JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 134/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
nig HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J:A.

R. V. NOEL SAMUDA

Dennis Daly, Q.C., Dr. Lloyd Barnett, Jack Hines, Esq., for Appellant

Douglas Leys, Senior Assistant Attorney-General and Yolande Lloyd-Alexander as amicus curiae instructed by **Director of State Proceedings**

Kent Pantry, Q.C. Deputy Director of Public Prosecutions & Lisa Palmer for Crown

4th, 5th, 6th, 7th, 8th, 11th, 12th, 13th, 14th May,
& December 18, 1998

RATTRAY, P

This appeal comes before the Full Court of the Court of Appeal against the sentence imposed by Theobalds, J on the 3rd July, 1996 on the conviction of the appellant for offences of burglary, larceny and rape in the St. Mary Circuit Court. Specifically, the sentence with respect to the conviction for rape was imprisonment at hard labour for fifteen years and additionally that the appellant receive 12 strokes of the tamarind switch. The additional sentence of corporal punishment is what has attracted this challenge on appeal.

In view of the fact that two of the grounds of appeal alleged breaches of the Constitution of Jamaica, the Court allowed an application by Mr. Douglas Leys, counsel on behalf of the Attorney-General to appear as amicus curiae in relation to these issues.

Mr. Leys took a preliminary objection to the hearing by the Court of a ground of appeal sought to be argued by counsel for the appellant which reads as follows:

> "The sentence which includes 12 strokes of the tamarind switch imposed on the appellant constitutes inhuman or degrading punishment or treatment in contravention of subsection 1 of section 17 of the Constitution."

By a majority the Court upheld the preliminary objection and refused leave to counsel for the appellant to argue this ground.

I respectfully disagreed with the majority decision for reasons which I now state.

Mr. Leys submitted that the Court of Appeal does not have the jurisdiction to hear and determine this constitutional issue.

He bases this challenge to our jurisdiction on the following:

> (a) That it is the Constitution itself which provides a remedy for this breach, which remedy was not in existence prior to the coming into effect of the Constitution;
>
> (b) that this remedy can only be pursued under the provisions of Section 25(2) of the Constitution which invests the Supreme Court with original jurisdiction to hear and determine any application alleging "that any of the provisions of section 14 to 24 (inclusive) of the Constitution has been, is being or is likely to be contravened in relation to him." The Court of Appeal therefore does not have an original jurisdiction with respect to a breach under section 17(1), and proceedings can only exclusively be instituted in the Supreme Court in this regard.

The Fundamental Rights and Freedom clauses of the Constitution are to be found in Sections 13 to 24. It is clear from section 13 that no new rights are created by this Chapter , and that the provisions which follow in the Chapter "...shall have effect for the purpose of affording protection to the aforesaid rights and freedoms..." While section 25 provides machinery for redress to a person alleging the contravention of section 17(1) the procedure for redress stated to be by way of application to the Supreme Court is manifestly and clearly stated as being - "without preiudice to any

other action with respect to the same matter which is lawfully available." [Emphasis mine]

The proviso to section 25(2) reinforces this as follows:

> "Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for The contravention alleged are or have been available to the person concerned under any other law."

It mandates the Supreme Court only to proceed in the absence of any other legal approaches by which the applicant can obtain the redress sought.

The exclusivity of the Supreme Court jurisdiction therefore propounded by Mr. Leys is without foundation.

The direct avenue of redress available to an appellant against sentence in a criminal matter is the Court of Appeal. (See section 13(1) the Judicature (Appellate Jurisdiction) Act. How then can the Court of Appeal refuse to exercise the very jurisdiction for which it was established, and for the purpose of which it exists? Had counsel representing the appellant at the trial, recognising the likelihood of a sentence of whipping being imposed, addressed the trial judge in his plea of mitigation on this aspect of the sentencing, he could have relied upon a submission that such a sentence would have been in breach of section 17 of the Constitution. If despite this, nevertheless the trial judge imposed the sentence of whipping, the appellant could have, as he has now sought to do relied upon the very ground which the majority has now determined that the Court of Appeal has no jurisdiction to hear. The effect of finding otherwise would be either:

a) that a submission relied upon at the sentencing stage after conviction in a criminal trial in the Supreme Court would be unavailable to the appellant as a ground before the Court of Appeal, or

b) that a submission in relation to a sentence likely to be imposed in a criminal trial which rests upon the unconstitutionality of the sentence by virtue of a

> breach of section 17 of the Constitution is not available for consideration by the trial judge in exercising his sentencing function.

Either situation would have been in my view untenable.

The submission by Mr. Leys also flies in the face of precedent: In ***R. v. Purvis and Hughes*** [1968] 13 W.I.R. 507, an appeal against a sentence of flogging, and which was based upon a consideration of section 17 of the Constitution, the very section with which we are concerned, the Court of Appeal heard submissions on this very point and came to its determination without objection or demur.

In ***Moses Hinds et al vs. The Director of Public Prosecutions et at with the Attorney General as intervenor*** [1975] 24 W.I.R. 326, an appeal based upon constitutional issues including the question of the constitutionality of a sentence was heard by the Court of Appeal, and proceeded to the Privy Council for final determination without any challenge to the jurisdiction of the Court of Appeal or a claim to exclusivity of the jurisdiction of the Supreme Court. The appeal concerned the constitutional validity of the Court which imposed the sentences on the applicants and as Lord Diplock stated at page 330:

> "...their Lordships cannot shirk the task of ruling upon the constitutional validity of those provisions of the Act which purport to confer jurisdiction to try offences upon the Circuit Court Division and upon the Full Court Division of the Gun Court."

Their Lordships considered the constitutionality of the sentences passed and found them to be unlawful as being in breach of the Constitution. Why then should the Court of Appeal shirk the task of ruling *upon* the constitutional validity of the Act which authorised and imposed the sentence of whipping against which the appellant complains? It was never maintained in ***Hinds*** as is now submitted by Mr. Leys in the instant appeal that the appellants should have instituted original proceedings in the Supreme Court, and therefore the Court of Appeal and the Privy Council were bereft of jurisdiction to deal with the matter.

In ***Maharaj v. Attorney-General of Trinidad and Tobago*** [1979] A.G. 385 at pages 398-399 Lord Diplock in the Privy Council considered the provisions of the Trinidad and Tobago Constitution and dealt with section 6 which in like terms as the Jamaican Constitution conferred the right "to apply to the High Court for redress," and "without prejudice to any other action with respect to the same matter which is lawfully available."

Lord Diplock stated at page 399:

> "It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6 (1) with further right of appeal to the Court of Appeal under section 6 (4). The High Court, however, has ample powers, both inherent and under section 6 (2), to prevent its process being misused in this way; for example, it could stay proceedings under section 6 (1) until an appeal against the judgment or order complained of had been disposed of."

This indicates in my view that the recourse to the original jurisdiction of the Supreme Court is not to be utilised if other avenues of redress are available. It would be a procedural incongruity in this case if we required the appellant to be diverted from his normal course of challenging the sentence imposed upon him to require him to commence original proceedings in the Supreme Court so as to have determined a question upon which we are empowered to adjudicate, that is whether his sentence is in violation of law. The Constitution is and remains the primary law of Jamaica.

Dr. Barnett for the appellant has referred us to ***Hobb and Mitchell v. R*** [1992] 46 W.I.R. 42, in which the Court of Appeal in Barbados, with a Constitution similar to that of Jamaica and in the exact circumstances of this case determined an appeal without the roadblocks which counsel for the Attorney-General (Mr. Leys) has

constructed to prevent the hearing of this ground of appeal. I find myself unable to place any interpretation on the judicial reasoning or the decision in ***Pratt and another v. Attorney-General and another*** [1993] 43 W.I.R. 340 which could forbid this Court of Appeal in exercising the jurisdiction to hear the ground of appeal sought to be relied upon by the appellant.

The right of access to the judicial process for the determination of whether or not the fundamental rights of a Jamaican citizen have been infringed should not be suffocated by a restrictive interpretation of the very provisions of the Constitution designed to provide such access.

I regret the need to dissent from my brethren in the majority, but I must. I would have ruled that this Court of Appeal has the jurisdiction to hear and determine the ground of appeal sought to be advanced by Dr. Barnett on behalf of the appellant.

Counsel for the appellant having been thus debarred, therefore proceeded to argue the following grounds of appeal for which leave was granted by the Court:

> 1. The sentence of twelve (12) strokes with the tamarind switch imposed on the appellant vests in the Executive, the power, discretion and/or facility to determine the control, to regulate and/or to vary its harshness or severity and therefore contravenes the principle of the separation of judicial power which is inherent in the Constitution.
>
> 2. Having regard to the nature of the punishment and the fact that its imposition is infrequent and unusual, the learned trial judge acted unfairly and in breach of the principles of natural justice and the applicant's constitutional rights to a fair trial in failing to give any notice to the applicant or his counsel that he was considering the imposition of such a sentence.
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> 3. That part of the sentence on count 3 namely:
>
> > "You are to receive 12 strokes of the tamarind switch" is unlawful and/or unconstitutional in that there was no valid law authorising the infliction of such a punishment at the time of its imposition and/or such a punishment is severer in degree than the punishment authorised by law at the time of the commission of the offence in question."

In order to appreciate counsel's submission on the third ground as stated, and which I will examine first, it is necessary to determine whether or not at the time of the infliction of the punishment that sentence was one which was authorised by law for the offence for which the appellant was convicted and the sentence imposed.

The 1953 Revised Edition of the Laws of Jamaica dates the Offences against the Persons Law as the year 1864. Section 39 of that Law states the penalty for rape as being:

> "... at the discretion of the Court to be kept in penal servitude for life or for any term not less than three years or to be imprisoned for a term not exceeding 2 years with or without hard labour."

On the 29th July 1942 there came into force Law 53 of 1942 - The Prevention of Crime (Emergency Provisions) Law 1942 - "A law to make provision during the present emergency with respect to sentences of corporal punishment for certain crimes of violence."

This legislation stated in the Interpretation section that - "Flogging" means corporal punishment administered with a cat-o-nine-tails" and "Whipping" is corporal punishment administered with a tamarind switch."

It provided that on conviction for certain offences including offences under Z section 39 of the Offences against the Person Act (rape) the convicted person shall "be liable in addition to or in lieu of any other punishment provided by law, to be sentenced by the Court to be once privately flogged or to be once privately whipped, and the number of lashes or strokes as the case may be which shall be inflicted shall be specified by the Court in the sentence; provided that no person who is under 16 years of age on the date of his conviction shall be sentenced to be flogged".

The law further provided, section 4(1), that the instruments to be used for flogging and whipping respectively under this law namely the cat-o-nine tails and the tamarind switch "shall be of a pattern from time to time approved by the Governor." It directed further by section 4(2) that "Flogging and Whipping shall be inflicted on such part of the person as the Governor may, from time to time generally direct."

It further stated in section 4(3) that:

> "4(3) - The provisions of the Flogging Regulation Law shall apply to every flogging and whipping carried out under this law: Provided that where the provisions of this Law conflict with any of the provisions of the Flogging Regulation Law, the provisions of this Law shall prevail."

The sentence shall take place in a prison or at a police station.

Of special importance is section 7 of the 1942 Law which reads:

> "This Law shall continue in force until the expiration of a period of six months after such date as His Majesty may by Order in Council declare to be the date on which the present emergency comes to an end and shall then expire, except as respect things previously done or omitted to be done."

The Flogging Regulation Law so far as is relevant for this purpose, requires flogging to be carried out in the presence of the surgeon of the prison or other medical practitioner who is "empowered to interpose after partial execution of the sentence of flogging and to direct the postponement of the remainder thereof until such time as the convict may be able to undergo the same."

On the 5th November, 1963 Act 42 of 1963 The Prevention of Crime (Special Provisions) Act 1963 became law. This Act provided for in camera hearings except with regard to the pronouncement of sentence, in respect of certain offences including rape. It further inter alia amended sections 39 and 43 of the Offences against the Person Act (Rape) to make flogging a punishment for the substantive crime as well as attempts. All the sentences of flogging imposed under this Act were

mandatory sentences. The Act also purported to amend The Prevention of Crime (Emergency Provisions) Law in relation to the offence of rape in the following respects:

> (1) By deleting reference to section 39 of the Offences against the Person Law as an offence attracting corporal punishment as provided by section 3 (a) of the 1942 legislation.
>
> (2) By bringing within the ambit of the 1942 legislation attempts to commit any offence under section 39 of the Offences against the Person Law having deleted the substantive offence from section 3(a) of the 1942 Act.
>
> (3) Amending section 3(d) of the 1942 Act so as to cause it to read as follows:
>
> > "(d) An offence under section 16 or section 18 or section 31 of the Offences against the Person Law where any such offence arose out of or was connected with, any offence referred to in paragraphs (a) (b) (c) of this sub-section or any offence under section 39 or 43 of the Offences against the Person Law or under sub-section (1) of section 34 of the Larceny Law." [Emphasis mine]
>
> (4) Deleted section 7 of the 1942 Act thus removing the limitation on its duration and the method of its repeal.

The question_ is whether the amendment as stated at (3) above replaced section 39 of the Offences against the Person Act which had been deleted at (1) above as a section, the breach of which would fall within the provisions of the 1942 Act as attracting the penalty of corporal punishment. For if the underlined words "arose out of governs the further underlined words "any offence under section 39 ... of the Offences against the Person Law' then the substantive offence under section 39 would not be caught by the amendment.

We therefore have two scenarios in the interpretation of the amendment -

> 1. That the offence of rape under section 39 of the Offences against the Person Act no longer fell under the Prevention of Crime (Emergency Provisions) Act;
>
> 2. That the offence continued to fall under the emergency legislation.

In the interpretation of the amendment and its effect I bear in mind that penal statutes are to be construed strictly and if there remains any doubt or ambiguity the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt." Under this interpretation the 1963 Act would have removed corporal punishment from the Prevention of Crime (Emergency Provisions) Law. Furthermore, on the alternative interpretation that flogging and whipping remained as legal punishments under the Prevention of Crime (Emergency Provisions) Law, we would have had two legislative punishment regimes with respect to corporal punishment - discretionary sentences of flogging or whipping for the offence of rape under the Prevention of Crime (Emergency Provisions) Law, and mandatory sentences of flogging for that offence under the Prevention of Crime (Special Provisions) Law. In my view they could not co-exist.

On the 11th August 1972 the Law Reform (Mandatory Sentences) Act came into effect. It was as stated in its long title "An Act to amend the law to abolish certain mandatory sentences." It removed the statutory mandatory requirement of flogging imposed by the amendments instituted by the Prevention of Crime (Special Provisions) Act 1963 from inter alia sections 39 and 43 of the Offences against the Person Law. It deleted section 3(a) of the Prevention of Crime (Emergency Provisions) Law which at that time, if still in existence, would have read, if the 1963 amendment was effective - "An offence under section 45 or section 48 of the Offences against the Person Law or under subsections 2 and 3 of section 34 of the Larceny Law 1942" and replaced it by the following -

> "(a) An offence under section 39 or section 43 or section 45 or section 48 of the Offences against the Person Law or under section 34 or section 36 or section 37 of the Larceny Law. "

It further deleted the words inserted by the Prevention of Crime (Special Provisions) Law in section 3(c) and (d) of the Prevention of Crime (Emergency Provisions) Law

and which incorporated in those subsections - "or any offence under section 39 or 43 of the Offences against the Person Act or under subsection 1 of section 34 of the Larceny Law."

The efficacy of the amendments in respect of the Prevention of Crime (Emergency Provisions) Act would depend upon whether the Act was in existence at the time when the Law Reform (Mandatory Sentences) Act came into effect.

In the trinity of iagisiation under examination to wit the Prevention of Crime (Emergency Provisions) Act, the Prevention of Crime (Special Provisions) Act and the Law Reform (Mandatory Sentences) Act, the identification of the instruments to be used for flogging or whipping and the method of imposition are to be found only in the first named legislation, in the interpretation section already cited.

That Act further requires that the instrument "shall be of a pattern from time to time approved by the Governor" , who also is authorised to direct "such part of the person" on which the "flogging and whipping shall be inflicted", The Act also makes the provisions of the Flogging Regulation Law applicable except so far as they conflict with its provisions when "the provisions of this Law shall prevail:" The Flogging Regulation Act deals exclusively with a sentence of "flogging" and does not in any way apply .to a sentence of "whipping".

There is no law presently extant which regulates how sentences of whipping are to be carried out. A definition with respect to "whipping" and an identification of the instrument to be used to administer this punishment would rest upon the continued existence of the Prevention of Crime (Emergency Provisions) Law.

The intended effect of the amendments in the 1972 legislation was -

(a) to abolish the mandatory sentences of flogging imposed in the 1963 legislation, and

> (b) to retain the discretionary sentences of flogging or whipping and the other provisions of the Prevention of Crime (Emergency Provisions) Law 1942 from which the limiting provision as to duration had been purportedly removed by the 1963 legislation.

In this regard therefore the questions which are posed on this ground of appeal are as follows:

1. In view of the limitation as to the duration provision of section 7 of the Prevention of Crime (Emergency Provisions) Law 1942 was this legislation in existence when the Jamaican Parliament in 1963 enacted the Prevention of Crime (Special Provisions) Act?

2. Did any of the amendments made to the various Jamaican Laws by the 1963 legislation in respect of flogging and/or whipping survive the enactment of the Law Reform (Mandatory Sentences) Act 1972?

3. Was the Prevention of Crime (Emergency Provisions) Law 1942 in existence in 1972 when by virtue of the Law Reform (Mandatory Sentences) Act the legislature purported to amend section 3 of that Law in the terms which it sought to do?

Dr. Barnett on behalf of the appellant has submitted that the "present emergency" referred to in section 7 of the Prevention of Crime (Emergency Provisions) Law was World War II.

The constitutional status of Jamaica at that time was that of a Colony of Great Britain. By virtue of the Jamaica Act 1866 29, 30 Vic 12 Jamaica's representative institutions were surrendered and since 1866 the Crown in Council provided for the Government of the Colony. The Governor was the representative of the Crown, and it was not until 1944 by the Jamaica (Constitution) Order in Council 1944 that any major changes occurred including the right of all adult persons to vote in parliamentary elections. A Ministerial system was introduced in 1953.

In the United Kingdom, in anticipation of the outbreak of World War 11 in 1939, the Emergency Powers (Defence) Act was passed by the United Kingdom

Parliament on the 24th of August 1939. The Crown was empowered to extend its duration by yearly periods by Orders in Council and by such Orders the Act remained in force until 23rd August 1945. However, prior to reaching that date by virtue of the Emergency Powers (Defence) Act 1945 provision was made for the Act to continue in force for a further period of six months and to expire at the end of that period. Although empowered by Orders in Council to have extensions for further yearly periods, this power was never exercised and the Act consequently expired on the 24th of February, 1946,

The Emergency Powers (Defence) Act 1939 was extended to Jamaica and its Dependencies and published in the Jamaica Gazette Extraordinary of Saturday August 26, 1939. The legislation was -

> "An Act to confer on His Majesty certain powers which it is expedient that His Majesty should be entitled to exercise in the present emergency." (Emphasis mine)

Dr. Barnett has submitted therefore that we are able to identify the "present emergency" which finds its expression in identical words in the Prevention of Crime (Emergency Provisions) Law 1942. The life of this Law by its own terms lasted until the expiration of a period of six months after such date as Her Majesty may by Order in Council declare to be the date on which the "present emergency" comes to an end and shall then expire. Were the termination provisions of the Act met?

In ***R. v. Purvis and Hughes*** [1968] 13 W.I.R. 507 the applicants for leave to appeal challenged inter alia the constitutionality of a sentence passed upon them by the Court which included the imposition of six lashes. They maintained that the punishment breached the provisions of section 17 of the Constitution of Jamaica which reads as follows:

> **"17-(1)** No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

As this Court by a majority has already refused leave to argue a similar ground sought to be urged on us by the appellant's counsel I will deal only with their Lordships' view of counsel's submission on what was the "present emergency" and its duration. Waddington, P (Acting) delivering the judgment of the Court stated inter alia at page 513:

> "It was submitted that the 'present emergency' mentioned in the section was the duration of World War II and as World War II was declared to be at an end that the Japanese Treaty of Peace Order 1952 (The Jamaica Supplement Proclamation, Rules, and Regulations 1954 at page 23) the law expired 6 months thereafter and accordingly flogging was not a form, type, mode or description of punishment which was in existence immediately before August 6, 1962. Counsel admitted that he was unable to locate any specific Order in Council by Her Majesty declaring the date on which the emergency came to an end. The fact that Counsel was not able to find any Order in Council under section 7 is not surprising, as the legislature itself seems to have regarded this power as still being in existence in 1963 when by section 2 of the Prevention of Crime (Special Provisions) Act 1963 it repealed section 7 thus removing the temporary nature of the duration of the law.'

With all due respect, the fact that the legislature regarded the law as still being in existence in 1963 cannot be determinant of that issue. Legislatures are not error proof and can be and have been at some time mistaken or not sufficiently advised. If the "present emergency" was World War II, I feel a sense of unreality in having to assess any submission which treats World War II as being in existence in 1963 when the Prevention of Crime (Special Provisions) Act was enacted; in 1968 when ***R. v. Purvis and Hughes*** was being decided; and in 1998 when this Court is hearing the

instant appeal. Indeed since in 1939 only the war against Germany was anticipated or in existence we can narrow our considerations in this regard.

The researches of counsel for the appellant have provided for our view the Supplement of the London Gazette of Friday the 9th of July 1951 issued out of the Privy Council Office (U.K.) which notified "that the formal state of war with Germany is terminated as from 4.00 p.m. the 9th July, 1951".

If we are to extend our considerations to include the other countries in which the colonial power was at war during World War II, Italy, Hungary, Roumania, Bulgaria, Finland these all had their States of War with Great Britain terminated by Treaties of Peace between 1947 and 1948. A Treaty of Peace with Japan was signed in San Francisco on the 8th September, 1951. No Treaty was signed as regards Austria and Germany but the State of War was declared to have ended on the 6th September, 1947 as regards Austria and 9th July 1951 as regards Germany (see the London Gazette 6th September 1947 for Austria and 9th July, 1951 for Germany). Under any calculation therefore at its latest the Prevention of Crime (Emergency Provisions) Law 1942 would have expired on the 8th of January, 1952.

When therefore the Prevention of Crime (Special Provisions) Act 1963 sought to amend the Prevention of Crime (Emergency Provisions) Law to introduce mandatory flogging for the offence of rape, the latter mentioned law had already expired. Likewise when it was sought by virtue of the Law Reform (Mandatory Sentences) Act 1972 to amend section 3 of the Prevention of Crime (Emergency Provisions) Law so as to reinstitute flogging and whipping as discretionary sentences that law having already expired could not be amended to achieve this purpose. There were no provisions still existing in relation to this Act which could be subject to amendment. Section 26 of the Interpretation Act provides:

> "Where by virtue of any enactment the whole or part of an Act has expired or lapsed or otherwise ceased to have effect that Act shall be deemed to have been repealed to the extent to which it has so expired, lapsed or otherwise ceased to have effect."

The provisions for its expiration are self contained. Insofar, therefore as it was sought to impose a sentence of whipping under the Prevention of Crime (Emergency Provisions) Law 1942 such a sentence would be illegal as that statute had long expired before the Law Reform (Mandatory Sentences) Act was enacted. Legislation cannot be engrafted on a statute which no longer exists.

It must also be noted that the challenged sentence pronounced by the Court on the appellant was in these words:

> "On count III sentence of the court is 15 years hard labour and in addition you are to receive 12 strokes of the tamarind switch."

The word "whipping" is not used by the trial judge. It finds its genesis in the Prevention of Crime (Emergency Provisions) Law. It is however clear that the language used by the trial judge in imposing the sentence relied upon the definition of "whipping" in that law. The effect of the expiration of that Law was that the pattern of the tamarind switch approved by the Minister for Development and Welfare in 1965 by virtue of powers purportedly given to him by that law was in fact of no effect since the law authorising the Minister to approve the pattern had expired and could no longer empower him to do so. (see Jamaica Gazette Supplement Proclamation Rules and Regulations, January 28, 1965 - The Prevention of Crime (Emergency Provisions) Law "patterns of Instruments and Parts of Persons".) The expiration of this Law also meant that the definition of "whipping" to mean "corporal punishment administered with a tamarind switch" was no longer in effect and therefore could not be relied upon as authority for the imposition of the sentence pronounced by the trial judge.

In contrast, quite apart from the provisions of the Prevention of Crime (Emergency Powers) Law and the Order made thereunder by the Minister which

approved the pattern of the instrument to be used for flogging, the Flogging Regulation Law empowered the Minister to approve the instrument to be used in carrying out the sentence of flogging separate and apart from the pattern thereof and that the Minister did under that Law by approving the cat-o-nine tails as that instrument in the following terms:

> "Now therefore I the Minister hereby approve as the instrument in which sentences of flogging shall be carried out, the cat-o-nine tails that is to say, a rope whip consisting of a round wooden handle 20 inches long, and 1-1 1/2 inches in diameter with nine thongs of cotton cord attached to one end of the handle each thong being 30 inches long and not more than 3/16 of a inch in diameter and knotted at the end or whipped at the end with cotton twine."

The Flogging Regulation Law however does not define what is "flogging" and that definition is to be found in the expired Prevention of Crime (Emergency Provisions) Law. I am therefore unable to identify the legislative source of a sentence which 'I) ' states - "You are to receive 12 strokes of the tamarind switch". It could not be the expired Prevention of Crime (Emergency Provisions) Law, nor could it be the Flogging Regulation Law since the latter does not confer jurisdiction on the Court to impose the sentence of flogging but only regulates its administration. -Furthermore, the sentence purported to be imposed would be one of "whipping" and not "flogging":

Mr. Pantry, Q.C. for the Crown has submitted that the "present emergency" must mean the state of crime in Jamaica at the time the Act was passed, and not the war then in existence. He has been unable to indicate any legislation establishing a local emergency as a result of the state of crime in Jamaica at that time. This would have had to be declared under specific emergency powers conferred by legislation. Neither can we visualize why a local emergency would fall to be terminated by an Order of Her Majesty in Council.

The essence of an emergency is the absence of permanence. It is identifiable by fa era axiating at a par iGLIt@F time and pleas: If; as in the instant ease; it is a

stated event, the emergency terminates with the cessation of that event. Parliament does not create the emergency - it recognises it. The legislation is peculiarly identified as "emergency" legislation, and under such rubric makes provision for a situation that is not normal and is indeed temporary. If, as is the case in this legislation, the limitation of the life of the emergency is calculable in relation to an identifiable event, in this case the termination of World War II, an interpretation cannot be placed on the terminating words in the statute which results in extending the emergency forever beyond its demise. Whenever the emergency ends the law expires at a time to be calculated as six months thereafter. The fact that the law has stated a procedure for notifying the termination of the emergency cannot be interpreted to override the established fact that the emergency has indeed been terminated. Otherwise on the Crown's submission it would have been possible for emergency legislation to become permanent merely because the method indicated of notifying the end of the emergency has not been followed. This in my view would lead to an absurdity.

Another point for consideration is the effect constitutionally of the achievement of Jamaica's Independence as a sovereign nation on the provisions of section 7 of the Prevention of Crime (Emergency Provisions) Act 1942. Could Her Majesty in Council after the 6th August, 1962 (the date of Jamaica's Independence) or anyone acting in Her stead have the constitutional authority to declare "the present emergency" to be at an end?

It is true that section 68(1) of the Constitution vests the executive authority of Jamaica in Her Majesty. This authority (section 68(2)) "may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him." Is the declaration of the end of the "present emergency" an exercise of executive authority? I would think not. It would in this particular case be the exercise of a function required by legislative authority. Its exercise would lead to the repeal of this specific statute. The repeal of a statute is essentially a legislative act and this

could not be done by Her Majesty in Council after Jamaica's Independence had been achieved nor in my view could it be done by the Governor-General performing this function imposed on Her Majesty in Council at a time when Jamaica was a colony. Furthermore, the question which must be addressed is as to whether emergency legislation imposed in 1942 whilst the constitutional status of Jamaica was that of a colonial territory with a very restricted franchise for the large majority of its population did survive the achievement Of national savereignty in 1962 or did that change of status Create the strongest implication of repeal`s I would hold the letter proposition to be correct.

In my view for the reasons stated the Prevention of Crime (Emergency Provisions) Law could not co-exist with Jamaica's changed constitutional status and was therefore impliedly repealed on the date of the achievement of Jamaica's Independence. The constitutional change in Jamaica's status would have made the emergency law redundant and consequently would have resulted in its repeal.

Assuming the Prevention of Crime (Emergency Provisions) Law to have remained in force after the end of World War II and six months after its termination - what would be in effect on this legislation of the later Acts amending the Offences against the Person Act? Although there is a genuine presumption against implied repeal it is well established **by** case law that a prior statute is impliedly repealed to the extent that its provisions are incompatible with a subsequent statute or the two statutes together would lead to **absurd** consequences or if the entire subject matter was taken away by the subsequent statute. This is equally applicable to penalty provisions. In ***R. v. Davis*** [1783] 1 Leach 271 it was held that a statute creating a capital offence was impliedly repealed by a later Act carrying a penalty of only a fine of £20. In ***Henderson v. Sherborne*** [1837] 2 M & W 236 at page 239 Lord Abinger C.B. stated that :

> "The principle adopted by Lord Tenterden (in ***Proctor v Mainwaring*** 3 B. & Ald. 145) that a penal law ought to be construed strictly is not only a sound one but the only one consistent with our free institutions.
>
> „/The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject and I hope will always remain so. If a crime be created by statute with a given penalty, and afterwards be repeated in another statute with a lesser penalty attached to it, a person ought not to be held liable to both. There may no doubt be two remedies for the same Act but they must be of a different nature. The new Act then would be in effect a repeal of the former penalty."

As Lord Abinger, C.B. explained in ***Attorney-General v Lockwood*** [1842] 9 M & W 378 at page 391 in reference to his judgment in ***Henderson v Sherborne:***

> "My judgment was founded on the principle that - where the same offence is re-enacted with a different punishment it (the subsequent enactment) repeals the former law."

In ***Smith v. Benabo*** [1937] 1 K.B. 518 at p. 525 Goddard, J in delivering the judgment of King's Bench Division (Lord Hewart, C.J., Swift and Goddard, JJ) in a Case stated declared in my view correctly that:

> "It is a well settled rule of construction that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute."

In ***Fortescue v. Vestry of St. Matthew, Bethnal Green*** [1891] 2 Q.B.D. 170 at p. 177 Charles J. delivering the judgment of the Court (Lord Coleridge, C.J. Matthew, Cave, Smith and Charles JJ) stated correctly:

> "... it is a well recognized principle that an Act describing the quality of an offence, or prescribing a particular punishment for it, is impliedly repealed by a later Act altering the quality of the offence or prescribing another punishment for it."

The amending Act 42 of 1963 - the Prevention of Crime (Special Provisions) Act imposed in respect of the offence of rape a mandatory sentence of imprisonment

and flogging. This would have the effect of impliedly repealing the provisions of the Prevention of Crime (Emergency Provisions) Act in so far as that Act imposed a sentence of flogging or whipping for the offence of rape. The penalty authorised by the later amending Act is substantially different from that imposed by the Prevention of Crime (Emergency Provisions) Act in two important respects (i) the omission of the power to impose a sentence of whipping; and (ii) the power to impose a sentence of flogging is mandatory rather than discretionary. These variations indicate a penalty which is substantially different from that previously authorised by the Prevention of Crime (Emergency Provisions) Act. Consequently, the penalty prescribed in the Prevention of Crime (Emergency Provisions) Act in respect of the offence of rape must be considered as impliedly repealed by the amending Act. Both could not exist side by side without anamolous results. With the repeal of the Prevention of Crime (Emergency Provisions) Act the authority to impose a sentence of whipping in respect of the offence of rape is removed.

By virtue of the Law Reform (Mandatory Sentences) Act No. 9/1972 which amended the Offences against the Person Act, the mandatory sentence of flogging for rape imposed by the earlier Amending Act No. 42/63 was removed leaving only the sentence of imprisonment. There is therefore no longer any provision in the Offences against the Person Act authorising whipping or flogging as a sentence for the offence of rape.

For these reasons I would hold that the trial judge had no authority to impose a sentence of whipping as he purported to do. The appeal consequently succeeds. I would however go on to examine the other submissions made before us.

RE: THE JAMAICAN CONSTITUTION AND THE SEPARATION OF POWERS

If indeed what was imposed was a sentence of whipping, counsel for the appellant has urged the Court to hold that the imposition of this sentence breaches the constitutional principle of the separation of judicial and executive powers. That this

principle provides one of the underpinnings of the Jamaican Constitution cannot at this stage be doubted. In ***Hinds and Others v. R*** 24 W.I. R. 326 at page 341 Lord Diplock in the Privy Council stated:

> "In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of powers.
>
> The power conferred upon Parliament to make laws for the peace, order and good Government of Jamaica enables it, not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law. (see Constitution Chapter III Section 20(1)) The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power and subject to any restrictions imposed by law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out.
>
> In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as for example capital punishment for the crime of murder. Or it may prescribe a range of punishment up to a maximum in severity either with or, as it were, without a minimum, leaving it to the Court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
>
> Thus, Parliament in the exercise of its legislative power, make a law imposing limits upon the discretion of Judges who preside over the Courts by whom offences against the law are tried to inflict upon an individual offender the custodial sentence, the length of which reflects the judges own assessment of the gravity of the offender's conduct in the particular circumstances of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body

> whose members are not appointed under Chapter III of the Constitution, a discretion to determine the severity of the sentence to be inflicted upon an individual member of a class of offenders". [Emphasis added]

The submission of counsel for the appellant in this regard is that the imposition of the sentence of whipping transfers to the executive, that is the prison authorities who carry out that sentence, the authority or discretion to determine the degree of, and the severity of the sentence and this is a function of the Judiciary and not a matter for the Executive.

In reply, Mr. Leys for the Attorney-General has submitted that the sentence which includes imposition of twelve strokes with the tamarind switch falls within the judicial power, but that the executive is vested with the authority to regulate the manner in which the sentence is carried out. The fact therefore that the sentence by the Court has not directed the time at which the sentence is to be inflicted, the dimensions or pattern of the tamarind switch, the manner in which the strokes are to be administered, the intervals between the strokes, relate to matters which are properly left to executive determination and are not as Dr. Barnett has submitted a usurpation by the executive of what is rightly a judicial function. Both counsel have relied upon the very passage cited in ***Hinds*** to establish their differing contentions.

The Flogging Regulation Law limits the number of strokes the Court can order in respect to both adults and juveniles. It provides further that:

> "No sentence of flogging shall be carried out except with an instrument approved by the Minister."

It also provides for the Court or Prison Authority to determine summarily in the absence of evidence of the actual age of the person "that such person is either an adult or a juvenile offender and to direct the number of lashes or strokes accordingly."

On the 28th of January 1965, the Minister of Development and Welfare purporting to act under the provisions of subsection 1 of section 4 of the Prevention of

Crime (Emergency Provisions) Law which legislated the instruments to be used in respect of flogging and whipping and directed that they shall be "of a pattern from time to time approved by the Governor", approved in respect of whipping "that the pattern of the tamarind switch shall be three lengths of twigs of the tamarind tree, each forty-four to forty-eight inches long and no more than one quarter of a inch in diameter, trimmed smoothly so that there shall be no protrusion or knots or joints and bound together with cotton twine". He further directed that whipping shall be inflicted on the prisoner's buttocks. The Minister's Order is headed "Patterns of Instruments and Parts of Persons" (See Jamaica Gazette Supplement January 28, 1965). On that date the Minister also made an order in similar terms under the Flogging Regulation Law with respect to the instrument to be used for flogging.

It is to be noted in the instant case that although the trial judge specified that the tamarind switch was the instrument to be used the Act under which the sentence was purportedly imposed required the "pattern" of the instrument to be approved by the Minister and the Flogging Regulation Law requires the Minister to approve the instrument.

Dr. Barnett's submission is that the severity of the sentence of whipping is determined by many factors which include the instrument approved by the Minister, the pattern of the instrument also approved by the Minister, the size and strength of the person carrying out the whipping and the parts of the body to which the blows are administered. Since the decision as to the severity of the sentence is a judicial prerogative the transfer to the Minister of this determination is in breach of the separation of powers inherent in the Westminster Model Constitution.

Both Mr. Leys for the Attorney-General and Mr. Pantry, Q.C. for the Crown have urged on us the submission that severity in respect of a sentence of whipping specifically relates to the number of strokes ordered by the judge and the executive is empowered to carry out the sentence imposed in a manner regulated and determined

by the executive. Thus, if the sentence is one of imprisonment, the length of the incarceration is determined by the judge but the conditions of incarceration including the prison in which the sentence is to be served is determined by the executive.

The severity of usual punishments like imprisonment and fines can be measured by the length of the imprisonment in terms of time to be spent in prison or the value of the fines imposed. The punishment of whipping is not akin to the deprivation of liberty or the deprivation of monetary value. The essential element of the penalty of whipping is the infliction of pain. The severity of the pain is not only restricted to the number of lashes but as Dr. Barnett correctly in my view points out, to the nature of the instrument and the factors to which he has drawn our consideration. This being so, I hold that the imposition of whipping as a penalty does breach the principle of the separation of powers which underpins our Constitution. The question then raised is whether the statute under which it is imposed is saved by having been in force immediately before the appointed day i.e. 6th August, 1962.

In regard to this both Mr. Pantry, Q.C. and Mr. Leys have relied upon the provisions of sections 4(1) of the Jamaica (Constitution) Order in Council 1962 and 17(1) & 2 and 26(8) of the Constitution which clauses they maintain_ save the constitutionality of the relevant statute if indeed the sentence of whipping does contravene the principle of separation of powers one of the plinths upon which the Westminster Model Constitutions have been constructed.

Section 4(1) of the Jamaica (Constitution) Order in Council 1962 reads as follows:

> "4. (1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed,

> in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

The Order Itself' then proceeds under subsection (2):

> "(2) Without prejudice to the generality of the preceding subsection, ..."

to indicate the list of amendments which automatically takes effect whenever references to specific offices have to be construed.

Subsection (5) (a) of section 4 of the Order provides as follows:

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

If the statute authorising whipping as a sentence breaches the separation of powers principles which underpin the Constitution, can any adaptations or modifications bring "it into conformity with the provisions of this Order?" This does not appear to me to be possible.

If the Governor-General fails within the period of two years to make the necessary modifications or adaptations, does this mean that the law which offends the principle of the separation of powers remain in effect? I think not. In any event the provisions of section 4(1) must relate to laws legally in force in Jamaica before the appointed day. It cannot refer to laws which have expired prior to that date although erroneously believed to have been still in existence.

The authority given to the Governor-General to make adaptations and modifications can only be in respect of adjustments made necessary by virtue of matters like the changed nomenclature of offices and cannot extend to fundamental changes such as the validation of a law which has already expired.

The Constitution does not explicitly establish the separation of powers. As Lord Diplock said in delivering the majority judgment in of the Board in ***Hinds and Others v. R*** (supra) at page 330:

> "A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject-matter and of the surrounding circumstances with reference to which it was made. Their Lordships have been quite properly referred to a number of previous authorities dealing with the exercise of judicial power under other written constitutions, established either by Act of the Imperial Parliament or by Order in Council made by Her Majesty in right of the Imperial Crown, whereby internal sovereignty or full independence has been granted to what were formerly colonial or protected territories of the Crown.
>
> ... 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 has 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 courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for 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, an Executive and a 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 legislation powers by the Executive or of judicial powers by either the Executive or the Legislature.
>
> In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as 'the Westminster Model'." [Emphasis added]

This citation traces the origins and identifies the nature and effect of the separation of powers which underpins all the Constitutions of the Westminster Model such as the Jamaican Constitution.

The foundation and rationale for the doctrine is not to be found in Chapter III - The Fundamental Rights and Freedom clauses of the Constitution. The reliance therefore by the respondents on section 17(1) and (2) already cited and section 26(8) of the Constitution, which reads:

> "26 (8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

is misconceived for the reason that (1) in relation to section 26(8) the separation of powers does not fall under Chapter III and (2) in relation to section 17 this ground of appeal rests on no allegation that the applicant was subjected to torture or inhuman or degrading punishment or other treatment.

Furthermore, as I have already indicated the statute under which the sentence was imposed had expired long before the appointed day.

In my view therefore, the sentence of whipping imposed infringed the separation of powers requirement in the Constitution of Jamaica and for this reason this ground of appeal must also succeed.

The Question of Fairness

The final ground of appeal argued is that the trial judge in imposing on the appellant a sentence which included whipping breached the principles of fairness and of natural justice in that he gave no intimation prior to the imposition of the sentence of his intention to do so. It is urged that the principles of fairness dictated that he should have notified the appellant of his contemplation in this regard so that counsel on his behalf could have made submissions as to why the contemplated sentence should not be imposed. In not so doing, counsel for the appellant maintains that the appellant was denied a fair hearing.

Section 20 subsection (1) of the Constitution provides:

> " Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Common law principles also demand procedural fairness. It cannot be disputed that sentencing is an important aspect of the trial and the right of a fair hearing applies equally to the sentencing process.

Mr. Leys on behalf of the Attorney-General set out in writing the principles applicable to the doctrine of modern fairness as outlined in ***R. v. Secretary of State for the Home Department ex parte Doody*** [1993] 3 W.L.R. 154 at 168 as pronounced by Lord Mustill as follows and I cite Mr. Leys' written submission:

> "(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

> (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
>
> (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
>
> (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
>
> (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
>
> (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

I regard Mr. Leys' précis from the passage of Lord Mustill's judgment in ***Doody*** as accurate and in my view relates equally to general fairness.

Historically, for over twenty (20) years a sentence of corporal punishment has not been imposed in the Courts in Jamaica. In August 1994 in ***R. v. Errol Pryce*** SCCA 88/94 a sentence which included whipping as a component was imposed in the Home Circuit Court. Since then, the imposition of a sentence which includes a component of corporal punishment has indeed been very rare.

In ***Errol Pryce*** (supra) the Court of Appeal in dealing with whether the trial judge should have invited counsel to make submissions on the appropriateness of a sentence of corporal punishment referred to ***R. V. Earl Simpson*** SCCA 54/93 in which this court called attention to the situation where a judge was minded to impose a

discretionary life imprisonment, that he should inform counsel and allow him to deal with the matter specifically. The reason for this course is to enable counsel to bring the judges mind to all relevant factors that bear on the matter. The result of that assistance is that the judge will be better able to balance all the factors necessary to advise himself. The Court however also referred to ***R. v. Morgan*** [1987] 9 Cr. App. Rep. 201 where the very remarks were made by the Court of Appeal in England but in which however the Court did not proceed to set the sentence aside. **R. *v. MacDougall*** [1983] Cr. App. Rep. 78 was referred to as well as being a case relating to a discretionary life imprisonment in which similar comment was made by the Court but the sentence was also upheld. The Court of Appeal therefore declared in ***Pryce:***

> "... that although it would have been desirable for the judge to have invited counsel that he was minded to invoke the provisions of the Crime (Prevention of) Act, that omission cannot result in that sentence being set aside if the sentence or combination of sentences is not otherwise manifestly excessive."

I see a difference between a sentence of life imprisonment which is discretionary and a discretionary sentence of whipping. The nature of a sentence of whipping is unusual in the circumstances of Jamaica. After the lapse of over twenty (20) years and the very infrequent nature of its use in the years following its reintroduction, it could not be expected that such a sentence would be anticipated by counsel for the appellant and fairness would require some indication that the trial judge was considering the imposition of a sentence of this nature. Counsel would then have been able to make submissions on the appropriateness of the sentence including the submissions which have been made on this appeal as well as the ground in respect of which the majority has ruled that this Court does not have jurisdiction. In any event, it would have been reckless of counsel and not in his client's interest, without an indication from the trial judge to bring to the mind of the judge (who might not have been considering it at all) in a mitigation submission that such a sentence was available for consideration.

In my view the failure of the trial judge to indicate that he was contemplating such a sentence breached the principles of fairness.

Had I not concluded in any event that in respect of the two previous grounds argued by counsel for the appellant, the appeal must succeed and the sentence of whipping set aside, the Court of Appeal could have even at this stage heard submissions on the appropriateness of the sentence. However this is not necessary. For the reasons already stated I would allow the appeal and set aside the sentence with respect to twelve strokes of the tamarind switch.

FORTE J.A.

At the commencement of the appeal, the respondents took a preliminary objection to the appellant being granted leave to argue supplemental ground three which challenged the constitutionality of the sentence of whipping which was imposed by the learned trial judge. The ground alleges a breach of Section 17 (1) of the Constitution which reads as follows:

> "17.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

The basis for the objection is that by virtue of Section 25 of the Constitution, which provides for "the enforcement of the protective provisions"(see marginal note) the appellant could not present arguments in this regard in the context of the appeal, but is obliged to seek redress in the Supreme Court as that court has original exclusive jurisdiction in such matters. For easy understanding I set out hereunder the relevant provisions of Section 25:

> "25--(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without 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) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing

> the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".

Section 25(1) allows a person, alleging a breach of his rights under any of Sections 14 to 24 to apply to the Supreme Court for redress. This right however is specifically stated to be given without prejudice to any action with respect to the same matter which is lawfully available. It is the person's choice, therefore to decide whether he seeks redress in the Supreme Court, under the Constitutional provisions, or where another remedy already existed before the coming into effect of the Constitution, to resort to the latter.

Section 25(2) gives the Supreme Court original jurisdiction to hear and determine an application brought by virtue of subsection (1) and the power to make orders etc. for enforcing the rights given under Sections 14 to 24. There is however a proviso which mandates that the Supreme Court does not exercise that original jurisdiction if it is satisfied that adequate means of redress is or has been available under any other law.

In summary, a person who alleges that his fundamental rights have been breached, may either bring his grievance to the Supreme Court by virtue of Section 25, or seek redress by virtue of any other action lawfully available to him. If he seeks redress in the Supreme Court by virtue of Section 25, then the

proviso requires that Court, not to exercise its powers if adequate redress is available under any other law.

Before directly with the issue raised in the prelimingry ni?iectiPn if is necessary also to refer to the provisions of Section 3 (iii) of the Judicature (Constitutional Redress) Rules 1963 which reads as follows:

> "Where in the course of any action or proceedings (civil or criminal) before the Court any question arises under the provisions of Sections 14 to 24 inclusive of the Constitution, The ecAiri may: 0.6101711111@ &UCl1 qtiggTiCiti FId give effect to such determination so far as applicable; in its judgment or decision in such action or proceedings".

These provisions make it quite clear, that when an issue in relation to the human rights provision of the Constitution, arises in the context of any proceedings whether civil or criminal, then that Court has the power to determine that issue and give its judgment thereon accordingly.

By virtue of these provisions, the trial Court could, if the question arose, have determined the issue of whether the punishment to be inflicted on the appellant was in breach of Section 17 (1) of the Constitution. In the same way, so can this court determine that issue. If that issue is determined in favour of the appellant then this Court would be obliged to remove that part of the sentence, and thereby give redress to the appellant. So that if adequate means of redress is available by this process then the Supreme Court sitting on an application under Section 25, would be obliged to find that redress being available that Court ought not to hear the application. Also, Section 25 gives

the option to the person complaining to seek his remedy elsewhere if available rather than invoke its provisions.

If however, this was a case in which the appellant had already been whipped as a result of the sentence imposed upon him; then the mere setting aside of the sentence would not be adequate redress. In such a case he would have to seek compensation for the Constitutional Breach under Section 25 as the whipping being a sentence of the Court, he would have no action in tort, as those who inflicted it would have been carrying out an order of the court, nor of course could the learned trial judge be sued. (See *Maharaj v. A.G. Trinidad and Tobago* (No. 2) (P.C) */19791A.C.* 385. It is in those circumstances, that it can be concluded that Section 25 created a new remedy for a breach of a right which though existing prior to the Constitution , nevertheless had no remedy. In that case, the person would have to invoke the provisions of Section 25 to get redress. A short passage from the speech of Lord Diplock in the *Maharaj* case No 2 (supra) speaks eloquently to this point. He said: (pg. 399 - Letter H).

> "It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be but right on appeal to an appellate court. It is true that instead of, or even as well as pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under Section 6(1) with a further right of appeal to the Court of Appeal under Section 6 (4). The High Court, however, has ample powers, both inherent

> and under section 6 (2), to prevent its process being misused in this way; for example, it could stay proceedings under Section 6 (1) until an appeal against the judgment or order complained of had been disposed of". (emphasis added).

Lord Diplock was here speaking to the provisions of the Constitution of Trinidad and Tobago which does not have similar provisions to the proviso to Section 25 (2) of the Jamaican Constitution, the latter mandating the Court not to exercise its powers if satisfied that adequate means of redress was available under any other law. The underlined words in the above cited passage recognise that redress can be had by way of appeal, where the sentence had not yet been carried out, and in those circumstances given the provision of the Constitution of Trinidad and Tobago the Court may well in order to prevent the misuse of its process, for example stay proceedings brought under the Constitutional provisions (Section 6 (1)) until the appeal is heard. In the Jamaican context, the Court could apply the proviso and refuse to hear the application.

For the reasons set out heretofore, I regrettably was unable to agree with my brothers in the majority, who ruled that the Supreme Court has exclusive jurisdiction in the circumstances of this case. Accordingly I concluded that the appellant should not be restricted from advancing arguments aimed at establishing that the sentence imposed on him was unconstitutional. Indeed like Rattray P. I note that several cases were dealt with in this Court and in Her Majesty's Privy Council in which Constitutional points were raised on appeal and argued without demure. I refer only to two such cases.

R v Purvis and Hughes (1968) 13 WIR 507, raised the very point argued in this appeal without objection.

Moses Hinds et at vs The DPP[1975] 24 WIR 326 was another which was argued up to the Privy Council in which constitutional issues were advanced in the context of a criminal trial and in which their lordships determined those issues without any challenge to jurisdiction.

I am therefore fortified in my view, that the issue raised in Ground 3 as to whether the sentence of whipping is a breach of Section 17 of the Constitution could have been determined by this Court by way of this appeal. For these reasons I disagreed with the majority.

VALIDITY OF THE SENTENCE OF WHIPPING

The appellant contends that the Act under which he was sentenced to be whipped had long ceased to exist and consequently the sentence of whipping is illegal.

Before the Prevention of Crime (Emergency Provisions) Law 1942 a person convicted for the offence of rape was not liable to be whipped. However, the Act of 1942 provided through Section 3 that such an offence was thereafter so punishable. It did so in the following words:

> "3 -- Notwithstanding anything contained in any Law, any male person who, on or after the date of the coming into operation of this Law, is convicted before any Court of any of the following offences -
>
> (a) an offence under Section 39 (Rape)

> shall, on such conviction, ...be sentenced by the Court to be once privately flogged or to be once privately whipped, and the number of lashes or strokes, as the case may be, which shall be inflicted shall be specified by the Court in the sentence: Provided that no person who is under sixteen years of age on the date of his conviction shall be sentenced to be flogged".

The law was passed for the reason stated in its preamble:

> "A LAW to make Provisions during the present Emergency with respect to Sentences of Corporal Punishment for Certain Crimes of Violence".

Counsel for the Attorney General who was allowed to argue *amicus curiae* and who was supported in his submissions by Mr. Pantry, Q.C. Counsel for the Director of Public Prosecutions contended that the present emergency referred to in the Act, was not the emergency of war, but a local emergency in relation to crimes of violence.

Significantly the words used in the Act were "present emergency" which reflected the very words used in the Emergency Powers Act of 1939 which was extended to Jamaica then a colony of England. The Emergency Powers Act of 1939 begins:

> " An Act to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency and to make further provision for purposes connected with the defence of the realm".

That Act was extended to Jamaica by the Emergency Powers (Colonial Defence) Order in Council 1939 which gave to the Governor the power to make

Defence Regulations- Section 1 (1) of the Emergency Powers(Colonial Defence) Act states:

> "1.-- (1) Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as "Defence Regulations") as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community".

Then subsection (2) speaks to specific purposes for which His Majesty in Council without prejudice to the generality in Section 1 (1) may if he thinks it necessary or expedient provide for in the Regulations. Among these is a provision to make regulations to provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification.

Section 4(1) provided as follows:-

> "4.--His Majesty may by Order in Council direct that the provisions of this Act other than this section shall extend, with such exceptions, adaptations and modifications, if any, as may be specified in the Order--,
>
> (a)...
> (b)...
> (c) to any British protectorate,
> (d)...
> (e)...
>
> and, in particular, but without prejudice to the generality of the preceding provisions of this section, such an Order in Council may direct that any such authority as may be specified in the Order shall be substituted for His Majesty in Council as the authority

> empowered to make Defence Regulations for the country or territory in respect of which the Order is made".

The provisions of the Act were with some exceptions in fact extended to Jamaica by virtue of the Emergency Powers (Colonial Defence) Order in Council 1939 which made the necessary 'adaptation and modifications as were necessary, particularly substituting the Governor for His Majesty in Council, as the authority empowered to make Defence Regulations for the territory [see 1st schedule para. (a)].

In keeping with the Emergency Powers (Colonial Defence) Order in Council, the Emergency (Public Security) Law- Law 33/1939 was passed giving the Governor the power in certain circumstances to declare by Proclamation that a State of War/Emergency exists.

Section 3 (1) reads:

> "3--(1) The Governor in the event of His Majesty being engaged in any war, or whenever at any time it appears to him that a state of war between His Majesty and any Foreign State is imminent, may, in the interest of the public security, by Proclamation declare that a State of War /Emergency exists.

and subsection (2):

> "Every state of emergency so proclaimed shall be deemed to continue until determined by a further Proclamation made by the Governor on that behalf".

Sections 4 - 7 then make similar provisions as some of those in the Emergency Powers (Defence) Act particularly giving the Governor the power to

make War Emergency Regulations (Section 4) and for such regulations inter alia to provide for amending any law, for suspending the operations of any law and for applying any law with or without modification.

The scheme of these Laws and Orders in Council was to give the Governor of Jamaica the power during the state of war, to make Regulations as was necessary for securing the public safety, the defence of Jamaica, the maintenance of public orders and the suppression of mutiny, rebellion, and riot, and for maintaining supplies and services essential to the life of the community.

Though no proclamation, declaring the State of War /Emergency at an end, was produced, counsel, nevertheless referred us to the War Emergency (Revocation) Regulations 1946 which was made under the Public Security (War Emergency) Law - Law 33/39 declaring the War Emergency Regulations 1939 to be 'hereby revoked'. In my view the revocation of this War Emergency Regulations of 1939, in the year 1946 suggest that there was no longer any necessity for such Regulations as the reason for the Regulations i.e. the War had ceased.

The provision of these Acts, clearly demonstrate that the reference made to the 'present emergency' in the Emergency Powers (Defence) Act 1939 was a reference to a state of war that existed at that time. The purpose expressed for the making of Defence Regulations and the additional powers extended to His Majesty and in Jamaica - the Governor, speaks eloquently to the fact that all

these provisions were directed at the defence of the island, the securing of the public safety and the maintenance of public order etc.

It is not debatable that the Crime Prevention (Emergency) Act was passed at a time when Jamaica as a colony was in a state of war, and ruled under the provisions of the Emergency (Public Security) Law which had its genesis in the English Emergency Powers (Defence) Act 1939, which conferred certain powers on His Majesty which were expedient for him to exercise " in the present emergency". Certain of the provisions of that Act by virtue of its Section 4 were extended to Jamaica resulting in our legislation giving the Governor similar powers.

It is on the background of all the above that the Prevention of Crime (Emergency Provisions) Law 1942 was introduced.

It provided through its Section 7, the following:-

> "7-- This law shall continue in force until the expiration of a period of six months after such date as His Majesty may by Order in Council declare to be the ciote on which the present emergency comes to an end and shall then expire, except as respects things previously done or omitted to be done"(emphasis added).

The introduction to the law reads:-

> "A law to make provision during the Present Emergency with respect to Sentences of Corporal Punishment for Certain Crimes of Violence".
> (emphasis added)

Then it states:

> Be it enacted by the Governor and Legislative Council of Jamaica as follows-

> "1 -- This Law may be cited as the Prevention of Crime (Emergency Provisions) Law, 1942."

To my mind just on an examination of the legislation per se, it becomes obvious that the reference to the present emergency in the Prevention of Crime (Emergency Provisions) Act must be a reference to the state of war. Nevertheless, the Hansard Report on the proceedings of the Legislative Council, are revealing and relevant to the cause for which the Law was introduced. Some extracts from the speech of the Attorney General when presenting the Bill in the Council may be helpful.

> "1. I do not think it should be necessary for me to tell Honourable members about the state of affairs which has caused this measure to be brought forward in this House. Times of war in all countries, are times of trouble and disturbance. Jamaica is no exception to this rule. From information which for some time past, has been at the disposal of Government, it has been obvious that there has been among a certain class of the community an increasing tendency towards violence and lawlessness and what I may perhaps describe as ruffianism. Unhappily recent circumstances have undoubtedly contributed to exaggerate that tendency and to give opportunities for violence and crime which hither to have been lacking (emphasis added); and
>
> 2. Now in admittedly the bill gives drastic powers. It would be of no use if it did not. But may I point out that those powers are "discretionary" powers and furthermore that they are temporary powers. This is an emergency bill designed for a time of emergency".

Here are some words from a member: - Mr. Judah:-

> "Now Sir, my investigations show and I believe the House will get proof of that later on, that crimes

and violence are on the increase. The reason for this increase has been attributed to mass hysteria resulting from war-time stringencies and economic distress".

Speaking for myself , I believe that the wave of violence is due to nothing more than what I shall call criminal opportunism, and by that I mean a very simple thing. In every country in the world, as the Hon. Attorney General in fact pointed out, times of stress are taken advantage of by certain classes in the community, the criminal classes. We all know that in any country where there has been sudden devastation, as for example an earth- quake, the authorities are usually and invariably compelled to call upon military patrol to prevent looting and what not. Are these things attributable to widespread economic distress? Certainly, not . It is merely that the criminal with whom every country has to deal, takes advantage of the opportunity which is afforded to him to do wrong. What is the opportunity which has been offered in this case? The opportunity that as result of considerable distortion of transport large numbers of women and children are found on the highways unprotected, and it is nothing more than this: that the criminal classes have taken the opportunity to attack them."

Then another member, Mr. Campbell:

" And now, sir, as to the cause of this apparent wave of lawlessness which even my Hon. friend on my right states that it has been existing. In my mind there are two causes. The Hon. Nominated Member, Mr. Judah, has mentioned what is true that at all times in the world's history whenever any sudden upheaval occurs there is a tendency on the part of certain persons to take advantage of it and to commit offences which they would not commit in normal times. In other words, the cause is purely due to the war and its effects on the entire world".

Mr. Kirkwood thought that profiteering during war time should also meet the punishment of flogging. Here is a part of his contribution:

> "War profiteering for example. I think there are many of us who feel that the man who makes a large profit out of this war, who hoards foodstuffs and stores petrol or who saves up stores of produce and clothing in order to sell them to the people at an extortionate price that is the type of person who ought to be flogged".

Then he states:

> "I think that one of the greatest causes of discontent and real want is the poor distribution of available supplies between the rich and poor in town and country and between this section of the community and the other. I have heard with great respect Government's opinion that it is not possible to introduce a form of rationing".

This latter passage was ruled irrelevant to the debate but does demonstrate in my mind, the view of the Honourable Member that it was the hard times caused by the war which contributed to the crime rate.

I have cited these passages from the debate on the Bill to illustrate that in the minds of the speakers, it was the conditions that existed at the time as a result of the war, that caused the increase of violent crime which it was said necessitated the harsh measures contemplated by the proposed legislation. However, it is the debate on Clause 7 of the Bill (eventually passed as Section 7 of the Act) which in my view confirms that the emergency contemplated was the war emergency. I set out hereunder in full the text of the report of Hansard.

> "The Chairman: Clause 7
>
> Mr. Campbell: With regard to the duration it is true it is said that this Law will continue for six months

> after the date of the Order in Council declaring the present emergency at an end, but I suggest that we adopt the same policy as with Package Tax and have this Law reviewed from year to year. So that if we see that the effect of the Law is such as to make it unnecessary it could be done away with at the earliest possible moment.
>
> The Chairman: Then it dies of inanition.
>
> Mr. Lindo: I will move an amendment to clause 7: that this law shall be reviewed after six months and every twelve months thereafter.
>
> The Attorney General: That would not be possible. I would suggest that the only amendment that would be of any use would be to say that the law shall expire on a certain date.

These passages reveal an attempt by Messrs. Campbell and Lindo, to return the legislation to the House periodically, for a determination as to its continued necessity, but it was nevertheless decided to leave its expiration dependent on " His Majesty by Order in Council declaring the 'present emergency' at an end". It is noteworthy that the chairman voiced the opinion that the law would die of inanition which I interpret to mean that it would become void.

In my view, on the background of the above, there can be no doubt that the "present emergency" to which Section 7 of the Act refers, was the emergency that existed as a result of the war. Indicative of that, must also be the dependence of its expiration on an Order in Council by His Majesty declaring the emergency at an end. Jamaica was then a colony and subject to the rule of England. This country could not at that time declare (by itself)

war against a foreign state. Any war declared by England, involved putting the colonies also in a state of war. In the same vein if Jamaica could not declare war, then it could certainly not have declared a war involving its colonial power, at an end. On the other side of the coin, a law passed by the Jamaican Parliament as a result of what I will call a domestic emergency continued within the island, would hardly provide for its termination by an Order in Council by His Majesty declaring the domestic emergency at an end . Such circumstances, in my view would have been dealt with in the manner suggested by Messrs. Campbell and Judah (supra) but Parliament as Hansard shows tied it to the end of the war. For the above reasons, I would give to Section 7 of the Act, the plain meaning of the words therein, that is to say, the Act would have expired six months after the date on which His Majesty by Order in Council declared to be the date on which the present emergency (World War II) came to an end.

The question that follows, is whether, such declaration by Order in Council has been made the answer to which is provided by the Supplement to the London Gazette on Friday 6th July, 1951 which is hereunder set out.

" Monday 9 July, 1951

Privy Council Office, 9th July, 1951

is notified that the formal state of War with Germany is terminated as from four o'clock p.m. day, the 9th July 1951

> On the instructions of His Majesty's Principal Secretary of State for Foreign Affairs the United Kingdom High Commissioner in Germany addressed 9th July, 1951, a communication to the Federal Government of Germany in the following terms:

> His Majesty's Government in the United Kingdom, bearing in mind that on 3rd September, 1939, a state of war was notified with the German Reich.
>
> That active hostilities were ended by the declaration regarding the Surrender of the German Reich issued on the 5th June, 1945, but nevertheless the formal state of war with Germany has continued to subsist so far as the municipal law of the United Kingdom is concerned and will so continue until the appropriate action is taken by His Majesty's Government to terminate it.
>
> That through circumstances beyond German control it has as yet proved possible to conclude a treaty which would dispose of questions arising out of the state of war with the German Reich.
>
> I have determined that without prejudice to the Occupation Statute or to the decision of questions the settlement of which must await the conclusion of a treaty, the formal state of war between the United Kingdom and Germany shall be immediately terminated.
>
> A notification is therefore, being published that the formal state of war with Germany has terminated as from four o'clock p.m. on the 9th July, 1951."

No Order in Council by His Majesty has been produced in the appeal, but it is obvious that the intention of the Legislature in respect to Section 7, was to set the demise of the Act, to coincide with a date six months after the date notified upon which the war was formally ended. In my view the notice contained in the London Gazette (supra) while recognizing the difficulties in bringing the state of war to an end nevertheless indicated that the state of war with Germany was at an end. It is to be noted that the Gazette notice contains communication from the United Kingdom High Commissioner in Germany, on

the instructions of "His Majesty's Principal Secretary of State for Foreign Affairs" to the Federal Government of Germany. In my view, this is sufficient evidence upon which to draw the conclusion that the war was in fact finally terminated on July, 1951 and recognized to be so by His Majesty.

It follows then that the war having been declared terminated on the 9th July, 1951, that by virtue of its Section 7 , the Act expired six months after that date. It equally follows that at that date, flogging and/or whipping was no longer a punishment for the offence of rape.

In order to determine the issue raised in this ground, it is necessary to look at the legislative history concerning the imposition of whipping for the offence of Rape.

Prior to the Prevention of Crime (Emergency Provisions) Law 1942, no such punishment existed for the offence of rape. However, Section 3 (a) of the Act of 1942, (supra) enacted that any male person convicted for an offence under Section 39 of The Offences against the Person Law (Rape) shall be liable, in addition to or in lieu of any other punishment provided by Law to be sentenced by the Court to be once privately flogged or to be once privately whipped and that the number of lashes and strokes, as the case may be, which shall be inflicted shall be specified by the Court in the sentence.

By the Prevention of Crime (Special Provisions) Act of 1963 the Legislature then purported to amend the Prevention of Crime (Emergency Provisions) Law of 1942, inspite of the fact that the Law by virtue of the provisions in its Section 7 had long before expired. In so doing, it amended that Act by legislating for the

deletion of the said Section 7 which had provided for its demise. More will be said of this later. The amendment deleted the reference to section 39 of the Offences against the Person Law (i.e Rape) from Section 3 (a) of the Act, thereby withdrawing from its provisions the sentence of corporal punishment for the offence of Rape. it, however inserted into Section 3 (c) of the Act, the offence of attempt to commit rape, thereby making it discretionary for that offence to be punished by flogging or whipping if no dangerous or offensive weapon was used.

At the same time the amending Act, amended inter alia Section 39 of the Offences against the Person Act (Rape) making the sentence of flogging mandatory for that offence, as also for an attempt if an offensive or dangerous weapon was used.

In 1972, by the Law Reform (Mandatory Sentences) Act there were again amendments to the Offences against the Person Act and to the Prevention of Crime (Emergency Provisions) Law which in effect abolished the provisions of mandatory sentences of flogging for the offence of rape by deleting those provisions from the Offences against the Person Act , and returning to the Prevention of Crime (Emergency Provisions) Law, the discretionary power to inflict punishment of flogging or whipping for the offence of rape.

At the time, therefore that the appellant, in the instant case was sentenced to be whipped, he was so sentenced by virtue of Section 3 of the Prevention of Crime (Emergency Provisions) Act. The question that arises

therefore is whether a statute which has expired can be revived by an amendment repealing the section which provides for the expiration of the Act.

The answer in my view is to be found in the provisions of Section 26 of the Interpretation Act which states as follows:

> "26 -- Where by virtue of any enactment the whole or a part of an Act has expired or lapsed or otherwise ceased to have effect that Act shall be deemed to have been repealed to the extent to which it has so expired, lapsed or otherwise ceased to have effect".

By Section 7 of the Prevention of Crime (Emergency Provisions) Law, the Law had expired at a date six months after the 9th July, 1951. When the Legislature purported to amend it in 1963 by deleting the provisions of Section 7, the Law had expired a long time before.

In this regard, Section 23 of the Interpretation Act is of significance. It states:

> "23. Where an Act, whether before or after the 1st April, 1968 repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment."

The following words of Parker B in *Steavenson v Oliver* (1841) 8M & W 234,240,241, and taken from Craies on Statute Law - Seventh Edition at pg. 409 are helpful:

> "There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) became as if they have never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions are matters of construction".

In the instant case, once it has been established that the event which signifies that the expiration of the Act has occurred, and that six months have elapsed since that occurrence then the whole Act expired, including Section 7, the very provision which provided for its demise.

In my view it would not be possible to revive such an Act by amendment and a re-enactment of its provisions would be necessary to bring them back into existence. I have great difficulty in accepting the view, that where the event which brings a temporary Act, to its end has occurred, signifying the demise of the Act, that a deletion of the section providing for that demise can revive the Act after the section has already taken effect. In those circumstances, I would hold that the purported amendment of the Prevention of Crime (Emergency Provisions) Act of 1943 was of no effect, the Act, having long before expired. It would follow that the sentence of whipping passed by the learned trial judge in the instant appeal is not grounded on any legal basis and therefore null and void.

IS THERE A BREACH OF THE SEPARATION OF POWERS?

I turn now to the first ground of appeal which reads as follows:

> "The sentence of twelve strokes with the tamarind switch imposed on the appellant vests in the Executive, the power discretion and/or facility to determine, the control, to regulate and/or vary its harshness or severity and therefore contravenes the principle of the separation of judicial power which is inherent in the Constitution".

This argument was mounted on the basis that in the case of corporal punishment as legislated for by the Crime Prevention (Emergency Provision)

Law 1942 and the Flogging Regulation Law, the Executive is entrusted with the discretion to decide on critical matters which determined the severity of such punishment, thereby usurping a function which constitutionally rests with the judiciary and consequently infringes the "entrenched rule of law" developed since the Constitution of 1962, which mandates for the separation of powers.

The argument continues that it is the Executive who determines the nature of the instrument, its imposition, the parts of the person's body to receive the blows, the time of imposition, the interval between the blows, and suspension of the infliction of the punishment. *In* addition, the appellant contends, the Executive also has a wide discretion and the power to alter these factors from time to time.

Before commenting on the validity of these submissions a look at the provision of the relevant legislation is necessary.

We have already seen that the Prevention of Crime (Emergency Provisions) Law 1942, if still in existence, provides for the punishment of either flogging - with the cat-o-nine tails or whipping with the tamarind switch for the offence of rape.

The provisions of Section 4, bring into focus the substance of the appellant's contention.

It states:

> "4. --(1) The instruments to be used for flogging and whipping respectively under this law, namely, the cat-o-nine -tails and the tamarind switch, shall be of a pattern from time to time approved by the Governor.

> (2) Flogging and whipping shall be inflicted on such part of the person as the Governor may from time to time generally direct".

Subsection (3) then provides that the provisions of the Flogging Regulation Act shall apply to every flogging and whipping carried out under this Act except that where the Flogging Regulation Act conflicts with the Act, the Act shall prevail.

The Flogging Regulation Act however, makes provisions in respect of flogging, a punishment which relates to the infliction of strokes with cat-o-nine tails and consequently it appears that by virtue of (Section 4 (3) of the Prevention of Crime (Emergency Provisions) Act (supra) the same provisions which apply by virtue of the Flogging Regulation Act to flogging, also apply to whipping with the tamarind switch.

Of importance also is the Ministerial Order made under the Prevention of Crime (Emergency Provisions) Law i.e Patterns of instruments and Parts of Persons which provides for the pattern of the instrument, and the parts of persons to receive the punishment. In this Order the Minister approved the pattern of the tamarind switch, and directed that whipping shall be inflicted on the prisoner's buttocks (see para (b) and (c) (ii) of the Order).

Other provisions of Flogging Regulation Act which may be of relevance are:

> 1. That the punishment shall be inflicted in the presence of a surgeon of the prison in which the prisoner confined or another medical practitioner, either of whom has the power to interpose after partial execution of the sentence , and postpone the

> remainder until the prisoner may be able to undergo the same. (Section 6 (1).
>
> 2. That the surgeon or medical practitioner shall, within seven days after the infliction, of the punishment or part thereof, furnish a report to the Governor - General, of the state and condition of the prisoner.
>
> 3. If the punishment has been partially inflicted the Governor General has the power to direct a further postponement or to remit the remainder of the punishment.

The arguments advanced in this ground rely on the provisions of the varying legislative enactments (supra), which allow the Executive to determine the pattern of the instruments etc. Dr. Barnett in order to strengthen his contention referred us to cases, both of this Court and of the Irish Court, dealing with similar provisions in the respective Customs Legislation which provided for the election of the Revenue Commissioner as to whether in respect to certain offences under the Customs Law, the punishment should be three times the value of the unaccustomed goods or not. He relied mainly on dicta in the Irish case of *Reginald Denton v The Attorney General and the Revenue Commissioners* [1963] the Irish Reports 170. The words of Dalaigh C.J. in delivering the judgment of the Court at pg. 182 were emphasized in his argument:-

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. It is here that the logic of the respondents' argument breaks dawn. The

> Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain. Traditionally, as .I have said, this choice has lain with the Courts. Where the Legislature has prescribed a range of penalties the individual citizen who has committed an offence is safe- guarded from the Executive's displeasure by the choice of penalty being in the determination of an independent judge. The individual citizen needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty; and it is inconceivable to my mind that a Constitution which is broadly based on the doctrine of the separation of powers - and in this the Constitution of Saorstat Eireann and the Constitution of Ireland are at one- could have intended to place in the hands of the Executive the power to select the punishment to be undergone by citizens.
>
> ---
>
> In my opinion the selection of punishment is an integral part of the administration of justice, and, as such, cannot be committed to the hands of the Executive as Parliament purported to do in s.186 of the Customs Consolidation Act 1876".

The relevant part of Section 186 of the Customs Consolidation Act 1876, that was challenged as infringing the constitutional doctrine of the separation of powers reads as follows:

> "... shall for each offence forfeit either the treble value of the goods including the duty payable

> thereon or one hundred pounds, at the election of the Commissioner of Customs".

I have stated the section to show that in the case cited, the learned Chief Justice was directing his words to circumstances where the punishment for the offence was taken out of the hands of the Courts, and placed at the discretion of the Executive. In other words having convicted the citizen, the Court was required to await the decision of the Executive as to what the sentence should be, and thereafter, as Wright J.A said in *R v Roy George Wilson* SCCA 32/94 delivered 23rd November, 1994 (a case of similar circumstances where the Commissioner of Customs was given the power to elect what the sentence should be) act as " a mere agent" of the Commissioner.

In the *Deaton* case (supra) the rationale of the judgment of the learned Chief Justice has for its basis the fact that the particular legislation gave the power of sentence to the Executive and in so far as that interpretation goes I would have no difficulty with the reasoning contained in the cited passage.

In the instant case there is no such circumstance. The relevant enactments make it quite clear that the power to inflict corporal punishment on a convicted person lies in the discretion of the trial judge, who also determine the number of strokes or lashes as the case might be. Dr. Barnett seeks however, to equate the determination of the pattern of the instrument, and the parts of the body upon which the corporal punishment should be inflicted, with a decision as to the degree of severity of the punishment. He builds on this argument by reference to the size, weight and strength of the person who is

called upon to inflict the punishment. In my view, this is an untenable argument.

From time immemorial, the Courts have passed sentence, and thereafter it is the Executive who administers the execution of that sentence. Once the Courts have passed sentence, it is the executive whose function it is to determine e.g. in the case of imprisonment - where and under what conditions that sentence is to be served. It is of course arguable that if e.g. in the process of executing that sentence, the executive subjects the prisoner to inhumane and degrading punishment, then he would have an action against the state.

In *Hinds and Others v R* [1975] 24 W.I.R 326, Lord Diplock had this to say (at pg. 341):

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

If therefore it is the Executive who has the function of carrying out the punishment, then no infringement on the separation of powers can be said to exist in this case, as that is all that the legislation requires of the Executive when it provides for the pattern of the instrument and the part of the body upon which

it is to be inflicted. This is no different from the Executive deciding whether a prisoner should be kept in a high security prison or whether he should remain locked in his cell for particular hours each day or indeed whether he should be kept in solitary confinement for a particular period. The *Hinds* case (supra) upon which the appellant also relies, dealt with a case in which the Legislature prescribed a mandatory punishment by the Court of "indefinite detention" with a Review Board set up to determine when the prisoner should be released. This took from the Court the power to determine the length of sentence that the prisoner should serve, and gave that power to the Review Board -a non-judicial authority.

This led Lord Diplock to state (at pg. 341):

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

In my view, the legislative enactments which prescribe corporal punishment, do not deprive the judge of the power to determine, firstly whether it should be imposed in the particular circumstance of the case before him, and secondly the power to determine the severity of that punishment in that the

judge maintains the discretion to determine the number of strokes according to his assessment of the particular circumstances of the case. This is unlike the cases of *Hinds* (supra) and *Deaton* (supra) both of which dealt with legislation which gave to the Executive the power to determine the sentence or as in *Hinds* , the length of the sentence.

I would conclude that the legislative enactments which are challenged, do not infringe upon the separation of powers, but merely reflect the function of the Executive in carrying out the punishment imposed by the Courts. Having arrived at that conclusion it is not necessary to examine the effect of Section 4(1) of the Jamaica Constitution Order in Council 1962 to determine whether amendments might have been made except to say having regard to my conclusions no such amendments are necessary.

DENIAL OF FAIR HEARING

The other ground of appeal argued reads as follows:

> "Having regard to the nature of the punishment of flogging and the fact that its imposition is infrequent and unusual, the learned trial judge acted unfairly and in breach of the principles of natural justice and the applicant's constitutional right to a fair trial in failing to give any notice to the applicant or his counsel that he was considering the imposition of such a sentence".

For this complaint the appellant relies on the provisions of Section 20 (1) of the Constitution, which as Dr. Barnett advanced, expresses the fundamental principle of natural justice as it relates to criminal trials. Section 20 (1) states:

> "20 --(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a

> reasonable time by an independent and impartial court established by law".

There was no complaint that after the verdict of guilty was returned by the jury, and before the learned trial judge imposed the sentence, the appellant was given an opportunity to move the Court in mitigation of sentence. What Dr. Barnett submitted, was that in circumstances, where the sentence of whipping had long been in disuse, the learned trial judge had an obligation to inform the appellant that he was considering such a sentence, and to allow counsel to address him particularly as to whether such a sentence was appropriate in the circumstances of the case.

It has been conceded on both sides that the learned trial judge gave no indication that he was considering a sentence of whipping before imposing same.

In *Reg v Home Secretary Ex p Doody* [1993] 3 WLR 154 Lord Muskill spoke (at pg. 168) of one of the criteria of fairness as being that "a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification or both". This Court in *Reg v Earl Simpson* SCCA 54/93 delivered on 29th July, 1994, (unreported) in dealing with a sentence of life imprisonment for the offence of causing bodily harm with intent, per Downer JA. approved the practice in England in cases of discretionary sentence as follows:

> "Where a judge is contemplating the imposition of a sentence of life imprisonment, he should inform counsel and allow him to deal with the matter

> specifically (see *MacDougall* [1983] 5 Cr. App. R. (S) 78. CSP F 3. 2 (j); *Morgan* [1987] 9 Cr. App.R. (S.) 201, CSP F3. 2 (j); *Birch* [1987] 9 Cr. App. R. (S.) CSP F3 2 (j)

Mr. Pantry for the Crown, contended that contrary to Dr. Barnett's submission, the sentence of whipping had in recent times been imposed and consequently counsel who is presumed to know the sentences for which the appellant would have become liable on conviction, ought to have exercised his option of addressing the learned trial judge on that issue.

In my view, when sentences of this nature, have been imposed so infrequently that they have become the exception rather than the norm, fairness demands that the tribunal indicate to counsel that it is necessary to address the Court on that issue. But that being so, can the sentence be nullified for that reason?

Dr. Barnett's submission that that would be the effect is in my opinion untenable. In such a situation the recourse can be to the Court of Appeal, that Court having the power to review that aspect of the sentence having heard arguments in that regard. Indeed we have listened to such arguments and it is open to this Court having heard those arguments to determine whether a sentence of whipping is appropriate in the circumstances of the case. That being so, I need only state, that having regard to my conclusions as to the legislative validity of the Act under which the appellant was sentenced, I would hold that the sentence of whipping cannot stand.

I would allow the appeal against sentence but affirm the sentence of imprisonment and remove that part of the sentence which mandates the whipping of the appellant.

GORDON. J.A.

The Court of Appeal is a creature of statute and derives its powers from Statutory enactments. That this is irrefutably so is made clear in Section 103 of the Jamaica (Constitution) Order in Council 1962. This Section declares:

> **"103.--** (I) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as, may be conferred upon it by this Constitution or any other Law".

Section 97 (1) of the said, Constitution provides for the Supreme Court and its jurisdiction and powers in similar terms.

For the purpose of the discussion which hereafter shall ensue and as an easy point of reference, I give the provisions of Section 25 of the Constitution:

> **"25 --** (1) Subject to the provisions of sub-section (4) of this Section, if any person alleges that any of the provisions of Section 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without 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)The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-section (1) of this Section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said Sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this sub- section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

> (3) Any person aggrieved by any determination of the Supreme Court under this Section may appeal therefrom to the Court of Appeal.
>
> (4) Parliament may make provision, or may authorise the making of provisions, with respect to the practice and procedure of any court for the purposes of this Section and may confer upon that court such powers, or may authorise the conferment thereon of such powers, in addition to those conferred by this Section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this Section".

In this appeal the appellant gave notice of his intention to seek leave to argue the following ground as ground 3.

> "The sentence which includes twelve (12) strokes with the tamarind switch imposed on the appellant constitutes inhuman and/or degrading punishment or treatment in contravention of sub-section 1 of Section 17 of the Constitution".

The fundamental rights and freedoms of every individual in Jamaica are detailed in Sections 13 to 24 captioned Chapter III. Section 17 provides:

> "17.-- (1) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day".

Mr. Pantry Q.C. supported by Mr. Leys on behalf of the Director of Public Prosecutions and the Attorney General respectively, opposed the grant of leave to

argue this ground. They argued that in as much as the ground challenged that the sentence infringed the right of the appellant guaranteed under Section 17 of the Constitution, the issue fell to be determined in accordance with Section 25 which vests in the Supreme Court jurisdiction to hear and determine any application for redress under Section 17. The ground of appeal claimed redress and the Court of Appeal had no, and could not exercise, original jurisdiction.

The right under Section 17 had not hitherto been protected by statute and in formalising this right the Constitution also provided for its protection.

Dr. Barnett submitted that the Court of Appeal by virtue of Section 103 of the Constitution and Section 13 (1)c of the Judicature (Appellate Jurisdiction) Act was enabled to decide on the legality of any sentence in respect of which there is a pending appeal.

A person convicted on indictment in the Supreme Court may appeal with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by Law - Section 13 (1) (c) Judicature (Appellate Jurisdiction) Act.

Section 14 (3) of the said Act provides:

> "(3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal".

The powers of the Court of Appeal are thus limited to quashing the sentence passed and substituting another sentence or dismissing the appeal leaving the sentence passed, untouched.

Ground 3 as proposed challenges the propriety of the sentence passed on the appellant asserting that its imposition is in contravention of the appellant's rights under Section 17 (1) of the Constitution. This challenge to the constitutionality of the sentence is entertained by the provisions of Section 25 which give the appellant the forum in which the challenge should be launched.

Having given due consideration to the arguments raised and the provisions of the Constitution, I am satisfied that this Court does not have the power, to entertain the challenge posed in the proposed ground. Original jurisdiction to hear the issue raised in ground 3 is given to the Supreme Court. This Court is limited to exercise an appellate jurisdiction from a decision on issues determined under Section 25 in its original jurisdiction.

I am fortified in this view by the decision of the Privy Council in ***Walker, (Trevor) and Richards (Lawson) vs R etal*** 1993 43 WIR 363, This is an appeal from this Court which went to the Privy Council by special leave. The headnote reads:

> "The appellants who had each been convicted of murder and sentenced to death, had appealed unsuccessfully to the Court of Appeal against conviction (or been refused leave to appeal) some years previously (but not against sentence, which was mandatory). Exceptionally, they were given special leave to appeal to the Privy Council against sentence. On their appeals, they adopted the arguments of the appellants in ***Pratt v Attorney General*** (1993) page 340, ante, and sought to have their sentences set aside on constitutional grounds; it was not suggested that the decisions of the Court of Appeal were wrong at the time when they were delivered. (emphasis mine).

> **Held,** dismissing the appeal, that the Board was invited to decide the constitutional question as a court of first instance, but it lacked jurisdiction so to do."

The advice of the board, delivered *by* Lord Griffiths, in part runs thus:

> " These proceedings are not in truth appeals against the judgments delivered by the Court of Appeal. There was no appeal against the sentence of death passed by the Judges, and, if there had been, the Court of Appeal would have had no jurisdiction to alter the mandatory death sentence: see Section 13(1) (c) of the Jamaica Judicature (Appellate Jurisdiction) Act.
>
> These appellants have adopted the arguments for the appellants in ***Pratt v Attorney General*** and seek to have their sentences set aside on constitutional grounds based upon the delay that has occurred in the years following the 'decisions of the Court of Appeal. Their lordships are being invited to decide this question not as a matter of appeal but as a court of first instance: and this they have no jurisdiction to do. The question of whether or not execution would now infringe the constitutional rights of the - appellant has not yet been considered by the Jamaican Court. The jurisdiction of the Privy Council to enter upon this question will only arise after it has been considered and adjudicated upon by the Jamaican Courts".(ernphasis supplied).

I concur with my 'brothers Bingham and Harrison that ground three (3) cannot be entertained.

The appellant in his fourth supplemental ground of appeal argued:

> "That part of the sentence of Count 3, namely 'you are to receive twelve strokes of the tamarind switch' is unlawful and/or unconstitutional in that there was no valid law authorising the infliction of such a punishment at the time of its imposition and /or such a punishment is severer in degree than the punishment authorised by law at the time for the commission of the offence".

On Count 3 the appellant was charged with rape. The appellant traced the legislative history of corporal punishment in order to show that the imposition of a

sentence of whipping, in respect of the offence of rape, was not authorised by any law.

A chronology of the relevant legislation in respect of the offence of rape can be stated thus:

1. The Offences against the Person Act, 1864 s 52:

Under this provision rape was punishable by imprisonment but not by corporal punishment.

2. The Prevention of Crime (Emergency Provisions) Laws, 1942 Number 53 of 1942:

This Act made a legal distinction between flogging and whipping. The former was defined as corporal punishment administered with the cat-o-nine tails, the latter as corporal punishment administered with a tamarind switch. The Act extended corporal punishment to various offences under the Offences against the Person Act, including rape. It provided that a sentence of flogging or whipping may be imposed by the court for the offence of rape. Section **7** of the Act provides that the Act "shall continue in force until the expiration of a period of six months after such date as His Majesty may by Order in Council declare to be the date on which the present emergency comes to an end and shall then expire, except as respects things previously done or omitted to be done".

3. The Prevention of Crime (Special Provisions) Act No. 42 - 1963:

This Act purported to repeal Section 7 of the Prevention of Crime (Emergency Provisions) Law, and so to remove the temporary duration of that law, It also imposed a mandatory sentence of imprisonment and flogging for rape,

4. The Law Reform (Mandatory Sentences) Act, 1972

This Act removed the mandatory sentence of flogging for rape under the Offences against the Person Act.

The power to order a sentence of whipping for the offence of rape was first authorised under the provisions of the. Prevention of Crime (Emergency Provisions) Act, 1042. This Act, the 'appellant contends, is no longer in force having expired under the provisions of Section 7 of the Act itself.

Whether there was Zany Order in Council to that effect depends largely upon what is the "present emergency" referred to in the Section. The appellant submitted that the "present emergency" refers to World War II. At the time the Act was passed Great Britain was at war and therefore Jamaica, as a colony, was also at war by virtue of the doctrine of common belligerency.

There are two wartime emergency statues dealing with how a period of public emergency may arise. The Emergency Powers Act, 1938, defines "period of public emergency" as any period during which there is in force .a Proclamation by the Governor General declaring that a state of public emergency exists.

The Emergency (Public Security) Act, 1939, defines "period of public emergency" as any period in which:-

a) Jamaica is engaged in war ; or

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 majority of all the members of that House declaring that democratic institutions in Jamaica are threatened by subversion.

The later Act therefore enlarges upon the means by which a period of public emergency may arise. There is no evidence of any proclamation by the Governor General or resolution by Parliament precipitating the "present emergency" referred to in Section 7 of the Prevention of Crime (Emergency Provisions) Act. Therefore the inference (in keeping with the presumption of validity of laws) is that the emergency was brought about by the fact of the war. It appears that in the instance of a war a state of emergency would automatically arise under the Emergency (Public Security) Act without the need for any proclamation or resolution to that effect.

Counsel for the Crown argued that the "present emergency" referred to in Section 7 was not the war, but rather a state of crime prevalent in the island. However, to bring about a period of emergency from that cause there would need to be some proclamation by the Governor General. Further, counsel's references to Hansard to ascertain the purpose of the Prevention of Crime (Emergency Provisions) Act revealed that the legislature regarded the state of crime as attributable to the war. It was the

war which created the emergency situation, a feature of which was the upsurge in crime.

The appellant submitted that, under the doctrine of common belligerency, Jamaica ceased to be at war when Great. Britain ceased to be at war, and therefore the Prevention of Crime (Emergency Provisions) Act was no longer in force because it expired as a result of the declaration by His Majesty that the war had ended. There is abundant evidence that .Great Britain had declared the war to be at an end by His Majesty making Orders in Council to give effect to the peace treaties with various foreign territories. But the question is whether the declarations contained in those Orders in Council, which were not specifically applicable to, or extended to Jamaica were sufficient to satisfy the requirements of Section 7 of the Prevention of Crime (Emergency Provisions) Act.

Section 7 requires the use of a particular procedure, six months after which the Act would expire. Such expiry =is equivalent to repeal since Section 26 of the Interpretation Act provides that an Act which has expired is deemed to have been repealed.

A provision can effect a repeal only where contained in an instrument having power to override the Act in question. Under Section 7 of the Prevention of Crime (Emergency Provisions) Act this can be nothing less than an Order in Council. Section 7 requires His Majesty to make an Order in Council declaring "the date on which the present emergency comes to an end". A state of emergency having been brought about in Jamaica by the war, Section 7 requires His Majesty to pass an order in Council declaring a date on which that emergency comes to an end. Though the emergency was brought about automatically by the war, Section 7 requires more than an automatic cessation of the emergency through the cessation of hostilities. **It**

requires that a specific step be taken before the Act can expire. The Orders in Council made in respect of other territories are not sufficient since there was nothing extending their application to Jamaica, or to the particular Section 7. Though Jamaica was at the time a colony of Great Britain, certain procedures still had to be followed in order for His Majesty to legislate for the colony with legal effect.

Further, if any of the Orders in Council made to give effect to the peace treaties could be applicable to Jamaica, then one would have to consider that the Orders in Council were given effect on various dates. Which of these dates would be the relevant date six months from which the Act would expire?

Central to the decision of the Court of Appeal of Jamaica in ***R v Purvis and Hughes*** (1968) 13 W.I.R. 507 is the absence of any such Order in Council extending to Jamaica. In that case it was submitted that the Act had expired because World War II was declared to have ended by the Japanese Treaty of Peace Order 1952, published in the Jamaica Gazette Supplement Proclamations, Rules and Regulations 1954. The decision of the Court of Appeal that the Act was still valid appears to be based on the fact that there was no specific Order in Council made by His Majesty declaring the date on which the emergency came to an end.

I hold the view that Parliament was aware of the existence of the state of emergency occasioned by the war when the Prevention of Crime (Emergency Provisions) Law (53 of 1942) was enacted. Parliament could have, but did not declare a state of Emergency, accepting as it did the control of the Imperial Parliament in the state of war as legislated in Section 7 that the duration of the state of emergency, hence the life of the Act, should be determined by His Majesty. The declaration that the war was ended by the Japanese Treaty of Peace Order of 1952 brought an end,

six months later;to the life of the. Prevention of Crime (Emergency Provisions) Law, 1942. There was certainly no state of war in which Jamaica was engaged between 1953 and 1962. Section 7 had taken effect.

Assuming however, that the Prevention of Crime (Emergency Provisions) Law to have remained in force after the, end of the war, what would be the effect of the later Acts amending the Offences against the Person Act? Although there is a general presumption against implied repeal, it is well established by the case law that a prior statute. is impliedly repealed to the extent that its provisions are incompatible with the subsequent statute; or if the two statutes together would lead to absurd consequences; or the entire subject matter were taken away by the subsequent statute.

This is equally applicable to penalty provisions. In ***R. v. Davis*** [1783] 1 Leach 271, it was held that a statute creating a capital offence was impliedly repealed by a later Act carrying a penalty of only a fine of twenty pounds. In ***Smith v. Benabo*** [1937] K.B. 518 at 525, it was stated that:

> "... it is a well settled rule of construction that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure,_ the earlier_statute is repealed by the - later statute."

In ***Henderson v. Sherborne*** [1837] 2M & W 236 at 239, Lord Abinger stated that:

> "If a crime be created with a given penalty, and be afterwards repeated in another statute with, a lesser penalty attached to it a person ought not be held liable to both. There may, no doubt, be two remedies for the same act, but they must be of a different nature..."
>
> and
>
> "... where the same offence is re-enacted in a subsequent enactment with a different punishment it [the subsequent enactment] repeals the former law".

An amendment is in effect a re-enactment of existing legislation with the modification made by the amendment.

The amending Act no. 42 of 1963 imposed in respect of the offence of rape a mandatory sentence of imprisonment and flogging. This would have the effect of impliedly repealing the provisions of the Prevention of Crime (Emergency Provisions) Act in so far as that Act imposed a sentence of flogging or whipping for the offence of rape. The penalty authorised by the later amending Act is substantially different from that imposed by the Prevention of Crime (Emergency Provisions) Act in two important respects:

1. The omission of the power to impose a sentence of whipping; and
2. The power to impose a sentence of flogging is mandatory rather than directory.

These differences indicate a penalty which is substantially different from that previously authorised by the Prevention of Crime (Emergency Provisions) Act. Therefore the penalty prescribed by the Prevention of Crime (Emergency Provisions) Act in respect of the offence of rape must be considered as impliedly repealed by the amending Act. Both could not exist side by side without anomalous result.

With the repeal of the provision in the Prevention of Crime (Emergency Provisions) Act, the authority to impose a sentence of whipping in respect of the offence of rape is removed. By virtue of The Law Reform (Mandatory Sentences) Act, No. 9 of 1972, the mandatory sentence of flogging for rape imposed by The Prevention of Crime (Special Provisions) Act No. 42 of 1963 was removed, leaving

only the sentence of imprisonment. There is therefore no longer any provision in the Offences against the Person Act authorising whipping or flogging as a sentence for the offence of rape.

BINGHAM, J.A.:

Having read in draft the judgments of Rattray, P., Forte, Gordon and Harrison, JJA, I am in agreement with the views expressed by the majority on ground 4. Because of the division brought about by this appeal, I have considered it necessary to set out my reasons for the conclusion reached on ground 4 but also on ground 3 (the preliminary objection) as well as on the other two grounds. In the light of the conclusion reached on ground 4, grounds 1 and 2 are now only of academic interest.

Ground 3

This ground reads:

> "(3) The sentence which includes twelve strokes with the Tamarind Switch imposed on the appellant constitutes inhuman and/or degrading punishment or treatment in contravention of subsection (1) of section 17 of the Constitution."

By a majority, the court upheld the preliminary objection to this ground being argued as, in our view, this court had no jurisdiction to determine other than as a court of review the constitutionality of the provision in question. After a long period of reflecting on the matter, I still hold fast to this position. My reasons for doing so may be stated as follows: Chapter III of the Constitution, while incorporating rights which had hitherto existed at common law contain several new rights founded to a large extent and modelled upon the universal declaration of human rights which are a part of

the United Nations Charter of Human Rights. It is common ground that this Charter of Rights enshrined in Chapter III of the Jamaica Constitution (sections 14-24) intituled "Fundamental Rights and Freedoms", form a part of similar enactments in the Constitution of most Commonwealth countries which gained their independence following the Second World War.

Section 17, which is now under consideration, is one such provision which forms a part of Chapter III. Enactments which came into operation after 6th August, 1962 (the date of the coming into being of Independent Jamaica), are required to conform with the spirit and intendment of this Charter of New Rights embodied in Chapter III. If enactments offend any of this provisions in that Chapter, they may be struck down as unconstitutional: (Vide The Gun Court Act, 1974, and *Hinds v. The Queen* [1975] 24 W.I.R. 326).

A clear exception, however, is made in respect to laws which remained in force before the coming into being of the Jamaican Constitution. Such laws, unless abrogated or abridged by legislation, continued to have full force and effect. In this regard sections 4(1) of the Jamaica (Constitution) Order in Council, 1962, and sections 17(2) and 26(8) of the Constitution ensure that laws which authorise and regulate whipping are saved by the above-named enactments. For support, resort need only be made to *Nasralla v. D.P.P.* [1967] 2 A.C. 238 at 247 per Lord Devlin and *Riley and others v. The Queen* [1982] 3 W.L.R. 557 at 561 (c-g).

In the light of the above, any further discussion as to the effect of section 17 of the Constitution on that part of the sentence which relates to the question of the lawful nature of the punishment imposed on the appellant, would at this stage of the enquiry be purely academic.

The Court of Appeal which owes its origin to the Constitution, being a creature of statute, it is to the Constitution which creates and directs its operation that one ought to look to determine its role and functions.

Section 103(1) of the Constitution declares that:

> "103.--(1) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law." [Emphasis supplied]

Section 97(1) of the same Constitution provides for a Supreme Court and its jurisdiction and powers in similar terms.

Section 25 of the Constitution reads:

> "25.—(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without 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) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive)

> to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.
>
> (3) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.
>
> (4) Parliament may make provision, or may authorise the making of provision, with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorise the conferment thereon of such powers, in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section."

It is clear from this section that any person seeking judicial redress that any of their fundamental rights and freedoms as declared in Chapter III (sections 14 to 24) have been breached must first have -resort to the Supreme Court for such redress.

Although the Constitutional Redress Rules, in dealing with civil matters, uses the word "Court" in founding jurisdiction, "Court" here has to be interpreted and examined against the background of the very Constitution which gives to these rules its life and force and from which the rules owe their origin. It is the Constitution that has determined in clear and express terms the procedural manner in which a person seeking redress ought to

proceed. Section 25, in dear and express terms has, mandated that function to the Supreme Court. "Court", in my view, therefore, has to be interpreted in a restricted sense and to be given a limited meaning to refer to the court which section 25(1) has vested with original jurisdiction to determine such matters.

For support one need only to refer to the decision of Her Majesty's Board of the Privy Council in *Trevor Walker and Lawson Richards v. The Queen* [1993] 43 W.I.R. 363. The headnote reads:

> "The appellants, who had each been convicted of murder and sentenced to death, had appealed unsuccessfully to the Court of Appeal against conviction (or been refused leave to appeal) some years previously (but not against sentence, which was mandatory). Exceptionally, they were given special leave to appeal to the Privy Council against sentence. On their appeals, they adopted the arguments of the appellants in *Pratt v Attorney-General* (1993) page 340, *ante,* and sought to have their sentences set aside on constitutional grounds; it was not suggested that the decisions of the Court of Appeal were wrong at the time when they were delivered.
>
> Held, dismissing the appeals, that the Board was invited to decide the constitutional question as a court of first instance, but it lacked jurisdiction so to do; apart from the possibility of a reference under section 4 of the Judicial Committee Act 1843, the jurisdiction of the Board was confined to that of an appellate court in accordance with the 1833 Act and the Judicial Committee Act 1844 (which had entirely superseded any more extensive powers which might have previously existed under the royal prerogative)."

Lord Griffiths, in delivering the advice of the Board, sought to put the question, one similar to that now before this court for our determination, beyond all doubt. He said (page 365 (g-h):

> "These appellants have adopted the arguments for the appellants in *Pratt v Attorney-General* and seek to have their sentences set aside on constitutional grounds based upon the delay that has occurred in the years following the decisions of the Court of Appeal. Their lordships are being invited to decide this question not as a matter of appeal but as a court of first instance; and this they have no jurisdiction to do. The question of whether or not execution would now infringe the constitutional rights of the appellants has not yet been considered by a Jamaican court. The jurisdiction of the Privy Council to enter upon this question will only arise after it has been considered and adjudicated upon by the Jamaican courts." [Emphasis supplied]

The underlined words in the above passage can clearly be seen as a timely reference to the matter of constitutional review and the part the Board plays in the hierarchical nature of the Jamaican courts vested with such authority.

A fortiori the question of whether a sentence which included whipping as part of the punishment imposed by a judge of the Supreme Court is unconstitutional is a matter to be determined, firstly, by the court vested with the original jurisdiction to determine such a matter, viz., the Supreme Court (section 25(1) of the Constitution).

In this regard, I accept the arguments on this ground advanced by the Senior Deputy Director of Public Prosecutions, Mr. Pantry, Q.C., for the Crown and the Senior Assistant Attorney General, Mr. Leys, that this court

ought not to arrogate unto itself a power which under the Constitution it does not have.

It is for these reasons that I came to the view that the objection taken by the respondents in relation to this ground ought to be upheld.

Grounds 1 and 2

These two grounds may be conveniently dealt with together. They read:

> "(1) The sentence of twelve strokes with the Tamarind Switch imposed on the appellant vests in the Executive the power, discretion and/or facility to determine, the control, to regulate and/or to vary its harshness or severity and therefore contravenes the principle of the separation of the judicial power which is inherent in the Constitution.
>
> "(2) Having regard to the nature of the punishment of flogging and the fact that its imposition is infrequent and unusual, the learned trial judge acted unfairly and in breach of the principles of natural justice and the applicant's constitutional right to a fair trial in failing to give any notice to the applicant or his counsel that he was considering the imposition of such a sentence."

Although ground 1 was not seriously advanced by the appellant, some challenge was made to the role played by the Executive in the sentencing process. The appellant has sought to contend that to the extent that the Executive functions in relation to the sentencing process that this amounted to a contravention of the doctrine of the separation of powers. Our attention was drawn to section 210(1) of the Customs Act in relation to

the power to fix the penalty for revenue breaches being entrusted to the Commissioner for Customs. We were also referred to the role played by the executive in administering the manner in which corporal punishment was carried out on a prisoner.

In so far as the appellant has sought to contend that this function of the Executive encroached upon that of the Judiciary this ground is untenable. Although one has to admit that there is room for some improvement to a limited extent, such as that which now exists in relation to section 210(1) of the Customs Act, this has not passed unnoticed and there have been strong judicial comment made in this area. (Vide dictum of Wright, J.A. in *R. v. Wilson* R.M.C.A. No. 32/94 (unreported) delivered 23rd November, 1994). There can be no question that in the determination of trials and the extent of the punishment to be imposed, this function remains a matter as one within the province of "an independent and impartial" court set up by law (section 20(1) of the Constitution).

As to the type of instrument and the supervision of the punishment, the safeguards by the presence of a medical practitioner at the carrying into effect of the sentence of corporal punishment, this could hardly be a ground of complaint. There is the further safeguard where the condition of the prisoner renders the punishment not possible on medical grounds. Here it is the court which will ultimately determine what alternative punishment to inflict on the prisoner in substitution for the original sentence passed.

Ground 2

The appellant sought to rely on section 20(1) of the Constitution and to contend that the sentencing exercise and its determination being an important part of the trial, that even subsequent to the verdict, the determination of questions which affect the severity of the sentence, the entire process is one which demands procedural fairness.

The imposition of the sentence of corporal punishment was infrequently resorted to and has occurred in only a very small percentage of cases over the last decade. The gravity of the sentence is such that it called for a careful examination before its imposition.

The appellant relied for support on several authorities. Among them was that of *R. v. Errol Pryce* S.C.C.A. 88/94 (unreported) delivered 12th December, 1994. In that case learned counsel for the Crown conceded that fairness did require some invitation by a trial judge where such a sentence was being considered.

In *R. v. Errol Pryce* (supra) this court, having examined the dicta in *R. v. Earl Simpson* S.C.C.A. 54/93 (unreported) delivered 29th July, 1994; *R. v. Morgan* [1987] 9 Cr. App. R(s) 201; and *R. v. McDougall* [1983] 5 Cr. App. R(s) 78, expressed the view that (per Carey, J.A.) (page 4):

> "It seems to us therefore that although it would have been desirable for the judge to have invited Counsel that he was minded to invoke the provisions of the Crime (Prevention of) Act. That omission cannot result in that sentence being set aside if the sentence or combination of sentences is not otherwise manifestly excessive."
> [Emphasis supplied]

On the assumption, therefore, that the sentence was lawfully imposed, as it has been infrequently resorted to over time and because of the extreme nature of the punishment effected, fairness which in this sense can be equated with a just sentence required that as the learned trial judge had in his contemplation such a penalty as whipping, he ought to have brought this to the notice of the appellant or his attorney. His failure to do so, coming as it did following the plea in mitigation of sentence, would no doubt have taken defence counsel by surprise.

This, however, would not have necessarily rendered the sentence bad. As a court of review, this court's function would be limited to reviewing the sentence imposed and to determine whether in its opinion, taking all the relevant circumstances into consideration, the sentence passed was manifestly excessive. (Vide *R. v. Pryce and R. v. Simpson* (supra)).

In the light of the ruling in relation to ground 3, the appellant was granted leave to argue the following as ground 4. This ground reads:

> "4. That part of the sentence of Count 3 namely you are to receive twelve strokes of the tamarind switch is unlawful and/or unconstitutional in that there was no valid law authorising the infliction of such a punishment authorised by law at the time of its imposition and for such a punishment is severer in degree than the punishment at the time for the commission of the offence."

Learned counsel for the appellant, Dr, Barnett, In a very thorough analysis of the historical evolution of the laws relating to corporal punishment

in this country, sought to contend that it was the Prevention of Crime (Emergency Provisions) Law, 1942, that for the first time made a legal distinction between "flogging" and "whipping"; flogging being defined as corporal punishment administered with a cat-o-nine tails and the second administered with a tamarind switch. This Law also extended corporal punishment to a number of mainly violent offences under the Larceny Act and the Offences against the Person Act, including the offences of rape for which the appellant was convicted and sentenced on the indictment now under review. The Revised Laws of Jamaica, 1953, Chapter 11105, while retaining all the provisions contained in the 1942 Act, with the coming into being of Independence in August, 1962, the title was changed to that of (Crime (Prevention of) Act and section 7 removed. The importance of these changes will be examined later. Although a wartime measure, being an act which came into operation prior to Independence, the respondents have sought to use this as a basis for contending that the provisions relating to the legality of the sentence of whipping imposed on the appellant was, therefore, preserved by section 26(8) of the Constitution. This section reads:

> "26.--(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

The question which naturally follows, therefore was, as to whether the Crime (Prevention of) Act being a wartime measure enacted to deal with

the state of crime which existed during "the present emergency", which was the war, remained in force for as long as possible so as now to have the effect of allowing for a sentence of corporal punishment to be inflicted on the appellant.

This court in *Regina v. Errol Pryce* S.C.C.A. 86/94 (unreported) delivered on 12th December, 1994, in founding its judgment supporting the legality of the punishment of whipping on section 3(a) of the Crime (Prevention of) Act, did not consider the question of the constitutionality or the legality of the sentence of whipping imposed on the applicant. Although the issue was raised by learned counsel for the applicant, Mr. Daly, Q.C., it was not seriously advanced by him.

Before us Dr. Barnett for the appellant has submitted that whereas the Prevention of Crime (Emergency Provisions) Law, 1942, had prescribed the regime to be adopted, the power to prescribe the instruments had not been done until 1965: (Vide Proclamations Rules and Regulations No. 18 dated 28/1/65). That power which was brought about by the war had long ceased to exist. By the principle of common belligerency, Jamaica being a colony of Great Britain at the time of the Prevention of Crime (Emergency Provisions) Law was at war as long as Great Britain was at war and would have ceased to be at war when Great Britain was no longer at war.

The Second World War came to an end with a series of peace treaties which sought to deal with enemy property. These enactments being, the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary, Finland) Act, 1947, (10

and 11 Geo. 6, c. 23); the Japanese Treaty of Peace, Act 1951 (15 and 16 Geo. 6, 81 Eliz. 2, c. 6) and Austrian State Treaty Act 1955 (4 and 5 Eliz. 2, c. 1) vide Halsbury's Laws of England (3rd Edition) Vol. 39 Pars. 62-3, Halsbury's Statutory Instruments (2nd re-issue) Vol. 5 pages 104-6.

The Prevention of Crime (Emergency Provisions) Law, 1942, section 7 had originally provided that:

> "7. This Law shall continue in force until the expiration of a period of six months after such date as Her Majesty may by Order in Council declare to be the date on which the present emergency comes to an end and shall then expire, except as respect things previously done or omitted to be done." [Emphasis supplied]

The respondents have argued that there was no legislative instrument exhibited to establish that the Governor in Council administering the affairs of the Colony of Jamaica declared the State of Emergency to be at an end. They submitted that the Order in Council by Her Majesty's Parliament in 1955 declaring the war at an end had no application to the then Colony of Jamaica.

Dr. Barnett for the appellant has submitted that it was an Imperial statute, viz., the United Kingdom Emergency Powers (Defence) Act, 1939 (2 and 3 Geo. 6, c. 62) that declared the state of war with Germany and the State of Emergency brought about by that situation. This Act and the Regulations made thereunder were extended to the colonies including Jamaica and its dependencies, the Turks and Caicos Islands and the Cayman Islands. He further submitted that as it required an Imperial statute

to bring that emergency into being, it would also require an Imperial declaration of the Imperial Parliament to bring it to an end. This would be a declaration pursuant to the royal prerogative. Such a notification is by an Order in Council. The Crown was empowered to extend the operation of the Act by Order in Council for yearly periods. The Defence Act was extended by Order in Council to February 24, 1946. It is to the relevant Order in Council, therefore, that one need to look to determine when the state of war was officially recognised by the Imperial Parliament to be at an end.

In my view, the answer to this question lies in an examination of the Emergency (Public Security) Law, 1939, Chapter 112 of the Revised Laws of Jamaica, and the Prevention of Crime (Emergency Provisions) Law, 1942, Chapter 305 of the Revised Laws of Jamaica, 1953.

The former enactment which was brought into operation because of the outbreak of the war and the resultant threat to public security was administered by the Governor for the time being in charge of affairs of Jamaica and its dependencies. Section 8 provided that:

> "8. The provisions of sections 4, 5, 6 and 7 of this Law and of the Regulations made under this Law shall be, and continue to be, of full force and effect throughout the existence of any state of emergency which from time to time may be proclaimed under this Law, but upon the determination of the state of emergency in accordance with the provisions of subsection (2) of section 3 of this Law, they shall cease to have effect except as respect things previously done or omitted to be done."

Section 3 provided that:

> "3.--(1) The Governor in the event of Her Majesty being engaged in any war or whenever at anytime it appears to him that a state of war between Her Majesty and any foreign state is imminent may in the interest of public security by proclamation declare that a state of war emergency exists.
>
> (2) Every state of emergency so proclaimed shall be deemed to continue until determined by a further proclamation made by the Governor in that behalf."

This state of war emergency referred to in sections 3 and 8 of the Act terminated with the end of the war with the eventual surrender of Japan and this fact was declared by a Proclamation signed by the Governor of Jamaica on 15th March, 1946: (Vide Proclamation Rules and Regulations No. 11/46).

The Prevention of Crime (Emergency Provisions) Law, 1942, however, in section 7 provided that:

> "7. This law shall continue in force until the expiration of the period of six months after such date as Her Majesty may by Order in Council declare to be the date on which the present emergency comes to an end and shall expire as respects things done or omitted to be done."
> [Emphasis supplied]

As it is clear that on any reasonable interpretation it was the war that necessitated the coming into being of the emergency and not as the respondents contend the state of crime in Jamaica with the war coming to

an end by the cessation of hostilities one would need to determine when that state of war was to be regarded as formally at an end.

The appellant contends that the provisions relating to corporal punishment ceased to have effect with the coming into being of the Order in Council issued by Her Majesty in 1951. On any interpretation, therefore, that is resorted to, if it required a Proclamation to signify the end of the war in Jamaica, resort may be had to Proclamation Rules and Regulations No. 11/46. If as in section 7 it required an Order in Council by Her Majesty one would resort to the Order in Council issued by Her Majesty from Buckingham Palace in July 1951 declaring the war with Germany as formally at an end.

The appellant contends, therefore, that being wartime legislation both the Emergency (Public Security) Law, 1939 and the Prevention of Crime (Emergency Provisions) Law, 1942, ceased to have effect and expired by latest 1951.

The respondents further contend that "the present emergency" in section 7 of the Prevention of Crime (Emergency Provisions) Law, 1942, was brought about not by the state of the war but by the state of crime in the country. This is not borne out by the debate on the Bill before it was passed into law. This established that it was the state of war that brought about the escalation in crime.

The respondents sought to rely on R. v. *Purvis and Hughes* [1968] 13 W.I.R. 507 to establish that "the present emergency", as referred to in the Act in question, in that case was to be seen as being the state of crime in the

country. This was so as learned defence counsel in that case was unable to find any Order in Council to bring the emergency to an end.

Conclusion

Having considered this question carefully, I am in agreement with the analysis undertaken by Gordon, J.A. as to the effect of the doctrine of implied repeal. In so far as the Prevention of Crime (Special Provisions) Act, 1963, Act 42/63 brought about material changes to the imposition of corporal punishment by:

1. The introducing of flogging for all offences as set out in the Schedule of the Act;

2. The omission of whipping as a method of corporal punishment;

3. The introduction of mandatory sentences including flogging;

4. The offence of rape made punishable by a mandatory sentence of imprisonment and flogging;

this clearly had the effect of repealing the provisions in the Crime (Prevention of) Act, the title of which had replaced the Prevention of Crime (Emergency Provisions) Law.

With the passage of Act 9/72, the Offences against the Person (Amendment) Act, the mandatory sentence of flogging for rape was repealed. This Act also sought to revive the discretionary power of judges to inflict a sentence which included corporal punishment for rape and other kindred offences involving the use of violence.

As the Prevention of Crime (Specie' Provisions) Act, by its provisions could not stand together side by side with the Crime (Prevention of) Act, it effected a repeal of that earlier Act in so far as it was inconsistent with it. The attempt made by the legislature by the Schedule of the Offences against the Person . (Amendment) ..Act, 9/72, to give back to - the judges the diScretiondhipowerto impose-a sentence of corparal punishment in section. 3 of the Crime (Prevention of) Act did not have the effect of reviving a statute which had been repealed. To have that effect would reqUire'a new enactment giving that power.

The result is that the penalty of twelve strokes with the tamarind switch imposed on the appellant was done without lawful authority. I would uphold the submissions of the appellant on this ground and allow the appeal against sentence by removing that part of the sentence as it relates to the imposition of "twelve strokes with the tamarind switch".

HARRISON. J.A. (Dissenting)

This appellant whose application for leave to appeal against conviction was refused, was granted leave to appeal against sentence. He had been convicted in the St. Mary Circuit Court on the 3rd day of July, 1996, of the offences of burglary, larceny and rape and sentenced to ten years, one year and fifteen years imprisonment at hard labour respectively, all to run concurrently. In respect of the charge of rape and the sentence of fifteen years imprisonment, he was to receive, in addition, twelve strokes of the tamarind switch.

The facts are that during the night of the 9th day of August, 1994, at about 2:00 a.m. the appellant broke and entered through the window of the house of the complainant which house she had locked up, and by holding a knife at her throat, took her from her bed out of the house onto the road and into some bushes, and had her undress and lie on the ground. He had sexual intercourse with her without her consent. She reported the incident to the police and pointed out the appellant at an identification parade one month later. The defence was one of alibi.

The grounds of appeal are:

1. Tamarind Switch imposed on the appellant vests in the Executive the power, discretion and/or facility to determine, the control, to regulate and/or to vary its harshness or severity and therefore contravenes the principle of the separation of the judicial power which is inherent in the Constitution.

2. Having regard to the nature of the punishment of flogging and the fact that its imposition is infrequent and unusual, the learned trial judge acted unfairly and in breach of the principles of natural justice and the applicant's constitutional right to a fair trial in failing to give any notice to

the applicant or his counsel that he was considering the imposition of such a sentence.

3. The sentence which includes twelve strokes with the Tamarind Switch imposed on the appellant constitutes inhuman and/or degrading punishment or treatment in contravention of subsection (1) of section 17 of the Constitution.

4. That part of the sentence on Count 3, namely "you are to receive twelve strokes of the tamarind switch" is unlawful and/or unconstitutional in that there was no valid law authorising the infliction of such a punishment at the time of its imposition and/or such a punishment is severer in degree than the punishment authorised by law at the time of the commission of the offence in question."

Both Mr. Pantry and Mr. Leys took a preliminary point that ground 3 could not be argued before this Court.

Mr. Pantry submitted that this court had no jurisdiction to hear the constitutional point, because only the Supreme Court had original jurisdiction to entertain such an application as provided by Section 25 of the Constitution, and furthermore that the case of **Pratt et al vs. Attorney-General** (1993) 43 WIR 340 had decided that no lawful punishment in force before 1962 was inhuman and degrading in contravention of Section 17 and that Section 103 of the Constitution did not give to the Court of Appeal an original jurisdiction. He relied also on **Walker and Richards v R** (1993) 43 WIR 363.

Mr. Leys argued, in agreement with Mr. Pantry, that Section 25 gives original jurisdiction only to the Supreme Court to hear and determine matters which concern the provisions of the Constitution with the exclusionary bar, if other adequate means of redress exist; that the right claimed under Section 17 not to be subjected to "inhuman and degrading punishment" is not a common law right but one existing de facto, a new remedy for which redress is given by Section 25; that the sentence having been lawfully

judicially imposed one may challenge the validity of the statute in the Court of Appeal under the provisions of Section 14 of the Judicature (Appellate Jurisdiction) Act, but a challenge to its inhumaneness and the manner of its execution as inhuman and degrading may only be heard in the Supreme Court in the exercise of its original jurisdiction; and that there was no jurisdiction in this Court to hear and determine an application based on a right claimed under section 17(1). He relied, inter alia on **Director of Public Prosecutions v Nasralla** [1967] 2 A.C. 238; **Oliver vs Buttigieg** [1967] A.C. 115; **Maharaj vs. Attorney-General** [1979] A.C. 385; **Pratt v Director of Public Prosecutions** (1993) 43 WIR 340 and **Riley vs. Attorney-General** [1983] 3 WLR 557.

Dr. Barnett, in reply, stated that the jurisdiction of the Court of Appeal which is provided for by section 103 of the Constitution and the Judicature (Appellate Jurisdiction) Act empowers the said Court to decide on the legality of a sentence in an appeal, if its legality is conferred by statute, by the common law or constitutionally; that the Constitution, containing the law of the land, permits an aggrieved applicant to invoke its provisions in any appropriate situation to set aside or modify a sentence, unless the Constitution itself cuts down that jurisdiction; that the constitutional provisions are flexible, granting original jurisdiction to the Court of Appeal under the provisions of section 25; that neither **Nasralla's** case, nor **Pratt's** case nor **Riley's** case concern the exclusiveness of jurisdiction under section 25 and that in the instant case the appellant is not precluded from arguing his right under section 17.

In the instant case the sentence impugned was imposed under a statute presumed to be valid, namely the Offences against the Person Act. The sentence of whipping is not, by our laws, inhuman and degrading per se, having been saved by section 26(8) and section 17(2) of the Constitution; they read:

> "17.(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day..."

> "26(8)Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

The Board of the Privy Council in **Pratt et al vs Attorney-General** (supra), approving the minority judgment in **Riley vs Attorney-General(supra) held that a** judicial sentence of a description which it was lawful to impose prior to Independence in Jamaica in 1962 cannot be complained of as unconstitutional, in contravention of section 17(1) because such sentence remained valid by the provisions of section 17(2). It was however held that the prolonged delay in the execution of the death sentence was an added feature making the subsequent execution of the sentence of such a nature that it was in fact in breach of section 17(1). The headnote to_the Pratt case reads:

> **"Held,** advising that the appeal be allowed, (1) that section 17(2) authorised the passing of a judicial sentence of a description of punishment which had been lawful in Jamaica before Independence but it was not concerned with the act of the executive in carrying out the punishment; accordingly, section 17(2) did not itself preclude a finding that the circumstances in which the executive intended to carry out a sentence were in breach of section 17(1)."

In delivering the opinion of the Board, Lord Griffiths said, at page 355:

> "The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before Independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus,

> as hanging was the description of punishment for murder provided by Jamaican law immediately before Independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder."

The minority view expressed in **Riley's** case was, at page 565:

> "As we have indicated, it is necessary to identify the act of the state which is challenged. It is not the judicial sentence of death: that was and remains a lawful judicial act. If these proceedings were directed towards establishing the proposition that sentence of death is in itself a contravention of the Constitution as being an inhuman or degrading punishment, subsection (2) would be a complete answer. In Jamaican law a convicted man cannot be heard to say that sentence of death is itself a contravention of the Constitution, since it is authorised by a law which was in force when the Constitution came into effect and still remains in force."

Applying the above dicta and reasoning, it may not therefore now be argued that the imposition of the sentence of whipping is unconstitutional, "in contravention of section 17(1)." Furthermore, the Court of Appeal of Jamaica was established by section 103 of the Constitution. It reads:

> "103.-(1) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law...
>
> (5) The Court of Appeal shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court."

The Judicature (Appellate Jurisdiction) Act describes the powers of the Court and the rights of the individual on an appeal, in section 13:

> "13.-(1) A person convicted on indictment in the Supreme Court may appeal under this Act to the Court -

> (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law."

and in section 14:

> "14- ...
>
> (3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and •in any other case shall dismiss the appeal."

The Constitution and the various statutory provisions circumscribe the jurisdiction and powers of the Court of Appeal. The Court cannot arrogate to itself functions or a jurisdiction not expressly conferred except in the exercise of its inherent power to regulate its own procedure.

Section 17 of the Constitution declares the right of the individual not to be subjected to inhuman or degrading punishment. The enforcement of this right is provided by section 25:

> "25. - (1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without 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) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said

> sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

There is no corresponding statutory provisions conferring original jurisdiction on the Court of Appeal for the enforcement of the rights under section 17.

If the basis of the appeal is a challenge to the jurisdiction of the Court, that point may be raised at any stage of any proceedings - see R.M.C.A. No. 11/97 **Reg. vs. Lindsay et al** delivered the 19th day of December, 1997 where Downer J.A. in support of that principle relied on **Chief Koffie Forfie v Barima Kwabena Seifah(1958)** 1 All ER 289 and **Benson v Northern Ireland R.T.B.** [1942] 1 All ER 456. Similarly, a challenge that the sentence was imposed under a statute that is invalid may be raised in the appellate court.

If the challenge to the sentence takes on the flavour of a complaint of a contravention of the appellant's section 17(1) constitutional rights, it would be defeated by **Pratt's** case. Additionally, if such a right is sought to be enforced, under section 25, presumably in civil proceedings, original jurisdiction would reside only in the Supreme Court.

The appellate court has entertained a complaint of a contravention of the appellant's constitutional rights, where it was raised for the first time in the proceedings for example, in the case of **Hinds et al vs Director of Public Prosecutions** 13 JLR 266. The infringement of the appellant's right under section 20 of the Constitution was complained of, as well as, the validity of the statute, the Gun Court Act.

However, in **Walker and Richards v R.** (1993) 43 W.I.R. 363, the appellants by way of special leave to appeal against sentence granted by the Judicial Committee of the Privy Council sought to have their mandatory sentences of death on conviction for murder, set aside on the ground that their rights under section 17(1) of the Constitution

had been infringed. There had been no appeal against the mandatory sentence when their appeals had been dismissed by the Jamaican Court of Appeal. The Privy Council declined to alter the sentence on the ground that it had no such first instance jurisdiction. The headnote reads:

> **"Held,** dismissing the appeals, that the Board was invited to decide the constitutional question as a court of first instance, but it lacked jurisdiction so to do; apart from the possibility of a reference under section 4 of the Judicial Committee Act 1843, the jurisdiction of the Board was confined to that of an appellate court in accordance with the 1833 Act and the Judicial Committee Act 1844 (which had entirely superseded any more extensive powers which might have previously existed under the royal prerogative)."

The Board in its opinion said, at page 365:

> "These appellants have adopted the arguments for the appellants in **Pratt v Attorney-General** and seek to have their sentences set aside on constitutional grounds based upon the delay that has occurred in the years following the decisions of the Court of Appeal. Their Lordships are being invited to decide this question not as a matter of appeal but as a court of first instance; and this they have no jurisdiction to do. The question of whether or not execution would now infringe the constitutional rights of the appellants has not yet been considered by a Jamaican court. The jurisdiction of the Privy Council to enter upon this question will only arise after it has been considered and adjudicated upon by the Jamaican courts."

And at page 366:

> "These appeals must therefore be dismissed. It is nevertheless apparent that, in the light of the judgment in **Pratt v Attorney-General,** unless the sentences of these appellants are commuted on the advice of the Jamaican Privy Council, they have every prospect of making a successful constitutional application to the Supreme Court to have their sentences commuted to life imprisonment."

For the above reasons, it is my view that this court had no power to hear any arguments on ground 3. As a consequence therefore by a majority, the preliminary point succeeded.

Dr. Barnett, in support of grounds 1 and 4 argued that the provisions of certain statutes, namely, the Offences against the Person Act 1864 (for rape the punishment was imprisonment only), the Praedial Larceny Act 1877, the Flogging Regulation Law 1903, the Obeah Law 1898 and the Prison Law 1847, all permitted corporal punishment, but no instrument was specified for its infliction. The Prevention of Crime (Emergency Provisions) Law, Law 53/42, authorised for certain offences, including rape, flogging with cat-o'-nine tails, whipping with the tamarind switch, the "pattern of the instrument to be approved by the Minister," and provided, in section 7, "... this law shall continue in force until the expiration of a period of six months after such date as Her Majesty may by Order in Council declare to be the date on which the present emergency comes to an end and shall then expire except as respects things previously done or omitted to be done." The Emergency (Public Security) Act, 1939 gave authority to the then Governor to declare an emergency, which emergency was the Second World War. The Prevention of Crime (Special Provisions) Act, 1963 No. 42/63 amended the Offences against the Person Act providing for a mandatory sentence of imprisonment and flogging for the offence of rape and the deletion of section 7 of the Law 53/42, was of no effect, because by Independence in 1962 the state of emergency and the war had ended and therefore it was not possible in law to prescribe the instrument or manner of punishment under the said Prevention of Crime (Emergency Provisions) Act which had expired. The decision of the Court of Appeal in **R v. Purvis and Hughes** (1968) 13 WIR 507 maintaining that the latter Act was valid and in force because no Order in Council was produced declaring

that the emergency had ended was wrong and arrived at per incuriam. The Emergency Powers (Defence) Act 1939 (U.K.) an Imperial statute, declaring that Britain was at war, and extending it to its colonies, including Jamaica, conferred the power to declare war and peace and was intended to last for a period of one year and many statutory provisions, Orders in Council by His Majesty effecting numerous peace treaties, for example, with Japan, Austria and Germany, brought the state of war to an end. The declaration by the Privy Council Office and published in the London Gazette dated 9th July, 1951, was equivalent to a declaratory Order in Council formally declaring an end to the state of war. Therefore from the point of view of the said Privy Council declaration dated 9th July, 1951, because of the proclamation in Jamaica declared on 18th February, 1946, and the lapsing of the Imperial statute or the statutory provisions regulating peace, the reality of the situation was that the "emergency" referred to in the Prevention of Crime (Emergency Provisions) Act 1942 had long ended. The Act had expired and so could not be revived in 1963 by deletion purportedly done by the 1963 Act, nor utilized by the Ministerial order published in the Jamaica Gazette Supplement dated 28th January, 1965. If the Prevention of Crime (Emergency Provisions) Law 1942 exists, the ministerial power thereunder to make orders gives to the executive the discretion to determine the extent and degree of severity of the punishment instead of the judiciary. The scheme of the Flogging Regulation Law, the Prevention of Crime (Emergency Provisions) Law and the ministerial order of 1965 thereunder leaves an essential characteristic of the punishment to the discretion of the executive, namely, control of the variation of the degree of severity. Since 1962 the Jamaica Constitution because of its supremacy and the entrenched provisions of the separation of powers such discretion if exercised is invalid and unconstitutional **(Deaton v Attorney General** [1963] I.R. 170 and **R v.George**

Wilson (unreported) R.M.C.A. 32/94 delivered 23rd November, 1994. The failure of the learned trial judge to inform the appellant that the sentence of whipping was to be imposed and to give him the opportunity to make submissions thereon, was a denial of a fair hearing within a reasonable time, as required by section 20(1) of the Constitution in breach of natural justice. (**R v. Puru** (1985) L.R.C. Cain 817 and **R v. Errol Pryce** (unreported) S.C.C.A. 88/94 dated 12th December, 1994). The sentence was thereby void and should be set aside. He relied also on **Jackson vs. Bishop 404 F 2d. 571** Re **Grotrian, Cox vs. Grotrian** [1955] 2 WLR 695; **R v Secretary of State for the Home Dept., ex parte Doody** [1993] 3 WLR 154 and **Allaudin Mian v State of Bihar** 1991 L.R.C. (Crim) 573.

Mr. Leys for the Attorney General amicus curiae, submitted that the validity of the imposition of the sentence of whipping was preserved by sections 4(1), the Jamaica (Constitution) Order in Council, 1962 and sections 17(2) and 26(8) of the Constitution of Jamaica. Section 7 of the Prevention of Crime (Emergency Provisions) Law referring to "emergency" means emergency in respect of violent crimes and is not referable to the war emergency. The legislation did not mention war and therefore one should not assume that because the law was enacted in war-time it is war-related; **R v. Purvis and Hughes** (supra) is valid and should be followed. Parliament may regulate the conditions under which execution of punishment imposed by the judiciary may be effected by the executive, **(R v. Hinds** (supra)) and severity cannot depend on the weight of the executioner nor the angle of the blow and safeguards are placed within the statute itself. There was no breach of the principles of natural justice due to unfairness and the fact that the particular punishment is in disuse did not oblige a trial judge to give notice of his intention to impose it. Counsel could have addressed the Court when the allocutus was

pronounced. The sentence was not in fact in disuse. He relied also on **Ex parte Doody** (supra).

Mr. Pantry, adopting Mr. Leys' submission, argued that counsel at the trial had a full opportunity to make submissions on sentence in his plea in mitigation after the pronouncement of the allocutus. He said that corporal punishment had been knowingly re-introduced in use as a punishment since 1994 and therefore no obligation arose to invite counsel to address that issue specifically, though desirable, and failure to do so did not vitiate the sentence **(R v Pryce,** S.C.C.A. No. 88/94). Therefore there was no breach of natural justice in this respect. The administering of corporal punishment is the function of the 'executive which function does not contravene the principle of the separation of powers because it is the judiciary which determines the severity of the punishment by determining the number of years or strokes. **(Hinds vs. R** (supra)); the "emergency" in section 7 of the Prevention of Crime (Emergency Provisions) Law, 1942 which was in force up to Independence, and saved thereafter by section 4(1) of the Constitution Order in Council, 1962 was not the war but the high level of crime in the island requiring legislative intervention. **(Hansard, Proceedings of Legislative Council of Jamaica** 10th February, 1942 to 28th July, 1942). Section 7 of the said Law, which extended corporal punishment to the offence of rape, outlined the method by which the said law would expire, but no Order-in-Council was issued relating to or affecting the said section. The Order in Council in 1951 in England which related to the formal state of war with Germany was not an instrument relating to said section 7, therefore the said law continued in force in Jamaica. Parliament cannot amend a law that is not in existence and therefore where a law has lapsed and Parliament amends it, as was done to section 7 by Act 42/63, the law is deemed to have been revived. He relied on **Ex parte Doody**

(supra) and **Andre Chin et al vs Commissioner of Customs** S.C.C.A. No. 46/93 dated 7th April, 1995, among others.

Mr. Daly for the appellant in rebuttal submitted that "present emergency" was a term of art meaning the war, and this is supported by the Emergency Powers (Defence) [Law] 1939. The Imperial statute dated 26th August, 1939 refers to war and the Jamaica Gazette Regulations in 1939 were made under the said Imperial Statute; and the War Emergency Regulations 1939 were revoked by proclamation in 1946. The executive being empowered to decide on the instrument and the parts of the body for the infliction of the punishment is determining the severity of the sentence and those decisions should be made by the judiciary. In order to ensure a fair hearing counsel should be advised by the court that the sentence of whipping was to be imposed. **(R v. Pryce** (supra) and **R v Earl Simpson** SCCA 54/93 dated 29th February, 1994).

Mrs. Alexander for the Attorney-General replied that section 4 of the Jamaica (Qontitution) Order in Council, 1Q62 provided for the modification and adaptation of Iowa to conform with existing law. The Governor-General may do so within two years of Independence but thereafter it is the function of Parliament to do so and the Act in question is not invalid in its conferment of the functions of the enforcement of punitive powers.

Corporal punishment for sexual offences in Jamaica first appeared in the statutes in the Offences against the Person Law, 1864 (Cap.416). Section 52 made it an offence to procure a woman or a girl for the purpose of sexual intercourse, and provided that:

> "(2) Any male person who is convicted under subsection (1) of this section may, at the discretion of the Court, and in addition to any term of imprisonment awarded in respect of the said offence, be sentenced to be once privately whipped and the number of strokes and the instrument with which they

> shall be inflicted shall be specified by the Court in the sentence." (Emphasis added.)

The Flogging Regulation Law, 1903, (currently the Flogging Regulation Act) which applied-

> "(2) When a person is convicted of any offence legally punishable by flogging..."

is a comprehensive Act, providing for the maximum number of strokes that may be inflicted, the instrument to be used to be "approved by Minister," the presence of a surgeon, or other "qualified medical practitioner' and the execution of such sentence at the place of confinement.

In 1942, the Prevention of Crime (Emergency Provisions) Law was enacted, extending the range of offences punishable by corporal punishment, including specifically, the offence of rape, defining flogging and whipping as punishment inflicted with "a cat-o nine-tails" and "a tamarind switch" respectively, providing for the pattern of such instruments and the infliction on specific parts of the person to be approved by the Governor (currently the Minister), incorporating the provisions of the Flogging Regulation Law, inter alia, and providing in section 7, the significant provision:

> "7. This Law shall continue in force until the expiration of a period of six months after such date as Her Majesty may by Order in Council declare to be the date on which the present emergency comes to an end and shall then expire, except as respects things previously done or omitted to be done. " (Emphasis added).

When the statute was enacted in 1942, the Second World War was in progress, having commenced in 1939. Britain was at war. The British Parliament, on the 24th August, 1939 made a formal declaration of war by the enactment of the Imperial Statute,

The Emergency Powers (Defence) Act, 1939, and under section 4 extended its provisions to, inter alia,

> "... Jamaica (including Turks and Caicos Islands and the Cayman Islands)"

by Order in Council by His Majesty, the Emergency Powers (Colonial Defence) Order in Council, 1939.

The said Emergency Powers (Defence) Act 1939 provided for its initial existence for one year "and shall then expire", for its continuance in force for one year from time to time after an address to both Houses of Parliament by His Majesty issuing an Order in Council, and provided in section 11(2):

> "(2) Notwithstanding anything contained in the preceeding sub-sections, if His Majesty by order in Council declare that the emergency that was the occasion of the passing of this Act has come to an end, this Act shall expire at the end of the day on which such order is expressed to come into operation."

The publication of the Jamaica Gazette Extraordinary No. 85 dated Saturday 26th August, 1939, contained the text of the said Imperial Statute and the said Order in Council passed two days earlier and the fact of the extension of each to the colony of Jamaica. It reads, inter alia on page 1371:

> **"THE EMERGENCY POWERS (DEFENCE) ACT, 1939.**
>
> **No. 814. -** The provisions of the above-mentioned Imperial Statute, which has been extended to Jamaica and its Dependencies by an Order of His Majesty in Council, are set out below.
>
> A. G. GRANTHAM
> Colonial Secretary."

and on page 1374:

"THE EMERGENCY POWERS (COLONIAL DEFENCE) ORDER IN COUNCIL, 1939.

The text of the above-mentioned Order of His Majesty in Council, which extends to Jamaica and its Dependencies the provisions of the Emergency Powers (Defence) Act, 1939, is set out below:-

A. G. GRANTHAM,
Colonial Secretary."

Both the said Imperial Statute and the relevant Order in Council of His Majesty had to be specifically extended to Jamaica, in order to be effectively in force in Jamaica.

Prior to 1729, British Statutes "...were esteemed... used ... or received ..." in Jamaica, but thereafter to be effective, all such statutes must be specifically extended, as was the said Emergency Powers (Defence) Act, 1939. Orders in Council, which are regarded as subsidiary legislation have no greater force nor effect than such statutes.

The Interpretation Act (Jamaica), section 41 reads:

> "41. All ,such laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island."

Since 1729 therefore the Colony of Jamaica had full legislative power, with the reservation however, that it should not pass any laws repugnant to the I aws of England. In July 1959 Jamaica acquired complete internal self-government but within the framework of the West Indies Federation, by means of the passing of the Jamaica (Constitution) Order in Council 1959.

Prior to 1942, the Parliament of Jamaica had full authority in passing its laws and was supreme, and was not bound by nor subject to the statutes passed in England, as a general rule.

The Colonial Laws Validity Act, 1865, provided, in section 5:

> "5 Every Colonial legislature shall have full powers within its jurisdiction and every representative legislature shall, in respect of the colony under its jurisdiction have ... full powers to make laws representing the constitutional powers and procedures of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony."

The author in **Craies on Statute Law,** 7th Edition (1971), in discussing the supremacy of Colonial legislatures, said at page 494:

> "The legislative bodies in British possessions are not delegates of the British Parliament. They are restricted in the area of their powers, but within that area are supreme."

The Jamaican Parliament in 1942, by the recital in section 7 of the Prevention of Crime (Emergency Provisions) Law, was not thereby abdicating its supremacy to that of the British Parliament nor acknowledging that it was statutorily subject to an Order in Council by His Majesty. It was merely indicating the event which would enable the accustomed machinery to be utilized to bring the said Law to an end.

It is significant that, prior to the 26th August, 1939 when the said Imperial Statute was adopted in Jamaica, the Emergency (Public Security) Law, 1939 was enacted independently in Jamaica on 2nd August, 1939. Section 3 of the latter statute reads:

> "3. - (1) The Governor in the event of His Majesty being engaged in any war, or whenever at any time it appears to him that a state of war between His Majesty and any Foreign State is imminent, may, in the interest of the public security, by Proclamation declare that a State of War emergency exists.
>
> (2) Every state of emergency so proclaimed shall be deemed to continue until determined by a

> further Proclamation made by the Governor in that behalf."

This law provided for the making of "war regulations" by the Governor for the "securing of public safety, the defence of Jamaica, the maintenance of public order and the suppression of mutiny ... and maintaining supplies and services essential to the life of the community." It also provided for the detention and deportation of persons, the search of premises, the trial by Military Courts, >the supremacy of such regulations and their extension to the Dependencies, and circumscribed the period of its own duration in section 8:

> "8. The provisions of sections 4, 5, 6 and 7 of this Law and of any Regulations made under this Law shall be, and continue to be, of full force and effect throughout the existence of any state of emergency which from time to time may be proclaimed under this Law, but upon the determination of the state of emergency in accordance with the provisions of subsection (2) of section 3 of this Law, they shall then cease to have effect except as respects things previously done or omitted to be done."

Both the Emergency (Public Security) Law, 1939 by section 8, in accordance with the provisions of section 3 (2), and the Prevention of Crime (Emergency Provisions) Law, 1942, by section 7, contain provisions for effecting the termination of the respective statute, not automatically, nor by implication, but by means of the utilization of the machinery provided, that is, by proclamation and by the issuance by His Majesty of Order in Council, respectively. Each is a form of delegated legislation. Both methods, in order to ensure certainty, and notification to the public which would be affected by the said statute, would require publication.

In commenting on the duration of statutes, the author **Driedger,** in **The Construction of Statutes** (1974), said at page 172:

> "A statute may be expressed to expire on a named future day, or on the happening of a named event, such as the commencement or termination of a session of Parliament. Sometimes authority is granted in an Act to a subordinate body, the Governor in Council, to repeal a statute by order or proclamation. Express repeal by the legislature may be specific or general. The normal method of specific repeal is to state expressly that a statute or some division or some words of it are repealed. Sometimes a repeal may be in general terms ... Repeals in general terms may present problems because there can be no certainty that an Act is repealed; at least not until there has been an authoritative judicial decision."

I am not convinced by the argument of Mr. Leys that "the present emergency" is not referable to the war emergency of the Second World War. Both statutes were passed in 1939, and although there were several proclamations of a respective existing state of emergency in the Island, the reference to "His Majesty... by Order in Council" is less referable to the local state of emergency which was adequately governed by the proclamation of the Governor, than the state of war emergency referred to in the said Imperial Statute, 1939, within which, reference was expressly and repeatedly made to "His Majesty ... by Order in Council." Helpful assistance is gained by an examination of the definition of "Order in Council" in the Orders in Council (Amendment and Revocation) Act (Jamaica). Section 2 reads:

> "2. In this Act -
> "appropriate Minister means -
>
> (a) the Prime Minister; or
>
> (b) the Minister designated by the Prime Minister to exercise on any particular occasion the power conferred by subsection (1)of section 3;
>
> "Order in Council" means an Order in Council made under an Act of the United Kingdom

> PPS.liartlerlt or-by the Sovereign in virtue of the Royal Prerogative;
>
> "Order in Council to which this Act applies" means any Order in Council which applies, or applies the provisions of any Act of the United Kingdom Parliament, with or without modification, to Jamaica, but excludes any Order in Council which -
>
> (a) is referred to in paragraph 6 (2) (b) of the First Schedule to the Jamaica Independence Act, 1962; or
>
> (b) applies to Jamaica by virtue of an enactment of the Legislature of the Island." (Emphasis added.)

A proclamation is a "regulation" by definition. By section 3 of the Interpretation Act, (Jamaica)

> "regulations" includes rules, by-laws, proclamations orders, schemes, notifications, directions, notices and forms;"

In order to be valid and effective, all regulations must be published. Section 31 of the Interpretation Act provides:

> "31. - (1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the ***Gazette*** and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication."

In England, the Order in Council, a specie of delegated legislation, is included in the definition of a statutory instrument, which, in order to be binding and effective must be published.

In Administrative Law by **Wade and Forsythe** 7th Edition, in dealing with delegated legislation in the United Kingdom, the authors recognised that its increase in volume demanded "a systematic scheme for publication and reference," giving rise to the

enactment of the Rules Publication Act 1893, regulating the publication of statutory rules and orders and later the Statutory Instruments Act 1946. He said at page 890:

> "The Act of 1893 had two different objects. The first was, in the case of rules which had to be laid before Parliament, to give them (with some exceptions) antecedent publicity by requiring notice of them to be published and copies to be provided on demand
>
> The second object was to secure publication of all statutory rules (whether or not to be laid before Parliament) after they are made by requiring them to be sent to the Queen's printer to be numbered, printed and sold. Statutory rules were comprehensively defined as including rules made under any Act of Parliament, by Order in Council, or by any minister or government department..."

and at page 891:

> "The Statutory Instruments Act of 1946 came into force in 1948, repealing and replacing the Act of 1893. Its definition of 'statutory instrument' covers three categories of 'subordinate legislation' made (or confirmed or approved) under the authority of some statute:
>
> (i.) Orders in Council;
>
> (ii.) Ministerial Orders..., and
>
> (iii.)Future rules ... under past statutes...
>
> ... all statutory instruments must be sent to the Queen's printer as soon as made, and must be numbered, printed and sold."

The Emergency Powers (Defence) Act, 1939 (U.K.), the Imperial Statute creating the state of emergency was extended only to February 1945, under its provision for expiry contained in section 11(1). However, it was not formally repealed until 1959 (See the Emergency Laws (Repeal Act) 1959 enacted on the 25th day of March,1959.)

On 9th July, 1951, a notification was issued from the Privy Council Office in London and published as Supplement to the London Gazette, terminating the formal state of war. It read, inter alia:

> "His Majesty's Government in the United Kingdom, bearing in mind that on 3rd September, 1939, a state of war was notified with the German Reich that active hostilities were ended by the declaration regarding the Surrender of the German Reich issued on the 5th June 1945 but nevertheless the formal state of war with Germany has continued to subsist so far as the municipal law of the United Kingdom is concerned...
>
> ...without prejudice to the Occupation Statute or to the decision of questions of the settlement of which must await the conclusion of a treaty, the formal state of war between the United Kingdom and Germany shall be immediately terminated.
>
> A notification is therefore being published that the formal state of war with Germany has terminated as from four o'clock on the 9th July 1951."

This Order in Council, declared in accordance with the provisions of section 11(2) of the said Emergency Provisions (Defence) Act, 1939 (U.K.), was not extended to Jamaica, nor was it published in Jamaica. A "regulation", would need to be published in order to become a part of our statutory framework.

The Jamaican Parliament did not therefore give any cognizance to nor accept the said 1951 Order in Council (U.K.) and accordingly its publication in London did not validly affect nor influence any statute in Jamaica, whose Parliament was and is supreme.

Nor did the various Orders in Council and consequent peace treaties signed between the U.K. and the Axis powers (including Japan) between 1947 and 1955 add any conclusiveness in determining the date of the end of the "war emergency" for the purposes of the Jamaican statutes. The definition of the "Order in Council" in the Order

in Council (Amendment and Revocation) Act (Jamaica) recognizes its import in the English statutory framework. Consequently, there could be no less requirement in Jamaica, that, to be effective in Jamaica, the Order in Council had to be accepted by the Jamaican Parliament and published for the general notification of the Jamaican public.

The Evidence Act itself provides helpful assistance as to the method by which Acts of Foreign States or Commonwealth countries are recognized in our courts of law, as proof of their existence; foreign law must be proved as a fact. Section 25 reads:

> "25. All proclamations, treaties and other Acts of State of any Foreign State, or Commonwealth country... may be proved in any court of justice, or before any person having by law.., authority to hear, receive and examine evidence, either by examined copies, or by copies authenticated or hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty or other Act of State the authenticated copy to be admissible in evidence, must purport to be sealed with, the seal of the Foreign State or Commonwealth country to which the original document belongs;..."

Strict proof is required. Moreso, to treat an Act enacted in England, as requiring a less formal method for its incorporation into our statutory scheme, namely, by implication, cannot be supported.

I am of the view therefore that the decision in **R.v. Purvis and Hughes** (1968) 11JLR 124 is correct in holding that there was no "specific Order in Council by Her Majesty declaring the date on which the emergency came to an end" (per Waddington P (Ag) in relation to section 7 of the Prevention of Crime (Emergency Provisions) Act). Accordingly the latter Act was still in existence and enforceable in 1963.

Due publication of delegated legislation, "regulations" in Jamaica, and "statutory instruments" in the U.K., is the means by which credence is given to the presumption that

every man is presumed to know the law and certainty is ensured in the framework of statutory interpretation. The Parliament of Jamaica in its supremacy and the exercise of its inherent powers to regulate its own procedure, never sought to treat the Prevention of Crime (Emergency Provisions) Law, 1942, as having expired. The said Law had not "lapsed". Nor is a statute repealed by non-user or obsolescence. (Driedger, 1974, page 173).

Therefore in 1963, when Parliament passed the Prevention of Crime (Special Provisions) Act, which amended the Offences against the Person Act and the Prevention of Crime (Emergency Provisions) Law, 1942, providing that the sentence for the offence of rape, inter alia, should attract the mandatory provision of flogging and that section 7 be deleted, the latter Law was in• existence and enforceable, and made expressly permanent by the removal of section 7. Similarly, the ministerial orders made on 26th January 1965 under the provisions of section 4 of the said latter Law and section 5 of the Flogging Regulation Law and published in the Jamaican Gazette Supplement, Proclamation, Rules and Regulations dated 28th January, 1965 approving the pattern of instrument and directing the parts of the body of the prisoner on which the punishment of flogging and whipping should be inflicted, were equally valid and enforceable. In addition subsequent amendments to the said statute currently entitled, the Crime (Prevention of) Act, and in particular, the amendment in 1972, namely the Law Reform (Mandatory Sentences) Act, 1972, removing flogging and the mandatory provisions of corporal punishment, is evidence that the Parliament of Jamaica regarded the said statute, the former Prevention of Crime (Emergency Provisions) Law Cap 305 as valid and accepted it as being in force.

The fact that the "present emergency" of the Second World War ended with the formal declaration in 1951, is not determinate of the issue of whether or not the

Prevention of Crime (Emergency Provisions) Law correspondingly expired. The circumstances necessitating the passing of the said statute in 1942, did not necessarily cease with the cessation of hostilities. The answer lies in ascertaining whether or not the legislative machinery in Jamaica had in fact brought the said Law to an end. Parliament is free to determine what laws it enacts, accepts or retains and how it does so, as long as their constitutionality, validity or conformity with its Interpretation Act are not infringed. In such circumstances the court is not competent to decide whether or not a statute is in existence. Parliament is deemed to be aware of the existence of its laws and is not regarded as having made a mistake, as argued by counsel for the appellant. The judiciary may not legislate.

Driedger (supra), at page 188, in confirming the conclusiveness of Parliament, in the face of a challenge before the courts that Parliament had made a mistake, recounted the words of Lord Halsbury L.C. in **Commissioners for Income Tax vs. Pensel** (1891) A.G. 531, at page 549:

> "But I do not think it is competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes."

In the instant case the learned trial judge had the power to sentence the appellant as he did. The said statute acted upon, recognized by Parliament and enforced since 1942, was then, and is valid and is currently in force.

Furthermore, I am in agreement with Mr. Pantry for the respondent, that even assuming that the said Prevention of Crime (Emergency Provisions) Law, 1942 had expired, (although in my view it had not) it would have been revived by the act of amendment by Parliament by the Prevention of Crime (Special Provisions) Act 1963.

The latter Act 42/63, section 2 (Schedule) deleted section 7 of the Prevention of Crime (Emergency Provisions) Law, 1942 (Cap. 305). Section 7 reads:

> "This Law shall continue in force until the expiration of a period of six months after such date as Her Majesty may by Order in Council declare to be the date on which the present emergency comes to an end and shall then expire, except as respects things previously done or omitted to be done."

The effect of such deletion demonstrated that Parliament intended that the said statute should no longer contain its temporary feature, but be conclusively permanent. Parliament then intended that it should be treated to be in force and functional.

Section 25 of the Interpretation Act reads:

> "25.-(1)
>
> (2) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not -
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;" (Emphasis added).

The deletion of section 7 would display a "contrary intention" that the said statute should _be in force, and accordingly it_would thereby be revived, assuming its said prior expiration. This existence in force would be moreso because section 26 of the Interpretation Act construes an Act which has expired as:

"... deemed to have been repealed ..." A deeming provision is a legal fiction employed for a specific purpose in the statute. The expired statute would exist although it would not be in force.

It is also significant that Parliament issued legal notices in 1958 and 1961, namely Proclamations, Rules and Regulations Nos 246/56 dated 7th November, 1958 and 68/61

dated 20th April, 1961, modifying certain provisions of the Flogging Regulation Act, which were incorporated in the Prevention of Crime (Emergency Provisions) Law.

These are clear indications that Parliament consistently regarded the said statute currently the Crime (Prevention of) Act, as still being in force since its first enactment. Consequently, I am therefore of the view that the argument on ground four also fails.

The appellant argued, as ground one, that the principle of separation of powers under the Constitution was infringed, because the executive was in effect determining the severity of the sentence, which determination should be the function of the judiciary. The infringement complained of was, that the executive was permitted to determine the nature of the instrument and the parts of the body of the prisoner to be involved in the execution of the sentence of corporal punishment, and that the differing weight of and angle of infliction of the blows by the individual executing the punishment would result in variable and unequal punishment to different individuals.

It is the judiciary which determines the definitive severity of corporal punishment, but it is inevitable that the executive subsequently executes it. It is impracticable to assume that the Constitution did not so intend, or not contemplate some not invariable similarity in the size, weight, shape and dexterity of all individuals, and particularly those involved in the execution of a sentence.

The principle of the separation of powers prohibits a non-judicial body, for example, the executive, from determining the nature, extent and severity of the sentence. **(Deaton vs Attorney-General et al** [1963] I.R. 170). The Judicial Committee of the Privy Council endorsed this principle in the case of **Hinds et al vs. R** (1975) 24 W.I.R. 326. The Board (per Lord Diplock) in deciding that the power of the Review Board, a non-

judicial body, to determine the sentence of a person convicted in the Gun Court was unconstitutional decided, at page 341:

> "The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law. (See Constitution, Chapter III, s. 20 '(1).) The 'carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out.
>
> In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
>
> Thus. Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offenders conduct in the particular circumstances of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

I agree with counsel for the respondent, that the fact that it is the judiciary and not the executive which pronounces the length of the sentence and the specific number of strokes in a sentence of imprisonment and whipping respectively, sufficiently satisfies the constitutional principle of the separation of powers. The statutory safeguards, and in particular, the presence of a medical officer to supervise and control the execution of the sentence of corporal punishment ensures that there is no excess beyond that which was imposed by the judiciary. In my view therefore this ground also fails.

Finally, the defendant argued in ground three that his right to a fair hearing ensured by section 20 of the Constitution was denied to him, in that he was not granted the opportunity to make submissions prior to the imposition of the sentence of whipping, a breach of natural justice.

An elementary rule of natural justice is that fairness requires that a man may not be condemned before he is heard in his defence, **(Ridge v Baldwin** [1964] A.C. 40).

In **R. v. Home Security, Ex parte Doody** [1993] 3 W.L.R. 154, it was held by the House of Lords that a convicted man, subject to be sentenced to a mandatory life sentence before the Home Secretary decided on the minimum period he should serve for retribution and deterence before his case was submitted for first review, was entitled to be told of the minimum period recommended by the judiciary, entitled to make representations thereon and to be told the reasons therefor, if the said Home Secretary differed from the judiciary.

I accept that it is desirable that before a sentence is imposed the convicted man must be afforded every opportunity, in order to persuade and assist the sentencer to impose the most appropriate sentence.

In R. **v. Errol Pryce** (unreported) S.C.C.A. No 88/94 delivered on 12th December, 1994, Carey, P. (Ag.) recognized the latter principle, and noted at page 3, that:

> "In the recent case of **R. v. Earl Simpson** (unreported) S.C.C.A. 54/93 this Court called attention to the situation where a judge was minded to impose a discretionary life imprisonment, that he should inform counsel and allow him to deal with the matter specifically. The reason for this course is to enable counsel to bring the judge's mind to all relevant factors that bear on the matter. The result of that assistance is that the judge will be better able to balance all the factors necessary to advise himself."

He concluded at page 4:

> "It seems to us therefore that although it would have been desirable for the judge to have invited counsel that he was minded to invoke the provisions of the Crime (Prevention of) Act, that omission cannot result in that sentence being set aside if the sentence or combination of sentence is not otherwise manifestly excessive."

In the instant case after the allocutus was pronounced, counsel had ample opportunity to and did make submissions to the court in relation to the matter of sentence.

Even after the sentence was pronounced by the trial judge counsel was not precluded at that late stage to advance the case, of the appellant. Counsel was merely content to enquire, "Sentence is concurrent?", to which the trial judge pointedly replied "That is why I didn't say anything." Furthermore, although the imposition of the sentence of whipping had not been resorted to by the Court for a number of years, it was demonstrated to us that there had been a resumption of its use in several prior cases for offences under the Offences against the Person Act, including the offence of rape, since 1994. Counsel was therefore well aware that it was a form of punishment likely to be

resorted to by the trial judge. Although it was desirable that the said judge should have indicated to counsel, the specific form of sentence, namely corporal punishment, contemplated by him, counsel had a corresponding responsibility to address his mind to that option and make submissions thereon. The omission to so inform counsel would not make the said sentence invalid per Se. This ground therefore also fails.

For the above reasons I would dismiss this appeal.

RATTRAY, P.

By a majority (Harrison, J.A. dissenting) the appeal is allowed in respect of that part of the sentence which imposes the additional sentence of twelve strokes of the tamarind switch which is hereby set aside.