Privy Council Appeal No. 52 of 1992

The Commissioner of Police *Appellant*

v.

(1) Skip Patrick Davis and
(2) Barry Franklyn *Respondents*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 4th October 1993

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Lowry
Lord Mustill
Chief Justice Zacca

*[Delivered by **Lord Goff of Chieveley**]*

This appeal is concerned with two questions arising under the Constitution of The Bahamas. The first question is whether certain provisions of the Dangerous Drugs Act Ch. 213 ("the DDA"), viz. sub-sections (8) to (11) of section 22 which were added to the DDA by the Dangerous Drugs (Amendment) Act 1988, are inconsistent with the Constitution and are therefore void. The second question, which was raised for the first time in argument before the Court of Appeal, relates to the legal status of Magistrates' Courts in The Bahamas.

The matter has arisen as follows. On 24th February 1991 a Cessna aircraft crashed into the sea not far from the airport at West End, Grand Bahama. The crash marked the end of an air chase involving drug enforcement agents of The Bahamas and the United States. The two respondents, Skip Patrick Davis and Barry Franklyn, escaped from the aircraft and boarded a life raft. They were apprehended whilst still on the life raft near the position where the aircraft crashed. When the aircraft crashed, a large number of taped packages spilled into the sea from a bottom compartment of the aircraft. 149 of the packages were recovered. They were found to contain a total of 389lbs of cocaine.

The respondents were charged with three offences contrary to the DDA, viz.:-

(1) Possession of dangerous drugs (cocaine) contrary to sections 28(5) and 28(2)(b).

(2) Possession of dangerous drugs (cocaine) with intent to supply, contrary to sections 22(1) and 22(2)(b).

(3) Importation of dangerous drugs (cocaine) contrary to sections 15(5) and 28(2)(b).

Sections 28(5) and 15(5) provide respectively for the offences of simple possession and importation of dangerous drugs. Section 28(2) provides for the penalty applicable in the case of offences under the Act for which special provision is not otherwise made. Section 22(1) provides for the offence of possession of dangerous drugs with intent to supply. Section 22(2) provides for the penalty applicable in respect of such an offence, section 22(2)(b) so providing in the case of summary conviction. The sentences applicable in respect of possession with intent to supply are heavier than those applicable in the case of simple possession or importation under section 28(2)(b). In the latter case, the maximum penalty applicable on summary conviction is a fine of $5,000 or a sentence of five years' imprisonment or both. Under section 22(2)(b) the penalty applicable in the case of summary conviction is (1) on first conviction, a fine of not more than $100,000 and a term of imprisonment of not less than one year but not more than five years, and (2) on second or subsequent conviction, a fine of not more than $200,000 and a term of imprisonment of not less than three years but not more than seven years.

Furthermore, by virtue of sub-sections (8) to (11) of section 22, added in 1988, special provision was made in the case of amounts of dangerous drugs in excess of certain specified quantities. For cocaine, the amount so specified was 2lbs, which was far exceeded by the amount involved in the present case (389lbs). Since these four sub-sections are at the heart of the present case, their Lordships think it right to set out their terms in full:-

> "(8) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case in which a person is convicted of having committed an offence under subsection (1) and the quantity of dangerous drugs to which the charge relates is -
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> (a) in the case of Indian hemp, in excess of ten pounds;
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> (b) in the case of cocaine, in excess of two pounds; or
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> (c) in the case of opium morphine and its salts including diacetylmorphine (commonly known as heroin), in excess of twenty grams,

the provisions of subsections (2) and (4) shall have effect as if for the respective maximum terms of imprisonment liable to be imposed thereunder there were substituted a term of life imprisonment.

(9) In any case in which a Magistrate has convicted a person of having committed an offence under subsection (1) or (4) and the person so convicted is liable to imprisonment for life by virtue of subsection (8), the Magistrate shall commit the convicted person in custody for sentence to the Supreme Court either at any sessions then in progress or at the next convenient sessions.

(10) In any such case as is referred to in subsection (9), the Supreme Court may proceed to sentence the convicted person as if the person so committed had pleaded guilty before the Supreme Court to that offence or had been found guilty by verdict of a jury:

Provided that the Supreme Court shall not sentence any person in any case until the time limited by section 230 of the Criminal Procedure Code Act, 1968 for an appeal against conviction has expired or, in the event of a Notice of Appeal being served within that time, until that appeal has been finally determined.

(11) In a case referred to in subsection (9) or (10), it shall not be necessary for any information to be filed against the person so committed for sentence and the convicted person shall be sentenced for the offence in respect of which he has been convicted as aforesaid."

It follows therefore that, under sub-section (8), the maximum term for which the respondents were liable to be sentenced for the offence of possession with intent to supply on summary conviction was life imprisonment instead of five years on first conviction or seven years on second or subsequent conviction; though in such event the Magistrate had to commit the convicted person to the Supreme Court for sentence under sub-section (9), and the Supreme Court would then proceed to sentence him under sub-section (10).

The respondents were tried before a Magistrate, Ms. G. Manuel. Before the Magistrate, the principal question was whether the aircraft crashed, and the respondents were apprehended, within the Bahamian jurisdiction. The Magistrate had little difficulty in concluding on the evidence before her that they were. On 4th September 1991 she found all three charges proved against both respondents, and so committed the respondents to the Supreme Court for sentence pursuant to sub-sections (8) and (9) of section 22.

The respondents then appealed to the Supreme Court on a number of grounds, which included (1) that the Magistrate had wrongly failed to subpoena a witness whose presence had been requested by them, and (2) that the respondents had been deprived of their constitutional right to trial by jury in respect of the three offences with which they had been charged, and that the provisions of section 22 of the DDA under which they had been convicted and remanded in custody for sentence were unconstitutional and void. In support of the second of these grounds, the respondents relied in particular on Article 20(2)(g) of the Constitution, which provides that every person who is charged with a criminal offence "shall, when charged on information in the Supreme Court, have the right to trial by jury"; and they contended that the increase in the sentence applicable in the case of summary conviction of the offence of possession of dangerous drugs with intent to supply had resulted in an indirect denial of their right to trial by jury.

The respondents' appeal was heard by Hall J. In a judgment delivered on 22nd May 1992, he first concluded that the Magistrate had erred in failing to subpoena the witness whose presence had been requested by the respondents. In ordinary circumstances he would, for this reason, have simply ordered a retrial. However before making any such order, he considered next the constitutional question raised by the respondents, since that question went to the jurisdiction of the Magistrate. He concluded that sub-sections (9), (10) and (11) of section 22 must be rejected as conflicting with the Constitution; but that these provisions could be severed from the remainder of the section, as could sub-section (8) in so far as it applied to summary convictions. The effect, in his judgment, was that the magistrate's jurisdiction to impose a sentence of five years' imprisonment under section 22(2)(b), in respect of possession with intent to supply, applied in respect of that offence unaffected by the impugned provisions, as did the general provision to impose the same sentence under section 28(2)(b). He also concluded that a provision for sentence on summary conviction up to five years' imprisonment was not unconstitutional. On this basis, he remitted the case for retrial by a different magistrate, and directed that, should the respondents be again convicted, the magistrate should proceed to pass sentence under section 22(2)(b) and section 28(2)(b).

The appellant and the respondents both appealed against the decision of Hall J., the appellant appealing against his decision that sub-section (8) in part and sub-sections (9) to (11) of section 22 were in conflict with the Constitution, and the respondents against his decision to order a retrial. In addition, the respondents raised for the first time in argument before the Court of Appeal a question whether the Bahamian Constitution recognises the magistracy as part of the judiciary. The Court of Appeal rejected the latter argument, but generally affirmed the decision of Hall J., with two exceptions. First, they held that sub-section (8)

was void *in toto* as well as sub-sections (9) to (11); but they considered that all four sub-sections could be severed from the remainder of section 22. Second, although satisfied that the sentence of five years' imprisonment was not unconstitutional, they declined to uphold Hall J.'s opinion that a sentence of five years' imprisonment marked the outer limit of the lawful sentencing power of a Magistrate under the DDA. Henry P. (with whose judgment Melville J.A. agreed) and Campbell J.A. (who delivered a separate judgment) declined to determine for the future what the maximum permissible term of imprisonment should be on summary conviction.

The appellant and the respondents now appeal to the Privy Council, broadly on the same grounds on which they appealed to the Court of Appeal.

In order to consider the principal question which arises in this case, it is necessary to set out the relevant provisions of the Constitution of The Bahamas of 1973. In Chapter III there are found the provisions for the Protection of Fundamental Rights and Freedoms of the Individual. For present purposes, the most relevant is Article 20, which secures the protection of the law. Article 20(1) provides as follows:-

> "(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Article 20(2) makes provision for the protection of persons charged with a criminal offence. In particular, the Article provides that:-

> "(2) Every person who is charged with a criminal offence -
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> ...
>
> (g) shall, when charged on information in the Supreme Court, have the right to trial by jury ..."

These were the two principal provisions invoked by the respondents in the present case.

Chapter V of the Constitution is concerned with Parliament. In particular, Article 52(1) contains the general provision, that:-

> "(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of The Bahamas."

Chapter VII is concerned with the Judicature. The Chapter is divided into three parts, concerned respectively with the Supreme Court, the Court of

Appeal, and Appeals to the Court of Appeal and Her Majesty in Council. In particular, section 93(1) (the first provision in Part I) provides that:-

> "(1) There shall be a Supreme Court for The Bahamas which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law."

There is no direct reference to the magistracy, nor to the Magistrates' Courts, in the Constitution, though there are brief indirect references in Article 117 (concerned with the appointment of judicial and legal officers), and in section 13(5) of The Bahamas Independence Order 1973 which specifies the public officers to which section 117 applies, including the Chief Magistrate and Stipendiary and Circuit Magistrates. It is plain however that the Magistrates and the Magistrates' Courts are not treated as forming part of the Judicature as legislated for in Chapter VII of the Constitution. Even so, the definition of "court" in Article 31(1), which lays down definitions for the purpose of Chapter III, including of course Article 20, is very wide, viz., subject to certain immaterial exceptions, "Any court of law having jurisdiction in The Bahamas". Magistrates' Courts are in fact the subject of legislation of long standing, to be found in the Magistrates Act ch. 42.

At this stage their Lordships consider it desirable that they should turn to the decision of the Privy Council in *Hinds v. R.* [1977] A.C. 195, since that case provided the basis for much of the attack launched by the respondents on the relevant provisions of the DDA in the present case. In *Hinds*, the question related to the constitutionality of the Gun Court established by the Gun Court Act 1974 in Jamaica, a country whose Constitution does not contain any entrenched right to jury trial such as that contained in Article 20(2)(g) of the Bahamian Constitution. The Gun Court was established to try firearms offences, and the Act provided for three Divisions of the Court - the Circuit Court Division, in which a Supreme Court judge constituted the Court; the Resident Magistrate's Division, in which a resident magistrate constituted the Court; and the Full Court Division, constituted by three resident magistrates. The Privy Council rejected the argument that the first two Divisions were unconstitutional, because the jurisdiction of each was no greater than that of a Supreme Court judge or a resident magistrate respectively (though in fact it extended over a wider geographical area). But the argument that the Full Court Division was unconstitutional was upheld. This was because the jurisdiction of a Full Court Division extended to include (apart from capital offences) any firearms offence or other offence committed by a person detained for a firearms offence, a jurisdiction which, at the time when the Constitution came into force, was exercisable only by a Supreme Court judge in the Circuit Court. The reasoning which led the majority of the Board (Lord Diplock, Lord Simon of Glaisdale and Lord Edmund-Davies) to reach this conclusion was as follows.

Chapter VII of the Constitution of Jamaica, concerned with the Judicature, drew a distinction between the higher judiciary, consisting of judges of the Supreme Court and of the Court of Appeal, and the lower judiciary, which included resident magistrates; and the distinction between the higher and the lower judiciary was that the former was given a greater degree of security of tenure than the latter. Furthermore, although there was nothing in the Constitution to prohibit Parliament from establishing a new court to exercise part of the jurisdiction that was being exercised by members of the higher judiciary or the members of the lower judiciary at the time when the Constitution came into force, nevertheless it was the manifest intention of the Constitution that (see page 219E-F):-

> "... any person appointed to be a member of such a court should be appointed in the same manner and entitled to the same security of tenure as the holder of the judicial office named in Chapter VII of the Constitution which entitled him to exercise the corresponding jurisdiction at the time when the Constitution came into force."

Furthermore section 97(1) of the Constitution, which provided for the continued existence of a Supreme Court, must be read subject to an implication to the effect that the Supreme Court would exercise in Jamaica the kind of jurisdiction characteristic of a Supreme Court, including unlimited original jurisdiction in all serious criminal offences. From this, the following conclusions were drawn (at pages 221H to 223A):-

> "Their Lordships therefore are unable to accept that the words in section 97(1), upon which the Attorney-General relies, entitle Parliament by an ordinary law to vest in a new court composed of members of the lower judiciary a jurisdiction that forms a significant part of the unlimited civil, criminal or supervisory jurisdiction that is characteristic of a 'Supreme Court' and was exercised by the Supreme Court of Jamaica at the time when the Constitution came into force, at any rate where such vesting is accompanied by ancillary provisions, such as those contained in section 6(1) of the Gun Court Act 1974, which would have the consequence that all cases falling within the jurisdiction of the new court would in practice be heard and determined by it instead of by a court composed of judges of the Supreme Court.
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> As with so many questions arising under constitutions on the Westminster model, the question whether the jurisdiction vested in the new court is wide enough to constitute so significant a part of the jurisdiction that is characteristic of a Supreme Court as to fall within the constitutional prohibition is one of degree. The instant case is concerned only with criminal jurisdiction. It is not incompatible with the

criminal jurisdiction of a 'Supreme Court', as this expression would have been understood by the makers of the Constitution in 1962, that jurisdiction to try summarily specific minor offences which attracted only minor penalties should be conferred upon inferior criminal courts to the exclusion of the criminal as distinct from the supervisory jurisdiction of a Supreme Court. Nor is it incompatible that a jurisdiction concurrent with that of a Supreme Court should be conferred upon inferior criminal courts to try a wide variety of offences if in the particular case the circumstances in which the offence was committed makes it one that does not call for a severer punishment than the maximum that the inferior court is empowered to inflict. In this class of offences the answer to the question whether the concurrent jurisdiction conferred upon the inferior court is appropriate only to a 'Supreme Court' depends upon the maximum punishment that the inferior court is empowered to inflict.

At the time of the coming into force of the Constitution the maximum sentence that a resident magistrate was empowered to inflict for any of the numerous offences which he had jurisdiction to try was one year's imprisonment and a fine of 100 dollars. It is not necessary for the purposes of the instant appeals to consider to what extent this maximum might be raised, either generally or in respect of particular offences, without trespassing upon the jurisdiction reserved by the Constitution to judges of the Supreme Court. The limit has in fact been raised to two years in respect of some offences including those under section 20 of the Firearms Act 1967. Their Lordships would not hold this to be unconstitutional; but to remove all limits in respect of all criminal offences, however serious, other than murder and treason, would in their Lordships' view destroy the protection for the individual citizen of Jamaica intended to be preserved to him by the establishment of a Supreme Court composed of judges whose independence from political pressure by the Parliament or the executive was more firmly guaranteed than that of the inferior judiciary.

It is this that, in respect of a particular category of offenders, is sought to be achieved by the provisions of the Gun Court Act 1974, relating to the jurisdiction and powers of a Full Court Division of the Gun Court. As has been pointed out, the practical consequence of these provisions as they stand would be to give to a court composed of members of the lower judiciary, jurisdiction to try and to punish by penalties, extending in the case of some offences to imprisonment for life, all criminal offences however grave, apart from murder or treason, committed by any person who has also committed an offence under section 20 of the Firearms Act 1967."

The Full Court Division had never in fact sat, and the appeals before the Board were not therefore directly concerned with that Division. Nevertheless, as the majority made clear, it was necessary as part of the reasoning of the Board to consider the position of the Full Court Division, especially as that had an impact upon the severability of the effective provisions of the Act from the remainder.

Now it is plain that the present case can be differentiated from the case of *Hinds*. First of all, there is no question of the Bahamian DDA having led to the exercise of a jurisdiction by the lower judiciary of a character which had formerly been exercised by judges of the Supreme Court. On the contrary, jurisdiction over drug offences in The Bahamas has historically formed part of the summary jurisdiction exercised by magistrates. Second, since the right to trial by jury is not entrenched in the Jamaican Constitution, the decision in *Hinds* was not concerned with any such entrenched right. Even so, the fact that in that case the Board drew a distinction between serious criminal offences, which formed part of the characteristic jurisdiction of a Supreme Court, and lesser offences which did not, and furthermore that it drew that distinction with reference to the maximum punishment which the inferior court was entitled to inflict, provided a basis upon which the respondents in the courts below were able to build in submitting that the summary jurisdiction exercisable by the Magistrates' Courts under the DDA had become so enhanced over the years that finally it had become an indirect encroachment upon the entrenched right to trial by jury available to those charged on information in the Supreme Court.

Their Lordships approach the matter as follows. Let it be supposed that the jurisdiction to try offences under section 22(8) in respect of substantial quantities of certain specified drugs, together with the power to impose a sentence of imprisonment for life, had previously been vested in the Supreme Court. Let it then be supposed that, by subsequent legislation, jurisdiction over such offences, together with the power to impose a sentence of life imprisonment, had been transferred from the Supreme Court to the Magistrates' Courts. In such circumstances, on the assumption that there was no entrenched right to jury trial where the accused is charged on information in the Supreme Court, the question would have arisen whether, on the principle stated in *Hinds*, the jurisdiction so transferred constituted a significant part of the jurisdiction that is characteristic of a Supreme Court, having regard to the maximum punishment that the inferior court was empowered to inflict. Before the Court of Appeal, it was submitted on behalf of the appellant that jurisdiction in relation to drug offences cannot be said to form a significant part of a criminal jurisdiction exercised by the Supreme Court. To that submission, Henry P. (with whom Melville J.A. agreed) responded as follows:-

"No doubt this is so. But to adopt that approach would, it seems to me, be to open the door to permit piecemeal what cannot in principle be done as a whole."

Their Lordships would go further. As they read the judgment of Lord Diplock in *Hinds* (at page 222), it is to the effect that, where the jurisdiction over the offences in question is exclusively vested in an inferior court, the question whether the jurisdiction so vested is appropriate only to a Supreme Court depends both on the nature of the offence and on the severity of the punishment which can be imposed; whereas where a concurrent jurisdiction is vested in the inferior court, the question depends upon the maximum punishment. It follows that, on the hypothesis that there was no entrenched right to trial by jury in the Constitution of The Bahamas, and that the relevant jurisdiction had then been transferred from the Supreme Court to the Magistrates' Courts, the question under consideration would be whether the offences could be characterised as minor offences and whether the punishment capable of being imposed could be characterised as a minor penalty. If however the jurisdiction so transferred was concurrent with the jurisdiction of the Supreme Court, the question would relate only to the maximum punishment which the inferior court was empowered to inflict. On this approach, their Lordships have no doubt that a maximum sentence of imprisonment for life would inevitably render such transfer of jurisdiction unconstitutional on the principle in *Hinds*. In such a case, the transfer of the jurisdiction would be unconstitutional *per se*, though an additional effect would be that, since under the Bahamian Constitution it is a characteristic of offences charged on information in the Supreme Court that the accused is entitled to be tried by jury, by vesting in the Magistrates' Courts a jurisdiction to try offences which, under the Constitution, are properly triable only in the Supreme Court, the accused would inevitably be deprived of his constitutional right to jury trial.

However, in the opinion of their Lordships, the same infringement of constitutional rights may occur when, instead of the relevant jurisdiction being transferred from the Supreme Court to the Magistrates' Courts, the penalties which the Magistrates' Courts are empowered to impose in the case of offences within their jurisdiction are so increased as to confer upon the Magistrates' Courts jurisdiction which is appropriate only to a Supreme Court. In such a case the principle in *Hinds* is as much infringed as in a case where the relevant jurisdiction is transferred from the Supreme Court to the Magistrates' Courts. Here again, in the opinion of their Lordships, an enhancement of the magistrates' jurisdiction in respect of penalties for possession of dangerous drugs with intent to supply so as to empower the Magistrates' Courts to impose a sentence of life imprisonment would undoubtedly be unconstitutional, and would have the effect also (in the case of the Constitution of The Bahamas) that accused persons would lose the benefit of the entrenched right to jury trial under

Article 20(2)(g). *Prima facie*, therefore, section 22(8) of the DDA, in so far as, in the cases to which it applies, it enhances the maximum sentence capable of being imposed on summary conviction under section 22(2)(b) and section 22(4)(b) to life imprisonment, is unconstitutional and void.

However, as appears in section 22(9) and (10), the Bahamian legislature has sought to escape from that consequence by providing that, where there is a summary conviction in a case to which section 22(8) applies, the magistrate shall commit the convicted person in custody for sentence in the Supreme Court, in which event the Supreme Court may proceed to sentence the convicted person as set out in section 22(8). However, like Hall J. and Campbell J.A., their Lordships do not consider that these provisions can have the intended effect of preventing a constitutional infringement. Section 28(3) of the DDA provides that:-

> "... no person shall in The Bahamas be proceeded against by information for an offence under this Act unless the proceedings are instituted by, or with the consent of the Attorney-General."

It follows that an accused person has, in proceedings brought against him under the Act, no opportunity to elect to be tried by a jury. Such a procedure is to be contrasted with the customary procedure in respect of offences triable either way, i.e. either on indictment or summarily, under which the accused is given the option to elect to be tried by a jury, as under section 210 of the Criminal Procedure Code Act of The Bahamas. In England, the procedure in respect of offences triable either way is set out in sections 17 et seq. of the Magistrates' Courts Act 1980; and section 20 sets out the procedure applicable where summary trial appears more suitable, viz. that the accused person should be given the opportunity, if he so wishes, to be tried by a jury, but that he is to be informed that, if he is tried summarily and convicted, he may nevertheless be committed for sentence to the Crown Court under section 38 of the Act if the convicting court is of the opinion that a greater punishment is called for than it has power to inflict. It is plain that, if a person accused of an offence is given the opportunity to elect to be tried by a jury, there can be no question of the summary jurisdiction over such an offence constituting a constitutional infringement on the principle in *Hinds* nor can there be any question therefore of the accused being deprived of his constitutional right to trial by a jury under Article 20(2)(g) of the Constitution of The Bahamas. But the procedure for remission for sentence to the Supreme Court under section 22(9) of the DDA, which is a far cry from, for example, the procedure under section 38 of the English Magistrates' Courts Act 1980, cannot prevent the constitutional infringement involved in the summary procedure for trial of offences under section 22(8). The

fact remains that the accused has no opportunity to elect for trial in the Supreme Court on information, in which he will be able to exercise his constitutional right to be tried by a jury. On the contrary, he may be compelled to submit to trial before a Magistrate for an offence for which, if convicted by that court, he is liable to be sentenced to life imprisonment, albeit that such sentence may only be imposed on remission to the Supreme Court.

For these reasons, their Lordships are of the opinion that, on the principle in *Hinds*, sub-sections (9), (10) and (11) of section 22 are unconstitutional and void. Hall J. thought that it was possible to preserve so much of sub-section (8) as related to conviction on information, on the basis that there was no constitutional impediment to a simple increase of the maximum penalty on such conviction to life imprisonment. The Court of Appeal, however, took the view that, having regard to the terms in which the sub-section is expressed, it was not possible to achieve such a severance.

The problem of severance where a law is held to be in part inconsistent with a higher law was considered by the House of Lords in *D.P.P. v. Hutchinson* [1990] 2 A.C. 783. It was there considered that, in cases where such a problem of severance arises, "a rigid insistence that the test of textual severability must always be satisfied if a provision is to be upheld and enforced as partially valid will in some cases ... have the unreasonable consequence of defeating subordinate legislation of which the substantial purpose and effect was clearly within the law-maker's power when, by some oversight or misapprehension of the scope of that power, the text, as written, has a range of application which exceeds that scope" (see page 811E-F, per Lord Bridge of Harwich). It follows that the test of substantial severability must now be applied; and this test requires that, when the court must modify the text in order to achieve severance, this can only be done "when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision" (*ibid.*, at page 811G).

With this principle in mind, their Lordships turn to sub-section (8). The sub-section, as drawn, relates both to convictions on information and summary convictions; and it is its application to summary convictions which has resulted in constitutional infringement. However, its application to convictions on information is not inconsistent with the Constitution; and, in the opinion of their Lordships, although the preservation of the sub-section so restricted could not be achieved on a test of textual severability, nevertheless it can and should be achieved on the now applicable test of substantial severability, since reading the sub-section as applicable only to convictions on information would plainly effect no change in the substantial purpose and effect of the sub-section.

Before their Lordships, however, it was strongly argued by the respondents that sub-sections (8) to (11) of section 22 were not the only provisions of the DDA which fell foul of the Constitution on this ground. They drew attention to the fact that, under section 22(2)(b) of the DDA, the penalty which could be inflicted on summary conviction of possession of dangerous drugs with intent to supply was, on a first conviction, a fine not exceeding $100,000 and a sentence of not less than one year and not more than five years' imprisonment. Furthermore, even in the case of the offences of simple possession or importation of dangerous drugs, the penalty which can be imposed on summary conviction has been, since the amendment in 1980 of section 28(2), the provision concerned with penalties for offences for which no other penalty is provided, a fine of up to $5,000 and/or imprisonment for a term of up to five years. It was the submission of the respondents that jurisdiction in a court of summary jurisdiction to impose for such an offence a sentence of five years' imprisonment is contrary to the principle in *Hinds*; and indeed it was their submission that the only sentence which could lawfully be imposed was that applicable in the case of summary conviction when the Bahamian Constitution of 1963 came into force, viz. a fine of up to £250 and/or a sentence of imprisonment not exceeding twelve months.

The respondents also relied, for this purpose, on the scale of a maximum fine which can be imposed under section 22(2)(b), viz. $100,000, as offending against the principle in *Hinds*. Their Lordships are unable to accept this argument, which does not appear to have been raised in either of the courts below. There is no doubt that the power to impose very substantial fines may be conferred on courts of summary jurisdiction. An example is to be found in section 170 of the United Kingdom Customs and Excise Management Act 1979, under which an accused found guilty of the offence of fraudulent evasion of duty is liable, on summary conviction, to a penalty of three times the value of the goods involved, which can of course be a very substantial penalty indeed. Their Lordships do not consider that power in a court of summary jurisdiction to impose a substantial financial penalty as is provided for in section 22(2)(b) in respect of the commission of such an offence as possession of dangerous drugs with intent to supply gives rise to any constitutional infringement.

The power to impose a sentence of up to five years' imprisonment is, however, a different matter. In the Supreme Court, Hall J. considered that power to impose such a sentence constituted the outer limit of the permissible jurisdiction of Magistrates' Courts in The Bahamas. That conclusion would presumably have led to outlawing the seven year sentence which can be imposed on a second or subsequent conviction, which their Lordships understand is not material in the present case. The Court of Appeal, however, disagreed that a sentence

of five years constituted the outer limit. They were satisfied that a power to impose a sentence of five years' imprisonment fell within the permissible limit, but were not prepared to determine for the future what the maximum permissible term of imprisonment would be on summary conviction.

Their Lordships have come to the conclusion that they should not interfere with the conclusion so reached by the Court of Appeal. Their reasons for reaching this conclusion are as follows. First, like the courts below, they reject the submission, which has been advanced on behalf of the respondents, that there is a constitutional proscription against increasing penalties. Second, like the courts below, they take into account the fact that historically the penalties on summary conviction for drugs offences in The Bahamas have been higher than those generally applicable in the case of summary conviction for other offences. Thus, under the first Act concerned with drugs offences in The Bahamas, the Opium Act 1913, the maximum sentence of imprisonment which could be imposed on summary conviction of other offences under the Act was double that generally applicable on summary conviction, viz. twelve months as opposed to six months. This appears to reflect a view held in The Bahamas, long before the coming into force of the Constitution, that drugs offences fall into a special category calling for a higher level of penalty on summary conviction. Third, it appears from the legislative history that there was in the years before 1988 a gradual increase in the applicable penalties for drugs offences. This took place in 1971, 1980 and again in 1986. This policy no doubt reflected the fact that, as is plain from the judgments in the courts below, a serious problem has arisen in The Bahamas with regard to trafficking in drugs, no doubt in part due to the geographical position of The Bahama Islands not far from the coast of the United States - as is demonstrated by the fact that, in the present case, the apprehension of the respondents and the recovery of the very large consignment of cocaine from their aircraft followed upon an air chase involving officers from the United States Drug Enforcement Agency. Even so, until the change introduced in 1988 by the addition of subsections (8) to (11) to section 22, a clear distinction was maintained between summary conviction and conviction on information, with a substantially greater penalty applicable in the latter case.

It is against this background that their Lordships consider the conclusion reached on this point by the judges in the courts below. In considering that conclusion, their Lordships bear well in mind that the question at issue is essentially one of degree, and that questions of infringement of the Constitution are reserved to the judges of the Supreme Court of The Bahamas (see *Hinds* at page 222 per Lord Diplock). In the courts below, both Hall J. (sitting as a judge of the Supreme Court) and Campbell J.A. in the Court of Appeal expressed the opinion that a matter of this kind is "more peculiarly within the knowledge

and experience of the judges and legislators of a particular country at any given time". With that sentiment, their Lordships are respectfully in agreement; and it follows that they regard the conclusion reached on this point by a unanimous Court of Appeal of The Bahamas as entitled to great respect, with which they are most unwilling to interfere unless it is plain that they should do so. In all the circumstances, and taking full account of the submissions advanced on behalf of the respondents, they are not minded to depart from the conclusion reached by the Court of Appeal on this issue.

Their Lordships turn finally to the second issue raised by the respondents, which relates to the legal status of Magistrates' Courts in The Bahamas.

In the Court of Appeal, this was understood to constitute an attack on the constitutionality of the Magistrates' Courts, founded upon the fact that, in Chapter VII of The Bahamian Constitution of 1973, which is concerned with the judicature, provision is made for the Supreme Court and the Court of Appeal of The Bahamas, but (unlike the Constitution of Jamaica which was the subject of consideration by the Privy Council in *Hinds*) no provision is made for any inferior courts, and in particular for Magistrates' Courts. Their Lordships must confess to not having been surprised that the Court of Appeal understood the argument to be directed at the constitutionality of the Magistrates' Courts. Nor were their Lordships surprised that the Court of Appeal briefly dismissed the argument as they understood it, since the Magistrates' Courts in The Bahamas were established in that country long before the Constitution of 1973, or indeed the Constitution of 1963, came into force, and are the subject of legislation dating back to 1896 (The Magistrates Act Ch. 42); moreover, not surprisingly, there are indirect references to magistrates in the 1973 Constitution itself, to which their Lordships have already referred.

Before their Lordships, however, the respondents expressly disowned any attack on the constitutionality of the Magistrates' Courts as such. Instead, relying in particular on the fact that magistrates in The Bahamas have no security of tenure, and that they are categorised in legislation as holders of public offices rather than persons appointed to hold judicial office and in consequence as officers whose appointment is the concern not of the Judicial Service Commission but of the Judicial and Legal Service Commission, it was their submission that magistrates in The Bahamas, since they are not appointed in a manner and on the terms laid down in Chapter VII of the Constitution, may not constitutionally be vested with any of the plenitude of judicial power. In so far as by this expression the respondents intended to assert that a Magistrate's Court in The Bahamas may not exert the jurisdiction characteristic of a Supreme Court, as identified in *Hinds*, their Lordships are prepared to

accept the proposition. But in so far as it was intended to suggest that the Magistrates' Courts are not courts of law and are not lawfully entitled, consistently with the Constitution, to exercise the jurisdiction of inferior courts, their Lordships are unable to accept any such submission. Given the nature of a Supreme Court as described in Chapter VII, there is in their opinion nothing in the Constitution inconsistent with the continuance in existence of Magistrates' Courts in The Bahamas as in the past before the 1973, or indeed the 1963, Constitution came into force. Indeed it is obvious that the Constitution presupposes the existence of inferior courts, exercising summary jurisdiction, such a role having been historically fulfilled in the past by the Magistrates' Courts.

Notwithstanding the powerful argument addressed to them by Mr. Glinton on this point, their Lordships are satisfied that, in the last analysis, the second submission of the respondents adds nothing of substance to their first; and that the true question in the case is whether, on the principle stated in *Hinds*, the impugned provisions of the DDA are in conflict with the Constitution as purporting to vest in inferior courts part of the jurisdiction which is reserved for the Supreme Court as being a significant part of the jurisdiction which is characteristic of such a court. As their Lordships have already indicated, sub-section (8) in part, and sub-sections (9) to (11), added to section 22 of the DDA in 1988 do indeed fall foul of the principle in *Hinds*, and are for that reason unconstitutional and void.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal and the cross-appeal should both be dismissed, and that the decision of the Court of Appeal should be affirmed subject to their Lordships' conclusion that sub-section (8) of section 22 is only void in so far as it relates to summary convictions.