminal activities which undoubtedly was and still is out of control.

**[86]** Thus, it may reasonably be said that the objective which the measure was designed to achieve is of sufficient importance since a key characteristic of a democratic society is its capacity to curb crime and maintain public order. It could not in the remotest way be considered that the need to bring a high level of crime under control is trivial or discordant with the principles underpinning a free and democratic society, but the State must show that the imposition of SOPE is justified.

**[87]** It is worthy to observe that the State of Emergency Regulations purport to authorize actions which are likely to, and in some instances, will necessarily infringe various other rights, apart from those mentioned in section 20. These include:

- a) freedom of peaceful assembly and association (section 13(3)) - regulations 18);
- b) equality before the law (section 13(3)(g) – regulations 44(1) an (3));
- c) equitable and humane treatment by any public authority in the exercise of any function (section 13(3)(h) – regulations 30 and 33(4);

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<sup>36</sup> Paragraph 518 of the judgment.

- d) protection from search and of privacy (section 13(3)(j) – regulations 10, 11, 12, 13, 14, 27, 28, 30(3) and 31 (a));
- e) protection from inhuman or degrading treatment (section 13(3)(o) – regulations 30 and 33(4)).
- f) protection of property rights (section 13(3)(q) – regulations 10, 11, 12, 28 and 31(a)); and
- g) The right to due process in civil proceedings (section 16(2) – regulations 44(1) and (3)).

**[88]** We accept that the measures are not based on considerations that are irrational since it is readily appreciated that the intolerably high rate of crime in Jamaica is an issue of serious concern for all well thinking Jamaicans. The measures may in some instances be rationally connected to the objective of lessening criminal activities. This is so to the extent that the imposition of SOPE have been able to assist in curbing criminal activities. Statistics have demonstrated that there might not always be a causal connection between the imposition of a SOPE and a decrease in criminal activities, as there have been periods where there is an increase and other periods where there is a decrease in criminal activities during a SOPE.

**[89]** The evidence of DCP Blake is that while there was a 50% reduction in crime for the month of January 2023, there was a 22% increase in murders in the month of February 2023, a period during which a SOPE was in effect in the parish of Saint Ann.

**[90]** Further evidence in this regard was that during the period December 28, 2022 to January 10, 2023 and February 15, 2023 to February 28, 2023, there were SOPE in force in the Kingston West divisions. Yet DCP Blake's evidence is that from January 1, 2023 to February 10, 2023, the West Kingston division had the highest number of murders and shootings across all divisions. He continued that 17 persons were murdered and there were 12 reported shootings. When compared to the same period the previous year. This

represented a 31% increase in murders and a 20% increase in shootings when compared to the same period in the previous year.<sup>37</sup>

**[91]** The evidence discloses that since 2018 there have been 11 SOPE in Saint James including all extensions.<sup>38</sup> Yet DCP Blake's evidence reflects that as at November 8, 2023, the Saint James division had the highest number of murders across all police divisions with a total of 169 murders over the period January 1, 2023 to November 15, 2023 and the highest number of shootings, that is, 101. DCP Blake nevertheless claimed

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<sup>37</sup> Affidavit of Clifford Blake filed February 12, 2024, paragraph 17.

<sup>38</sup> We counted 11.

January 18, 2018 – SOE declared for the parish of St. James

Extended to May 2, 2018 (by virtue of The Emergency Powers (Continuance) Resolution, 2018- L.N. 10<sup>2</sup>A/2018 – Gazette dated February 1, 2018)

Extended to August 2, 2018 (by virtue of The Emergency Powers (Continuance) (No. 2) Resolution, 2018- L.N. 46-1A/2018 – Gazette dated May 18, 2018)

April 30, 2019 – SOE declared for parishes of Westmoreland, Hanover and St. James

Extended to July 29, 2019 (by virtue of The Emergency Powers (Continuance) Resolution, 2019-L.N. 98A/2019 – Gazette dated May 10, 2019)

Extended to October 28, 2019 (by virtue of The Emergency Powers (Continuance) (No. 2) Resolution, 2019 – L.N. – 137A<sup>2</sup>/2019 – Gazette dated July 26, 2019)

Extended to January 27, 2020 (by virtue of The Emergency Powers (Continuance) (No. 3) Resolution, 2019 – L.N. 210A/2019- Gazette dated October 16, 2019)

November 14, 2021 – SOE declared for parishes of St. James, Westmoreland and Hanover (by virtue of The Emergency Powers (Parishes of St. James, Westmoreland and Hanover) Regulations, 2021 – L. N. 187/2021, Gazette dated November 14, 2021 - Article 11, "the emergency")

November 15, 2022 – SOE declared for parishes of St. James, Westmoreland and Hanover (by virtue of Proclamation No. 14/2022)

December 6, 2022- SOE declared for parishes of St. James, Westmoreland and Hanover (by virtue of Proclamation No.18/2022)

December 28, 2022- SOE declared for parishes of St. James, Westmoreland and Hanover (by virtue of Proclamation No.21/2022)

some success in reducing murders over a short period during the imposition of a subsequent state of public emergency.

**[92]** Thus, contrary to DCP Blake's assertion that the impact of SOPE had the effect of reducing murder rates and shootings, those statistics do not bear out the assertion. This is a clear indication that the measures did not always achieve the objective of a reduction in crime.

**[93]** Even where there is a reduction in crime and this reduction is to be attributed to the imposition of the several SOPE, this would amount to ex post facto justification. We find that this would not be within the spirit of the relevant Constitutional provisions.

**[94]** While we accept that democratic rights may be limited or restricted in order to ensure public safety, and maintain public order, the restrictions should be temporary so that affected rights are impaired as least as is reasonably possible. It is unquestionable that the constitutional rights of members of certain marginalized communities will be disproportionately affected as there is increased policing of such communities. There is likely to be an erosion of public trust in government. There will be negative implications for social and economic stability.

**[95]** The executive's or legislature's assertion that they are solving something so important, that fundamental rights and freedoms can be trespassed upon is not sufficient. This is the ultimate logic of constitutional supremacy. A naked assertion by the legislature and/or executive without tangible evidence is not likely to be sufficient in many cases. The very existence of guaranteed entrenched fundamental rights and freedoms, thereby giving them special protection, is a clear recognition of the fact that legislative, executive, judiciary, and individuals have been known to abuse their power. To prevent this, the rights and freedoms that are entrenched are to be given pride of place in all circumstances unless stringent conditions for overriding them are met.

**[96]** Are the measures imposed with some degree of arbitrariness? We agree with King's Counsel that the evidence of DCP Blake regarding the imposition of SOPE in the entire parish of Saint Ann provides a glaring example of an absence of any attempt at achieving

proportionality. The evidence of DCP Blake <sup>39</sup> is that the main areas of concern in Saint Ann were Steer Town, Mansfield Heights, Parry Town, Pineapple in Ocho Rios and Mammee Bay. These are communities located in north-eastern Saint Ann. Yet, the SOPE were imposed in the entire parish of Saint Ann from December 6, 2022 to December 19 2022, from December 28, 2022 to January 10, 2023 and from February 15, 2023 to February 28, 2023. This represented an unnecessary restriction on the freedom of movement, the right to protection from search of the person and property, the right to freedom of peaceful assembly, the right to liberty and the right to due process; all of which are adversely affected by the imposition of SOPE.

- [97]** It was not in our view necessary to restrict the rights of a broad cross section of persons in order to curb ongoing and escalating crime in areas that were problematic, and certainly not in the areas where it was not established that any significant problems existed. The restriction of rights should be even more concerning in instances where there is limited or no realization of the ultimate goal of curbing criminal activity.
- [98]** There is a proportionate relationship between the important objective and the effects of the measures. This means that even if the action meets the first components it may be declared unconstitutional if the deleterious effects of the action are so severe that it cannot be justified.
- [99]** Even in respect of those infringements where the lower standard applies, the Government's evidence does not satisfy that standard. Section 13(9) permits the taking of measures that are "reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency". DCP Blake's Affidavit's signal failure is its neglect or omission to specify the situation that existed during each SOPE.
- [100]** Section 20(2) mandates the Governor-General's satisfaction. Section 20(5) also implies that the court must be similarly satisfied that the measures taken were a fitting and

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<sup>39</sup> Paragraph 19 of his first affidavit.



appropriate response to the identified situation. In this respect, we conclude that the government failed to honour the counsel of prudence.

[101] King's Counsel argued that the November 8, 2023 Rules and Regulations, while representing an improvement over previous regulations which were struck down, still have the potential to breach certain constitutional rights. He pointed specifically to regulation 30(1)(a), 30(4) and 31(a). Although in this claim we are not directly concerned with the constitutionality of the regulations, we will briefly consider the ones that have been mentioned.

[102] Regulation 30(1)(a) provides that *“a constable or member of the Jamaica Defence Force may arrest without a warrant and detain, pending enquiries, any person where it is reasonably necessary to prevent the person from committing”* an offence under certain named pieces of legislation. The pieces of legislation named are the Criminal Justice (Suppression of Criminal Organisations) Act, Firearms (Prohibition, Restriction and Regulation) Act, and the Law Reform (Fraudulent Transactions) (Special Provisions) Act.

[103] Regulation 30(4) provides that where a person is detained under paragraph (1)(b) for a period of 6 weeks without a charge being proffered, the person shall be released or shall be brought before a Judge of a Parish Court to be entered into a recognisance and find sureties to keep the peace or to be of good behaviour.

[104] Regulation 31(a) provides that a constable or member of the Jamaica Defence Force may, in the community –

*Stop, detain and search any person and may seize anything found on such person which the constable or member of the Jamaica Defence Force reasonably suspects is or was being used or is intended to be used for any purpose, or in any way, prejudicial to the public safety or public order.*

[105] Regulation 30(1) of the **Emergency Powers Regulations** 2023 appears to bear much similarity to section 14(1)(f)(ii) of the **Constitution** which provides that a person may be deprived of his liberty by his arrest or detention (i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence;

or (ii) where it is reasonably necessary to prevent his committing an offence. Regulation 30(1) stipulates that the arrest may be without a warrant, whereas the Constitution does not specifically so state. It also provides that the arrest may be made pending enquiries.

[106] With regard to Regulation 30(4), King's Counsel observed that to the extent that someone is detained and made to enter into recognisance, that provision cannot remedy a situation where someone is re-arrested after release as demonstrated by the circumstances of the claimant in **Roshaine Clarke v The Attorney General** (supra).

[107] As indicated above, regulation 31(a), for example, on the face of it has the potential to breach the right enshrined under section 13(3)(j)(i) of the Charter, that is, the right of everyone to the protection of search of the person and property. This is a qualified right.

[108] Mr Hylton KC submitted that it was noted in **Roshaine Clarke v The Attorney General of Jamaica** (supra) that reference to public order may be a reference to a variety of circumstances. The judgment spoke specifically to Regulation 22 of the Emergency Powers Regulations 2018, which restricted the right of all Jamaicans to move freely around the country. The then Regulation 22 restricted the movement of a person who was suspected of acting, had already acted or was about to act in a manner prejudicial to the public safety, the supply or distribution of any necessity of life or the preservation of the peace.

[109] At paragraphs 77 and 78 of the judgment, the wide and varied breaches of public safety were discussed. It was said that:

*[77] The starting point of any examination as to proportionality and rationality must be a determination as to who the regulation is directed to? The drafters commenced with a direction as to the person or persons who ought to be subject to this prohibition. That person is defined as one who is suspected of acting, or of having acted, or of being about to act, in a manner prejudicial to the public safety, the supply of distribution of any necessity of life or the preservation of the peace.*

*[78] What is public safety, if not the protection of the general public? Breaches of public safety are wide and varied. Examples include misdemeanours, traffic offences, disturbing the peace, breaches of the Disaster Risk Management Act, petty session offences as well as more serious offences such as possession of drugs or illegal firearms. This wide and varied category of persons breaches the rule of proportionality. It cannot be said that in furtherance of the legitimate aim of protecting the country from the scourge of criminality*

*that persons who disturb the peace and are guilty of a minor misdemeanour ought to be treated in the same manner as persons who are accused of being in possession of firearms. There has been no reasonable justification put forward by the state for the curtailment of this right on so broad a scale. The infringement cannot be said to be proportionate in these circumstances.*

- [110] The only perceivable difficulty with Regulation 31(a), is the very general reference to use for any purpose, or in any way, prejudicial to *public order*. This is because of the possibility of a breach of public order being a minor infringement.
- [111] We believe regulations 30(1)(a) and 30(4) constitute reasonable limitations on fundamental rights during a period when a SOPE is imposed for a legitimate purpose. Even if we were to be wrong in our assessment regarding the regulations singled out by King's Counsel, that does not impact our assessment of the validity of the imposition of the SOPE during the period under consideration.
- [112] Overall, the prevailing rate of murders and serious crimes today is testament to the fact that despite the imposition of SOPE in some parishes over extended periods of time, that measure has not achieved the goal of containing serious criminal activities in the areas where they have been imposed. Crime continues to be a significant and enduring threat to the stability, safety and security of the communities in which SOPE have been imposed and in the nation as a whole.

#### **Issue #4: Whether the Declarations breached the Doctrine of the Separation of Powers?**

- [113] It is the undisputed evidence that the government failed on the 25<sup>th</sup> of November 2022 to secure a resolution by a two-third majority of the Senate in order to facilitate an extension of the SOPE imposed on November 15, 2022 in St. Ann, Clarendon, St. Catherine and certain parts of the parishes of Kingston and St. Andrew. Those SOPE expired November 29, 2022. The Governor-General made a proclamation declaring a state of emergency in the exact same areas on December 6, 2022, which expired on December 20, 2022. On December 28, 2022, the Governor-General again by proclamation declared a state of emergency in the entire parishes of St. Ann, Clarendon, St. Catherine and the same areas

of Kingston and St. Andrew in respect of which the previous SOPE had been declared. There was a similar occurrence on December 28, 2022 with respect to SOPE in the parishes of St. James, Westmoreland and Hanover.

[114] The claimant's evidence shows that when the government failed to secure a resolution by a two thirds majority of all members of the Senate to achieve the extension, the government in each instance waited for about a week and then declared SOPE over the exact same geographical areas.

[115] These actions, it was posited, were manoeuvres on the part of the government to circumvent the proper procedure by which an extension of a SOPE is to be achieved, which was to seek to secure the vote of the two thirds majority of each house. The Defendant does not dispute the action of the government complained of, but states that it was within the powers of the executive to act as it did. The Defendant says that the mechanism utilized is not in conflict with the separation of powers doctrine as extrapolated from **Hinds v R**<sup>40</sup> because the concern in **Hinds v R** (supra) was with whether certain judicial powers were unlawfully vested in a non-judicial body, thereby violating the separation of judicial and executive functions. By this argument the defendant seeks to restrict the applicability of the doctrine.

[116] It is useful to look briefly at the case of **Hinds v R** (supra), in order to appreciate the doctrine of separation of powers. In that case, each of five defendants was convicted in a Resident Magistrate's Division of the Gun Court for a firearm offence which carried a mandatory sentence. All appealed to the Court of Appeal against conviction and sentence on the grounds that the Gun Court Act, or the provisions therein under which they had been tried and sentenced, were inconsistent with the Constitution and void. The appeals of four of the defendants were dismissed and that of the fifth defendant was allowed. The

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<sup>40</sup> [1977] AC 195.

four defendants, who were unsuccessful, appealed to the Judicial Committee of the Privy Council.

- [117] By virtue of the Gun Court Act 1974, the Jamaican Parliament had established a new court, the Gun Court, to try offences involving firearms. The Act provided for three divisions of the Gun Court; Circuit Court Division constituted by a Supreme Court judge, the Resident Magistrate's Division constituted by a resident magistrate and the Full Court Division constituted by three resident magistrates. The jurisdiction of the Circuit Court Division and the Resident Magistrate's Division was that of a Circuit Court and of a resident magistrate respectively, in relation to firearm offences and certain other offences, but they extended geographically to cover the entire island instead of being restricted to specific parishes.
- [118] The legislature also sought to invest in a review board the discretion to alter a criminal sentence in circumstances where the members of that board were not all members of the judiciary. Section 8 of the Act prescribed a mandatory sentence of detention at hard labour during the Governor-General's pleasure for specified offences, determinable by the Governor-General only, on the advice of the Review Board. Section 22 of the Act established the Review Board, consisting of five members of whom only the chairman was a member of the judiciary.
- [119] It was held that, while there is nothing in the Constitution to prohibit Parliament from establishing a court under a new name, Parliament was not allowed to vest in a new court composed of members of the lower judiciary, a jurisdiction that forms part of the existing jurisdiction of the Supreme Court and accordingly, to the extent that the Act provided for the establishment of a Full Court Division of the Gun Court, it conflicted with Chapter VII of the Constitution and was void.
- [120] It was also determined that, the principle of separation of powers was implicit in the Constitution of Jamaica and Parliament had no authority to transfer from the judiciary to the Review Board, the majority of whose members were not members of the judiciary and were therefore unqualified to exercise judicial powers, a discretion to determine the

severity of punishment to be inflicted on an individual member of a class of offenders. Those provisions in the Act were therefore contrary to the Constitution and void, and the sentences passed on the defendants were unlawful. Accordingly, the appeals against sentence were allowed, however, the appeals against conviction were dismissed.

[121] The claimant cited a passage from the judgment of Lord Diplock who delivered the majority judgment of the Board. That passage, which is found at page 212 of the judgment, along with the portion of the paragraph preceding that passage, in our view, explain the doctrine of Separation of Powers. Lord Diplock expounded as follows:

*Nevertheless, all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the State as to the structure of the organs of government through which the plenitude of the sovereign power of the State is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the court, reflected the same basic concept. The new constitutions, particularly in the case of a unitary state, were evolutionary not revolutionary. They provided for a continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way but each institution was to exercise powers which, although enlarged remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.*

*Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, and executive and judicature. **It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of the legislative powers by the executive or of judicial powers by either the executive or the legislature.** As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless, it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that **the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new State being exercisable exclusively by the legislature, by the executive and by the judicature respectively.** (emphasis added)*

- [122] It seems abundantly clear from the foregoing, and particularly the highlighted portions of the passage, that the core of the governmental structure as expressly set out in our constitutional arrangement is the existence of three separate organs of the state, and impliedly, each arm is to exercise exclusively its specific functions assigned to it, consistent with the constitutional arrangement. Even though the case was concerned specifically with the separation of powers between the executive and the judicature, the wider principle, indeed the ratio decidendi of **Hinds** is that the doctrine of separation of powers is applicable to all three organs of the state. This is so notwithstanding the existence of the Westminster model of parliamentary democracy whereby some members of the executive are drawn from the legislative branch which may appear to be a blurring of the lines between the two.
- [123] We shall now examine in the context of the undisputed evidence outlined at the commencement of this section why the claimant says that the executive has usurped a power given to the legislature.
- [124] Learned King's Counsel conducted a comparison of the old and new constitutional provisions. The old section 26(6) provided that a proclamation made by the Governor-General in accordance with the section shall remain in force for one month unless revoked, or for a period not exceeding 12 months as the House of Representatives shall determine by a resolution supported by the vote of a majority of all members of the House.
- [125] It is to be noted that the corresponding provision in the new Chapter III, section 20(3) (a) allows a proclamation to remain in force for fourteen days, and may be extended for a period of three months, as **both** Houses of Parliament may determine, but this extension is to be achieved by a resolution supported by a two thirds majority of all the members of each House.
- [126] Subsection (b) of section 26(6) allowed for further extensions, to be achieved in the same manner as provided for the passing of the resolution in subsection (a). Likewise, the new section 20(3)(b) provides for further extensions achieved in the same manner as the proclamation was extended.

- [127] Under the old provisions, the Proclamation could be revoked by a resolution supported by a majority of the members of the House of Representatives. Based on the new provisions, a revocation is to be supported by a two thirds majority of all the members of each House.
- [128] The upshot of the old provision was that the extension, further extension and the revocation of a proclamation could be achieved without bipartisan involvement, but under the new regime, those amendments cannot be attained without bipartisan involvement. Why is this so? Based on the constitutional provisions, the senate is comprised of twenty-one members. Thirteen senators are appointed by the Governor-General on the advice of the Prime minister. The remaining eight are appointed on the advice of the leader of opposition. In other words, a two thirds majority of the Senate necessarily requires the support of at least one opposition senator. Depending on the composition of the House of Representatives, a two thirds majority vote may or may not require bipartisan input.
- [129] The Defendant's contention is that a new proclamation by the Governor-General is not the same as extending an existing proclamation. The Claimant says that the assumption when a state of emergency expires and a new one is proclaimed, is that a new emergency has arisen, but that the evidence does not support this assumption.
- [130] The Claimant in essence says it is the same result as an extension when a SOPE is declared within days of the expiration of an existing SOPE in the precise geographical location without the need for the support of the opposition as is required, and therefore the executive usurps the function of the legislature. The evidence reveals that there would be lapses of seven or 8 days between the expiration of a SOPE and the declaration of another in the precise geographical location.
- [131] The first recital in the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, by which the Charter was inserted into the Constitution, states that the aim of enacting the Charter was to replace the original Chapter III so as to provide for "more comprehensive and effective protection for the fundamental rights and freedoms of all person in Jamaica." The comparison of the repealed section 26(5) to (9) with the



current section 20(3) to (5) clearly demonstrates that this aim was accomplished in respect of emergency powers. The initial length of an SOPE is now less than half of what it used to be, and the extension of a SOPE beyond that shortened initial period requires the support of a higher level of consensus. It seems obvious that this provision was enacted with a view to better protecting the fundamental rights and freedoms from abrogation diminishment or curtailment in the exercise of emergency powers.

**[132]** It is in our view, difficult to disagree with the assertion that the government has devised a method of securing the continuation of SOPE without securing the participation of the Opposition. What would be the purpose of the present Constitutional provisions? The provisions require the votes of a two-thirds majority of all the members of each House in order to secure an extension. If the government can have in place a SOPE which continues beyond the period of the validity of a proclamation by the Governor-General, with only a disruption of a few days, there would be no substantive difference from what obtained prior to the amendment.

**[133]** The constitutional provisions restricting the manner of imposition and the length of a SOPE are redundant in the present dispensation where proclamation after proclamation is made by the Governor-General in the same geographical area without the involvement of the Opposition. That could not have been the intention, that useless provisions be inserted in the Constitution.

## **CONCLUSION**

**[134]** This Court does not accept that the only basis of standing to bring a constitutional claim is where the Claimant is seeking to vindicate a breach of his own rights. The Claimant in this case has standing because he is a citizen with a sufficient interest in upholding the Constitution and the rule of law. The introduction of section 20(5) to the Constitution created a new avenue to invoke the court's jurisdiction to review the action of the state which may be in breach of certain constitutional provisions.

- [135] The Defendant has not put forward evidence to demonstrate that circumstances of public emergency existed on the occasions when SOPE were imposed. The evidence of DCP Blake demonstrates that SOPE are being utilized as a standard method of policing because normal policing methods have not been sufficiently effective in cauterizing the high crime rate.
- [136] Having determined that the SOPE were not imposed for a proper purpose, within the meaning of section 20 of the Constitution, we consider that in any event, the state has not shown that the imposition of SOPE with its consequent infringements of constitutional rights is a response that is proportionate to the circumstances. We consider that the specific provisions of the Emergency Powers Regulations 2023 addressed by King's Counsel may well be reasonable limitations on constitutional rights during a period of public emergency.
- [137] The separation of powers doctrine extends to the relationship between the executive and the legislature. The present constitutional arrangements require the participation of the executive as well as the legislature in order to properly secure an extension of a SOPE. Therefore, the declaration of a new SOPE within days of the expiration of one SOPE in circumstances where it could not be said that a new emergency arose, is a method of circumventing the constitutional provisions and process.

## **DECLARATIONS AND ORDERS**

- [138] It is declared as follows:

- a) The Claimant has standing to bring this Claim.
- b) That Proclamations made by the Governor-General on or after the following dates:

January 18, March 18 and September 23, 2018,  
April 30, July 7 and September 5, 2019,  
January 26 and June 14, 2020,  
November 14, 2021,

June 17, November 15, December 6 and December 28, 2022; and February 15, 2023.

by which he declared the states of public emergency in various and specified communities in Jamaica, were not made for any purpose specified in Section 20 of the Constitution.

- c) That the Proclamations made by the Governor-General in Order 1 were not demonstrably justified in a free and democratic society and were, therefore, inconsistent with the Constitution and void.
- d) That the Proclamations made by the Governor-General on November 15, December 6 and December 28, 2022, by which he declared States of Public Emergency in various and specified communities in Jamaica constituted a breach of the doctrine of separation of powers.

It is hereby ordered that:

- e) Costs are awarded to the Claimant to be taxed if not agreed.
- f) The Claimant's Attorneys at law are to prepare, file and serve these Declarations and Orders.

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**Bertram Morrison, J**

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**Andrea Pettigrew- Collins, J**

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**Simone Wolfe-Reece, J**