

ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FULL COURT DIVISION

SUIT NOS. M67/85 and M68/85

BEFORE: The Honourable Mr. Justice Malcolm
The Honourable Mr. Justice Orr
The Honourable Mr. Justice Ellis

IN THE MATTER OF THE JAMAICA CONSTITUTION
ORDER IN COUNCIL 1962

AND

IN THE MATTER OF CHAPTER THREE SECTION 20
SUBSECTION 3 OF THE CONSTITUTION.

BETWEEN LOUIS COOPER AND ELIJAH KERR - APPLICANTS
AND THE DIRECTOR OF PUBLIC PROSECUTIONS - FIRST RESPONDENT
AND THE ATTORNEY GENERAL - SECOND RESPONDENT

Mr. F.M.G. Phipps, Q.C., Mrs. K. Bennett-Sherman and Miss K. Phipps
instructed by Hamilton and Bennett for the Applicants.
Mr. I. X. Forte, Q.C., Director of Public Prosecutions and F.A. Smith,
Deputy Director of Public Prosecutions for First Respondent.
Mr. R. G. Langrin, Q.C., and Douglas Leys instructed by Director of
State Proceedings for Second Respondent.

4th and 5th November, 1985.

MALCOLM, J:

These are applications by Louis Cooper and Elijah Kerr made
pursuant to Section 3 (1) of the Judicature (Constitutional Redress)
Rules No. 1 1963 and were consolidated and heard together by Order of
a Full Court made on the 7th October, 1985.

Both applicants contend that their rights under Section 20
Subsection 3 of Chapter 3 of the Jamaica (Constitution) Order in Council,
1962, were contravened when the Court of Appeal, on a reference by the
Governor General to the Court under Section 29 (1) (b) of the Judicature
Appellate Jurisdiction Act, purported to consider such reference in

- 2 -

private and to certify their opinion to the Governor General without the applicants having audience.

Section 29(1) (a) and (b) of the Judicature Appellate Jurisdiction Act, hereafter referred to as "the Act " reads as follows:

"The Governor General on the consideration of any petition for the exercise of Her Majesty's mercy, or any representation made by any other person having reference to the conviction of a person on indictment, or as otherwise referred to in sub-section 2 of section 30, or by a Resident Magistrate in virtue of his special statutory jurisdiction, or to the sentence other than sentence of death passed on a person so convicted, may, if he thinks fit at any time, either (a) refer the whole case to the Court and the case shall then be heard and determined as in the case of an appeal by a person convicted; or (b) if he desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for their opinion thereon and the Court shall consider the point so referred and furnish the Privy Council with their opinion thereon."

For the applicants, Mr. Phipps submitted that on a petition under Section 90 of the Constitution, which relates to the exercise of the prerogative of mercy, the Court has no supervisory power or monitorial mechanism over the Governor General's action. However, he submitted that once he makes reference to the Court under Section 29(1) (b) there must be a strict compliance with the law.

The law which Mr. Phipps contends was contravened is to be found at Section 20 Sub-section 3 of Chapter 3 of the Constitution, which reads as follows:

"All proceedings of every Court and proceedings relating to the determination of the existence or extent of a person's civil rights or obligations before any Court or other Authority, including the announcement of the decision of the Court or other Authority, shall be held in public."

He submitted that the reference to and the consideration by the Court of Appeal are "proceedings" as contemplated by Section 23 of the Constitution. To support this contention he invited the Court to consider the definition of the word "proceedings" to be found in the Fourth Edition of Stroud's Judicial Dictionary, p. 21241 to 8, No. 44,

- 3 -

and submitted that "proceedings" as defined therein means any process or step in the performance of a function by a Court.

He further submitted that "opinion" in 29(1)(b) is interchangeable with "decision".

Mr. Phipps, having contended for an interpretation that the reference and certification are proceedings, submitted that both under the Common Law and the Constitution they ought to have been held in public. They could only have been properly held in private by express statutory provision. In support of this reasoning he referred to Section 19(b) of the Criminal Appeal Act, 1907, U.K. which is similar to Section 29(1)(b) of the Act, and he referred to the case of *R. v. McCartan* [1958], 3 All. E.R., page 140, in which a reference relating to the Prerogative of Mercy was made by the Home Secretary to the Court of Criminal Appeal, and was heard in private sanctioned only by the specific provisions of the Criminal Appeal Rules, U.K., 1908, Rule 51. Accordingly, he asked the Court for Orders in terms of the Motions filed.

Mr. Forte, contra, submitted that the provisions of Section 20, Sub-section 3 of the Constitution were not applicable to a consideration by the Court of Appeal on a reference by the Governor General under Section 29(1)(b) of the Act, because that consideration and the giving of opinion were not proceedings of the Court. What the Governor General was doing was an exercise of his Executive functions in considering the exercise of the Prerogative of Mercy.

One of the main plinths of his submissions was that Sub-sections (1)(a) and (b) are in contra-distinction to each other. The former is the only method by which an Executive function can be sent to the Court of Appeal to be dealt with judicially. On this point he drew attention to the absence of the words "heard and determined" and the words "as in the case of an appeal", which appear in Sub-section (a), from the wording of Sub-section 29(1)(b).

He finally submitted that the absence of these words from Sub-section (b), was a clear indication that the Legislature did not require the Court of Appeal either to hear, determine or treat it as an appeal.

The Court was only required to consider the point referred. Decision was not of the Court but of the Governor General.

He cited certain cases and placed full reliance on *Thomas v. R.*, [1980] Appeal Cases, page 125. In that case the Governor General of New Zealand referred a point in exercise of his Prerogative of Mercy to the Court of Appeal under Section 406 (b) of the Crimes Act, 1961, which is similar in wording to Section 29(1) (b) of the Act. The Court of Appeal furnished an opinion to the Governor General which was adverse to the defendant who petitioned the Privy Council for special leave to appeal. The petition was dismissed because it was held that the wording of Section 406 (b) showed that the Legislature had not intended that an opinion of the Court of Appeal furnished on a reference to it under Section 406 paragraph (b) should be appealable to the Judicial Committee, and, further, since such an opinion did not bind the Governor General or impinge on any legal right of the defendants it was not a decision within the ambit of Section 3 of the Judicial Committee Act, 1833, and that, accordingly, the Judicial Committee had no jurisdiction to entertain the appeal.

Mr. Langrin adopted Mr. Forte's arguments and submitted that since the opinion sought under 29(1) (b) did not fetter the Governor General's discretion relative to the Prerogative of Mercy, it was not then a proceeding contemplated by Section 20 Sub-section 3 of the Constitution. He further submitted that redress under Chapter 3 of the Constitution can only be obtained if an applicant shows an infringement of a fundamental right, and not merely a procedural fault. He relied on the *Thomas* case and cited inter alia the case of *DeFreitas v. Benny et al.*, [1976] Appeal Cases, page 239.

We have considered the authorities cited, and the submissions advanced, and bolstered by the decision in the *Thomas* case which we accept as binding on us, we are of the view that when a reference is made by the Governor General to the Court of Appeal under Section 29(1) (b) the consideration of the point is not a proceeding of the Court, and the opinion is not a decision.

- 5 -

Accordingly, in our view there is no obligation on the Court to sit in public, and there is no right of audience to the applicants or their legal representatives. For these reasons the motions are dismissed.

Anything wished to be said on costs?

Mr. Forte: No, my lord

Mr. Langrin: No, my lord

Malcolm, J: This is a unanimous decision that the
Motions should be dismissed with no
order as to costs.