A FEW NOTES ON BODY SEARCHES, WIRETAPS & THE RIGHT TO SILENCE

BODY SEARCHES

1. The Second Schedule to the Jamaica (Constitution) Order in Council 1962 (hereinafter called "the Constitution") provides in Section 19, the foundation of the law governing body searches in Jamaica. Like many of the provisions for Fundamental Rights and Freedoms in the Constitution, this provision is arguably more interesting for the number and nature and of exceptions to the right, rather than for the right itself. The section is set out fully:

> "19. (1) Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises.
>
> (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 makes provision which is reasonably required -
>
> *(a)* in the interests of defence, public safety, public order, public morality, public health, public revenue, town and country planning or the development and utilisation of any property in such a manner as to promote the public benefit; or
>
> *(b)* to enable any body corporate established by any law for public purposes or any department of the Government of Jamaica or any local government authority to enter on the premises of any person in order to carry out work connected with any property or installation which is lawfully on such premises and which belongs to that body corporate or that Government or that authority, as the case may be; or
>
> *(c)* for the purpose of preventing or detecting crime; or
>
> *(d)* for the purpose of protecting the rights or freedoms of other persons."

2. Searches of the person, or "body searches" are allowed by the common law as well as under several pieces of legislation. The Constabulary Force Act is of the widest and most general application, while the Firearms Act and the Dangerous Drugs Act create the offences regarding which these searches are most frequently and particularly encountered by the practitioner and indeed the citizen.

THE COMMON LAW

3. At common law, the police, and indeed any ordinary citizen, may arrest a person, if there is reasonable suspicion, that a felony has been or is being or is about to be committed. In any of these events an arrest or charge or both may be made. (If no felony was in fact committed, and there was no malice involved, the police is protected under section 33 of the Constabulary Force Act, but the ordinary citizen is not, and will be liable in damages for assault and battery and false imprisonment) This power extends to breaches of the peace but it is unclear whether the same is true for misdemeanours, and the better view is that it does not. [see DUMBELL v. ROBERTS [1944] 1 ALL ER 326]

4. Where an arrest, even though no charge, is made, a search of the person conducted either to seize evidence of the crime suspected, or to ensure that the

defendant while held in custody is not in possession of dangerous weapons or other objects, is lawful. According to Palles, CB, in the case of **DILLON v. O'BRIEN AND DAVIS** (1887) 16 Cox CC 245:

> "I, therefore, think that it is clear, and beyond doubt, that, at least in cases of treason and felony, constables, (and probably private citizens) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution. ... I take the only real question upon this defence as being, whether this right (in reference to misdemeanour) has been judicially decided to exist, and no textbook draw the distinction here attempted to be drawn. The matter must therefore be decided on principle. For this purpose I must first ascertain the reason of the rule as applicable to felony ... Its purpose and object, viz, to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the state has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice ... as well as the preservation of material evidence of his guilt or innocence ... His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture. ... It appears to me to be clear that this must be the origin of the right in felony; and that, being derived from the common law, it ought, *prima facie* at least, to be deemed to exist in all cases in which that interest of the State exists ..."

THE CONSTABULARY FORCE ACT

5. Section 15 of this Act provides as follows:

> "It shall be lawful for any constable, without warrant, to apprehend any person found committing any offence punishable upon indictment, or summary conviction, and to take him forthwith before a Justice (of the peace) who shall enquire into the circumstances of the alleged offence, and either commit the

offender to the nearest jail, prison or lock-up to be thereafter dealt with according to law ..."

6. Section 18 provides that:

> It shall be lawful for any constable to apprehend without warrant any person known or suspected to be in unlawful possession of opium, ganja (*cannabis sativa)*, morphine, cocaine, or any other dangerous or prohibited drugs, or any person known or suspected to be in possession of any paper, ticket, or token related to any game, pretended game or lottery called or known as peka peow or drop pan, or any game of a similar nature, and to take him forthwith before a justice of the peace **who shall thereupon cause such person to be searched in his presence.**" (emphasis supplied)

7. Section 19 gives power to the police to stop, without warrant, "any vehicle suspected to be carrying stolen goods" or carrying the things set out in section 18, "and to search the aforesaid vehicle and the driver or any person conveyed therein".

8. Section 15 does not in terms provide for a search of the person, and it was decided by the Privy Council in **HERMAN KING v. THE QUEEN** (1968) 10 JLR 438, that the section (which was then section 18) does not authorize a search as part of the enquiry that the justice of the peace is mandated to make.

THE FIREARMS ACT

9. The Firearms act sets out several circumstances in which the police may do a body search for firearm or ammunition, and the manner in which a search may be

done in each circumstance. Not all of these circumstances envisage a search of the person without warrant. Some of the circumstances in fact allow an arrest without warrant but not a search without warrant, and the person arrested should in some cases be able to insist successfully on being searched in the presence of an independent witness.

10. The first circumstance is under Section 39 **where the police sees** a person carrying a firearm in a public place. The police has the power to seize the firearm or ammunition only if the person refuses or fails to produce a licence or permit for it, or does not allow the police to read the licence or permit. After such seizure, the police then has the power to arrest the person without warrant if the person refuses to declare truthfully his name and address, or if the police suspects that the person has given a false name or address or intends to abscond.

11. But the power to arrest a person without warrant does not automatically mean that the person may be searched without warrant. Such a search is not authorised in this circumstance and the person should properly be taken before a Justice of the Peace or some other independent witness for the search to be fairly done. The person may well deny that he was carrying what the police allege had been seen,

and may very well wish to be searched in circumstances to ensure that nothing is planted on him.

12. The second circumstance is under Section 40 **where the police suspects** that a person is carrying a firearm concealed about his person. Here, the *locus in quo* is not limited to a public place. The police then has the power to ask the person if he is carrying such firearm or ammunition. If the person admits carrying such and then fails or refuses to produce a licence or permit for it, or does not allow the police to read the licence or permit, the police then has the power to seize the firearm and ammunition. The police may thereafter without warrant arrest the person if the person refuses to declare truthfully his name and address, or if the police suspects that the person has given a false name or address or intends to abscond.

13. Again, the power to arrest a person without warrant does not automatically mean that the person may be searched without warrant, and the scenario described in paragraph 11. above is applicable here. Neither does it seem that an arrest without warrant is authorized where the person admits to carrying the firearm and ammunition, and then gives a true name and address, and it is submitted that in this case the person should be arrested only on a warrant.

14. However, if in this second circumstance the person denies carrying what the police suspect he is, the person may be searched and any such thing being carried seized. The section does not require a warrant for this search occurring after a denial.

15. The third circumstance is under Section 42 **where the police suspects** that a firearm or ammunition is being conveyed in a vehicle. The police then has the power to stop and search the vehicle and the driver and any passenger therein. Unlike the sections in the two preceding circumstances, this section does not lay down any detailed procedure to be followed consequent on the suspicion of possession, or the actual finding, of a firearm or ammunition arising from the search. Indeed the section goes silent as to what should happen after the suspicion is formed and the search effected.

16. It is not unusual of course that all occupants of a private vehicle, especially a motor car, are in this circumstance arrested without warrant and charged for the unlawful possession of whatever is found.

17. The fourth circumstance arises under section 43, where the police has or where there is **reasonable grounds for suspecting** "that an offence under [the] Act has been, is being, or is about to be committed." Here, the police may search premises and **persons** thereon, seize any firearm and ammunition found, and arrest without warrant anyone found in possession thereof.

18. It is noteworthy that this is the only section which uses the expression "reasonable ground" in relation to a suspicion, and it is worth considering whether the express mention of the concept in this section impliedly excludes it from, or whether it is nevertheless implied in, the other sections.

THE DANGEROUS DRUGS ACT

19. This act does not itself contain any express power for search of the person. The statute which really authorizes body searches for drugs is the Constabulary Force Act *(supra)*. What the Dangerous Drugs Act does is to describe and define the various drugs and the offences relating to them. Not only is no power of search of the person expressly given by this act, but in addition, while it gives a power of arrest regarding dangerous drugs, this power is circumscribed in a way that the power of arrest under the Constabulary Force Act is not.

20. Thus section 23 of the Dangerous Drugs Act provides:

> "any constable may arrest without warrant any person who has committed, or attempted to commit, or is reasonably suspected by such constable of having committed or attempted to commit, an offence against this act, **if** he has reasonable grounds for believing that that person will abscond unless arrested, or if the name and address of that person are unknown to and cannot be ascertained by him." (Emphasis supplied)

It may be noted by the way that the section says "if". It does not say "if and only if", so the issue is still open whether the formation of reasonable grounds is the only circumstance in section 23 in which an arrest without warrant can be made.

21. It is worth noting, that section 69 the Justices of the Peace Jurisdiction Act confers on a court of summary jurisdiction, the power to order the search of a person who has been ordered by that court on conviction or otherwise to pay a sum of money, or so ordered in the course of proceedings to enforce an earlier order. The section expressly mentions orders for the payment of maintenance to for wife or child. This writer has not practised long enough to experience this power being exercised by any court.

THE ADMISSIBILITY OF EVIDENCE FOUND UPON AN UNLAWFUL SEARCH

22. A very crucial issue for a trial judge often to decide is whether to admit evidence found upon a unlawful search of the person. The search may be unlawful if not

supported by a warrant as required and in terms prescribed by the relevant statute, or if it is not preceded by a state of mind that the common law requires the searcher to have.

23. Although it was not expressly so decided, it is submitted, that there is room for the argument that on the authority of the case of HINDS *(infra)*, the enquiry the justice of the peace is authorized to make does not include embarking upon a search of the person. But on the authority of the same case, evidence found in the course of an unauthorized search would be admissible to support the police that the defendant was found committing the offence in question.

24. In the case of HINDS (*supra)*, the Privy Council authoritatively emphasised that evidence obtained from an unlawful search was admissible as long as it was relevant to the charge laid, but that the decision whether to exclude it on the ground that it was unfairly obtained was squarely within the discretion of the trial judge. In this case, a search of the appellant purportedly upon a warrant issued to the police by a justice of the peace, was held to be unlawful in that the warrant "did not in terms authorize search of any person although it did contemplate the arrest of one person named in the warrant". The Board declared that:

"in these circumstances the search was not on the face of it justified by the warrant nor in their Lordships' opinion can authority for the search of any person be implied from the language of the section without express authorization" (Lord Hodson at p. 441)

25. But the appellant was unfortunate in that the search of his person produced ganja. The argument put on his behalf was summarized as follows:

"(the policeman" admitted at the trial that he knew the warrant was to search the premises (of someone other than the appellant) and that it referred to the search of no-one else. He suspected that the appellant might have had ganja on him and did not offer him the opportunity of being searched in front of a justice of the peace, although he knew of that right as a citizen. It can therefore be said that he should have had the advantage of a search before a magistrate and the choice was never offered to him. The substantial argument on behalf of the appellant was that, in the discretion of the court, the evidence produced as a result of the search, which was the whole of the evidence against him, ought, though admissible, to have been excluded as unfair to him". (Page 443 A – C)

26. The argument was rejected and the Board upheld the decision of the trial judge and the Court of Appeal that the evidence, agreed to be admissible, was fairly admitted.

27. In rejecting the argument for the appellant, the Board relied heavily on the practicalities of law enforcement, and after reviewing decisions from England, Scotland, Ireland, South Africa and Jamaica, either upheld or approved previous dicta tending to establish the following principles:

"It would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means it could not be used against a party charged with an offence." (approving Mellor, J. in JONES v. OWENS (1870) 34 J.P. 759);

"From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict: (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities and (b) the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted on to the uttermost. The protection of the citizen is primarily protection for innocent citizens against unwarranted, wrongful, and perhaps high handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the state cannot be magnified to the point of causing all the safeguards of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods." (approving Lord Cooper in LAWRIE v. MUIR [1950] S.C. 19 at 26];

28. The Board sought to make the distinction between a deliberate trick, in which case evidence obtained thereby would be more readily, but by no means necessarily, excluded; and obtaining evidence through "detection by deception", in which case it would be more readily included. They relied on the case of R v. PAYNE [1963] W.L.R. 637, as an illustration of the former, and the case of R v. MURPHY [1965] N.I. 138, the latter.

"in these circumstances the search was not on the face of it justified by the warrant nor in their Lordships' opinion can authority for the search of any person be implied from the language of the section without express authorization" (Lord Hodson at p. 441)

25. But the appellant was unfortunate in that the search of his person produced ganja. The argument put on his behalf was summarized as follows:

"(the policeman" admitted at the trial that he knew the warrant was to search the premises (of someone other than the appellant) and that it referred to the search of no-one else. He suspected that the appellant might have had ganja on him and did not offer him the opportunity of being searched in front of a justice of the peace, although he knew of that right as a citizen. It can therefore be said that he should have had the advantage of a search before a magistrate and the choice was never offered to him. The substantial argument on behalf of the appellant was that, in the discretion of the court, the evidence produced as a result of the search, which was the whole of the evidence against him, ought, though admissible, to have been excluded as unfair to him". (Page 443 A – C)

26. The argument was rejected and the Board upheld the decision of the trial judge and the Court of Appeal that the evidence, agreed to be admissible, was fairly admitted.

27. In rejecting the argument for the appellant, the Board relied heavily on the practicalities of law enforcement, and after reviewing decisions from England, Scotland, Ireland, South Africa and Jamaica, either upheld or approved previous dicta tending to establish the following principles:

"It would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means it could not be used against a party charged with an offence." (approving Mellor, J. in JONES v. OWENS (1870) 34 J.P. 759);

"From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict: (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities and (b) the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted on to the uttermost. The protection of the citizen is primarily protection for innocent citizens against unwarranted, wrongful, and perhaps high handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the state cannot be magnified to the point of causing all the safeguards of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods." (approving Lord Cooper in LAWRIE v. MUIR [1950] S.C. 19 at 26];

28. The Board sought to make the distinction between a deliberate trick, in which case evidence obtained thereby would be more readily, but by no means necessarily, excluded; and obtaining evidence through "detection by deception", in which case it would be more readily included. They relied on the case of R v. PAYNE [1963] W.L.R. 637, as an illustration of the former, and the case of R v. MURPHY [1965] N.I. 138, the latter.

29. In PAYNE, the appellant was expressly told by the policeman that he was being taken to a doctor to see if he suffered from any illness or disability, and not to see whether he was unfit to drive. The appellant agreed to be examined and the doctor testified at his trial that the examination showed him to be unfit to drive because of drink. The appeal was allowed and the conviction quashed.

30. In MURPHY, a soldier was court-martialled for subversive activities, on the evidence of police officers who posed as members of the subversive organization. His conviction was upheld by the Courts-Martial Appeal Court, and it was said that there is certainly:

> "no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it as old as the constable in plain-clothes ..." (Per Lord McDermot, L.C.J.)

31. The Board also held that the Constitutional prohibition against unlawful search of the person did not change the common law position. In a dictum which really takes the view that the constitutional provision merely declares the common law, it was held that:

> "This constitutional rights may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such

enshrinement or simply upon the common law as it would do in this country (England). In either event the discretion of the court must be exercised, and has not been taken away by the declaration of the right in written form."

32. Although the issue of search of the person arose only peripherally on the facts, and was dealt with only *obiter*, in the case of **DANHAI WILLIAMS ET AL v. THE ATORNEY GENERAL OF JAMAICA** (1994) 31 JLR 605, brings into perspective, and shows a practical application of, the decision of the Privy Council in the case of HERMAN KING case.

33. In DHANAI WILLIAMS' case, challenges were mounted against search warrants issued under section 203 of the Customs Act. They were issued to search for evidence to support allegations of customs fraud and tax evasion. They were challenged mainly on the grounds that, first, no information on oath was given to the justice of peace, which could justify the issue of the warrant, hence the warrants and all action thereunder were bad and section 19 of the Constitution was violated; and secondly, that they did not conform to the requirements of section 203.

34. The Court of Appeal, reversing the Constitutional Redress Court, held that warrants issued under section 203 of the Customs Act for the search of premises

exceeded the terms of that section and were therefore invalid. WRIGHT, J.A. (at page 8) found that "there was such a departure from what section 203 authorizes that it may be said that in preparing the warrant the draftsman was on a frolic of his own". The result was that the search conducted thereunder, and resultant seizure of documents and material not sanctioned by the act, were held to constitute trespass and detinue, and the assessment of damages for these torts was remitted to a judge of the Supreme Court.

34. In this case the warrant was drafted also to cover a search of persons. The relevant section of the Customs Act does not empower such a search. In the Court of Appeal, WRIGHT, J.A. restrained himself from ruling on the lawfulness of the search provisions of the warrant. He addressed the matter in this way:

> "(Counsel) submitted that the authority to search the place includes authority to search persons as well. No authority was cited for this proposition, but he added as a caveat that if the warrant authorizes the search of the persons but in fact there was no such authority, then the warrant would not be bad but the search of the person would be illegal. Since there was in fact no search of person, it is not necessary to resolve the illegality thereof." (at pages 610, I – 611 A)

35. Considering the principles applied to reach the decision that the warrant breached the relevant section, and considering the practical consequences the breach was held to have, two things needed to be made clear. One was whether, if a

search of the person had been done under the warrant and impugned in court, the search would have been held unlawful. The other was whether any material, found by the police during any unlawful search of the person, and found by the court to be admissible evidence, would have been allowed in evidence. In an express approval of the HERMAN KING proposition in this regard, WRIGHT, J.A. made both issues clear in the affirmative.

> "Although there was a trespass the police are entitled to retain to be used as evidence any item which qualify to be so used because once the evidence is relevant it is immaterial how it was obtained ... though of course what use could be made of the evidence is subject to the overriding power of the court to exclude evidence despite the fact that it is relevant. By this the prosecution ought to have decided what items are required as being of evidential value, and it would be appropriate to return to the appellants all items which are not so required. The claim in detinue can relate only to those items which are not so required which have been detained unnecessarily." (at page 615, C - D)

36. The case is of more than passing importance to the practitioner of human rights and criminal law in how their Lordships took much effort to provide a clear picture of how the court sees the practicalities and workability of conditions like "reasonable suspicion" and "reasonable grounds". Dealing with this ground of challenge, WRIGHT, J.A. stated that (page 609, F *et. Seq.)*

> "Regarding the first objection, the contention is that there is an absence of the information which was supplied on oath to the justice to justify the issue of the warrant. To so insist is to be guilty of misreading the section. "information on oath" is a term of art for the document sworn to before a justice of the peace when he is requested to issue a warrant. ... What is required is first that the

officer shall have reasonable cause to suspect etc and that this "be made to appear before any Resident Magistrate or justice" by way of information on oath. The section is not dealing with the production of evidence, matters are at the 'reasonable – cause – for – suspicion stage'. I agree ... that there is no requirement for the justice to make an assessment of the officer's reasonable cause to suspect and to satisfy himself before issuing the warrant. ... There is no such requirement in the instant case for the justice to satisfy himself nor that that fact should be stated in the warrant. However, since the section, by stating that "it should be lawful for the resident magistrate or justice etc" gives the authority issuing the warrant a discretion, there was nothing to prevent him asking questions of the officer before acting as the section enables."

37. FORTE, J.A. concurred with these views of his brother, and took the effort to put them in his own words (page 618, A – C and G)

"There is no requirement under the section that the information on oath be in writing nor is there any set or formal procedure by which the justice of peace determines whether to issue his warrant. The informations exhibited do show that the customs officer swore on oath that he had 'good reason to believe' that uncustomed goods were kept or concealed in the several premises. The search warrants issued aver that the justice of the peace who issued them did so 'on being satisfied upon written information on oath that there is good reason to believe etc'. Although it is clear in the statute that it is the customs officer who has to have 'reasonable cause to suspect' it is equally clear in my view that he (the customs officer) has to make it appear to the justice that he (the customs officer) had reasonable cause to suspect. If it does not appear to the justice of the peace that the officer had 'reasonable cause' then he ought not to issue the warrant. In coming to that conclusion, it is inescapable that the justice would also have to apply his mind to the matters upon which the officer's cause for suspicion is based and / or the credibility of the officer ... (and continuing at page 24): in the instant case the information on oath stated simply that the applicant – 'hath good reason to believe' without giving the basis for that belief. It would not have been incorrect however for the justice of the peace to make enquiries of the applicant in order to satisfy himself to the requisite standard that the applicant had reasonable cause to suspect that uncustomed goods etc were concealed in the stated premises. There is no evidence in that regard, but the warrants were

issued so on the face of it, it did appear to him that the applicant had 'reasonable cause to suspect' ... The Justice of the Peace .... Cannot be a 'rubber stamp' for the application for a warrant, but must satisfy himself that the information presented to him on oath makes it appear that the applicant has reasonable cause to suspect."

THE RIGHT TO SILENCE

38. The right to remain silent in the face of accusations of criminal conduct is commonly referred to as the "right to silence". This right flows from Section 20 (5) of the Constitution which provides that:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:
>
> Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts."

39. A defendant's right to silence arises mainly at the stages of being confronted with allegations of criminal conduct; being arrested; being charged and cautioned; and being tried. At every stage, it is the consequence of the defendant's exercise of the right that falls for examination, and the consequence is usually either that adverse inferences as to his guilt may or may not be drawn from the silence.

UPON CONFRONTATION

39. Broadly speaking, the basic principle that may be distilled from the case law is that silence in the face of an accusation, made by an accuser who is on equal terms with the accused, is admissible to show the guilt of the accused; but that such an accusation made by an accuser who is in authority over the accuser, is not. An ancillary principle of importance seems to be that an accusation made in the absence of the accused, and merely related to him by someone else, is not so admissible.

40. In **HALL v. R** [1971] ALL E.R. 322, the police confronted the accused with an accusation made in his absence by a woman that a bag in which ganja had been found was brought onto the premises by him. The accused remained silent. The Privy Council, in reversing the Jamaica Court of Appeal, held that the silence was not admissible as evidence of his guilt, even if the accused had first been cautioned by the police. The Privy Council however ruled that in exceptional circumstances an adverse inference may be drawn from silence in the face of an accusation of guilt.

41. In **R v. DONALD PARKES** [1974] 12 JLR 1509, the Jamaica Court of Appeal, applying a dictum of CAVE, J. in R v. MITCHELL (1892) 17 Cox C.C. 503 at 508, held that where the accuser and the accused were on equal terms, silence in the face of an accusation was admissible to show guilt. In this case (PARKES'), the

mother of the deceased asked and repeated to the accused the question: "what she do you why you stab her?" and at both times he said nothing. At trial, he said that he did not respond because "he did not know what she was speaking about". The Court of Appeal ruled that the evidence of his silence was admissible, and the Privy Council (in **DONALD PARKES v. R** (1976) 14 JLR 260) agreed. The dictum of CAVE, J. relied on was as follows:

> "now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly when persons are speaking on even terms and a charge is made, and the person charged says nothing, and express no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true."

42. This dictum was set out by the Privy Council, as it was by the Court of Appeal, and expressly approved.

43. It was accepted by both the Court of Appeal and the Privy Council, and should be noted, lest one concentrates too much on the issue of 'silence', that the silence of the accused may be broken not just by his words, but also by his conduct and demeanour. In PARKES both appellate courts relied heavily on the fact that the

accused when confronted by the mother, stabbed at her, and the Privy Council cited the dictum of Lord Atkinson in R v. CHRISTIE [1914] A.C. at page 554] that:

> "He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to acceptance of it in the whole or in part."

44. In **R v. DERRICK LATTY AND HERNARD SMITH** (1988) 25 JLR 119, the accusation against the accused was first made to the police by a civilian in the absence of the accused, and then repeated in the presence of both the police and the accused. The Jamaica Court of Appeal held that the silence of the accused was inadmissible, and quashed the conviction. In so doing, it laid down the applicable principle in terms as brief as they are comprehensive:

> "It is made abundantly clear in *Donald Parkes V. R.* that the only circumstances in which mere silence can give rise to the inference of an admission of the truth of a charge, is where the accuser, and the accused are so circumstanced that no police officer or other person in authority charged with the investigation of the crime, is, to the knowledge of either of the parties, present, or within hearing distance and the accusation is spontaneous, that is to say, not made for and on behalf, and on the promptings of a police officer or other person in authority aforesaid."

45. The unreported case of **R v. HAZEL GRANT** delivered by the Jamaica Court of Appeal on March 19, 1990, identified the superiors of an employee of a bank as

"persons in authority" over her. While the direct issue of silence did not arise, the conviction of the accused was upheld even though the evidence of what transpired during the 5 hours of questioning by the persons in authority was successfully impugned on the grounds of oppression.

46. In **KERWIN WILLIAMS AND MELBOURNE BANKS v. R** (1994) 31 JLR 315 the stage and purpose of the investigation by the police, and the spontaneity of the statement to which there was silence, were held to be relevant factors whether the silence in the face of an accusation was admissible.

47. The applicant KW made a statement before the police and the co-accused MB that "a dat bwoy carry me go round deh go kill the people dem". The co-accused remained silent. Both accused were taken to a doctor who told them that they had nothing to fear from the police while in his presence and that if they had any complaint they should voice them, whereupon KW said: "this idiot bwoy carry me and get me in trouble." It was submitted that the silence of MB should be inadmissible because KW had not been cautioned when he made the accusation.

This was rejected (page 321):

> "Learned Crown Counsel argued correctly ... that the time for a caution to the applicant had not arrived because the officer was still on a fact finding mission.

> He also pointed to the obvious fact that the response to his intimation was a spontaneous outburst by the applicant."

The court (at page 320, E – H) approved dictum in R v. OSBOURNE [1973] 1 ALL E.R. 649 that the Judge's Rules:

> "contemplate three stages in the investigations leading up to somebody being brought before a court for a criminal offence. The first is the gathering of information, and that can be gathered from anybody, including persons in custody provided they have not been charged. At the gathering of information stage no caution of any kind need be administered. The final stage, the one contemplated by r3 of the Judge's Rules, is when the police has enough (and I stress the 'enough') evidence to prefer a charge. ... But a police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer a charge. He reaches a stage where he has got the beginnings of evidence. It is at this stage that he must caution."

UPON ARREST

48. Although it is commonly seen in statements by the police that (commendably) they cautioned the accused at the point of arrest, and before charge was laid, that he need not say anything etc, the constitutional right to the presumption of innocence and therefore the right to silence, seems to exclude, or at least does not expressly include, the stage between being arrested and being charged. The Judge's Rules operate here, and it becomes a matter of fairness, to be determined by the trial judge in his discretion, whether admissions made should be admitted.

49. The ground of exclusion of admissions at this stage is usually presented in the much overworked submission that the probative value of the admission is outweighed by its undue prejudicial effect.

UPON BEING CHARGED

50. The Judge's Rules require that after being charged the defendant be cautioned. It is ironic that the first words of the customary caution are that the defendant "need not say anything", when one issue that may arise later is whether an adverse inference should be drawn from the defendant's failure to say something after caution. Indeed, trial judges routinely, and it is submitted wrongly, castigate defendants for not doing exactly what the caution says he does not have to do.

51. What the defendant in fact states after this caution is sometimes carefully scrutinized by the trial judge and counsel. Where appropriate, defence counsel usually seek to show that such statement demonstrates an initial version of the facts which is consistent with the evidence or unsworn statement given at trial; while the prosecution counsel usually seek to identify in it, inconsistencies with the evidence or unsworn statement given at trial. When asked by counsel while taking instructions, very few defendants in Jamaica admit to having been cautioned before being charged, and many even express surprised ignorance as to what a caution is.

52. It is at this stage too, that the court often expects that the defendant will naturally abandon his silence and tell the police about, and show available evidence of, any offence committed against him in the course of the transaction from which the charge arises. As a matter of practical utility, counsel should endeavour to have this matter covered by instructions if relevant, and the instructions should include the reaction of the police. It is not unusual for a defendant to say that when, for example, he told the police about being assaulted or wounded and showed the police the bruise or cut, he was told to tell that to his lawyer, or to tell that to the Judge. Counsel should also endeavour at trial to confront, or "put to", the police, the instructions on this matter, to avoid the impression of recent fabrication on the part of the defendant when he testifies to same in his evidence or unsworn statement.

AT TRIAL

53. The right to silence at trial becomes relevant when the defendant has to decide whether to say anything at all, and if the decision is to say something, from where to say it. Counsel owes a duty to the defendant to advise of the right and option to say nothing at all, or to give sworn evidence from the witness box where he can be cross-examined, or to make an unsworn statement from the dock where he cannot be cross-examined. Counsel owes a corresponding duty to himself to have written acknowledgement from the defendant that the advice as to, and the implications of,

each option was given. The importance of this duty, by counsel to the defendant, is demonstrated by the fact that the court has a duty so to advise an unrepresented defendant, and invariably does so. Some judges, especially Resident Magistrates, and sometimes because of the state of the evidence, will, even obliquely, remind counsel to do so, and so remind counsel in a manner which suggests, in case counsel had missed it, what is in the best interest of the accused.

54. The value of the options to say nothing or to make to an unsworn statement from the dock is largely determined by the comments that a trial judge may make to a jury, and by the negative impression that may be formed by a jury on its own accord, or by a trial sitting alone, from the failure of the defendant to give sworn evidence.

55. In this regard, Section 9 (b) the EVIDENCE ACT prohibits the prosecution from making comments on the failure of the defendant to give sworn evidence. This prohibition, it is worthy to note, does not apply to defence counsel or co-defendants. Defence counsel may wish to anticipate and counter in advance the "Walker" (*infra)* directions that the trial judge may be expected to give the jury on that failure. Co - defendants or their counsel may wish to make comments where justified, especially and usually where the co-defendants advance competing or commonly called "cut-throat" defences.

56. It seems to be now accepted, that such statement given by the defendant from the dock is not evidence. Trial Judges routinely say this to juries in Jamaica, without challenge on appeal. The issue now is really the extent to which the trial judge can criticize the defendant for not giving evidence, and the comments and directions that should be made and given as to the usefulness or value of such a statement.

57. The current law is that the judge should be restrained in such criticisms and comments. In **REGINA v. WAUGH** [1950] A.C. the Judicial Committee of the Privy Council in England, on an appeal from the Jamaica Court of Appeal, disapproved comments by the trial judge to the effect that it was essential that the defendant give evidence and be cross-examined on it.

> "It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence, but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comments"

58. In **CARL BRISSETT v R** (1994) 31 JLR 584, the Privy Council quashed the conviction for murder on several grounds including that the learned trial judge was wrong to direct the jury in terms that:

> "Now, if he had given evidence there (in the witness box), I could ask or Crown

> Counsel could ask, 'open you mouth let the jury have a look and go there, go up there to the jury, open your mouth"

A witness had testified as part of the identification evidence, that the perpetrator had such teeth.

59. Whenever an accused in Jamaica makes an unsworn statement before a jury, he may safely anticipate what the judge will tell them about his statement. This is because the directions that the trial judges by and large now use in Jamaica were directly laid down by the Privy Council, on the specific request of the Jamaica Court of Appeal, in the case of the **DPP v. LEARY WALKER**, (1974) 12 JLR 1369.

60. The Privy Council saw the invitation it received from the Jamaica Court of Appeal in this way:

> "The Court of appeal has indicated that it would be in the public interest if this Board were to give some guidance on the 'objective evidential value of an unsworn statement' by an accused, since it has been for some time the standard practice in Jamaica to keep the accused out of the witness box." (Per Lord Salmon at p 1373, B – C)

61. Noting that in the instant case the appellant could not have been properly

acquitted on the grounds of self defence even if everything the accused said in his unsworn statement was true, the Board responded to the invitation in this way:

> There are, however, cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

WIRETAPS

62. The Constitution does not expressly prohibit them, but it provides the starting point for analysing the legal implications of "wiretaps", meaning essentially the interception of and eavesdropping on communication over the telephone. The relevant provision is also set out in full. Is the wiretap, however, not really mere "interception", and if it is, does that, in law or logic, necessarily mean "interference"?

Maybe there is here, a lot of room for an agile mind to use the possible meanings of "interference", which may of course change over time, as a platform to perform semantic gymnastics.

> "22. - (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from **interference with his correspondence and other means of communication**. (emphasis supplied)
>
> (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 makes provision -
>
> (a) which is reasonably required -
>
> (i) in the interests of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or
>
> (b) which imposes restrictions upon public officers, police officers or upon members of a defence force."

63. The legality of a telephone wire tap made by the police in the investigation of a criminal case arose in **MALONE v. COMMISSIONER OF POLICE OF THE METROPOLIS [No. 2]** [1979] 2 ALL ER 620, where MEGARRY, V.C., sitting in the Chancery Division of the High Court of England, delivered at first instance a judgement which is still regarded as the *locus classicus* on the issue.

64. Malone, the Plaintiff, was being tried for receiving stolen goods; and a warrant was issued by the Secretary of State, on the application of the police, for his telephone to be tapped. The warrant was sent to the post office which made the tap, recorded the conversations, and sent the recordings to the police. These facts were revealed to the plaintiff by Crown Counsel during the trial. Malone responded by suing the police. He sought declarations that the tapping of his telephone and the disclosure of the recordings was unlawful; that he had rights of property, privacy and confidentiality in the respect of the telephone conversations and the tap was a breach of those rights; that the crown had no authority under statute or at common to tap telephones.

65. In rejecting the claims of the plaintiff, the court laid down the following principles:

(a) there was no right of property in words transmitted along telephone lines;

(b) there was in English law no general right of privacy nor a particular right of privacy to hold a telephone conversation without molestation;

(c) No one who overheard a telephone conversation had a duty to respect its confidentiality;

(d) The police were entitled to tap a telephone by methods which did not involve trespass, if there was just cause or excuse in the public interest to do so. There had to be grounds for suspecting that the tapping would materially assist the police in their functions relating to crime, the material obtained should not b used for any other purpose; and a minimum of persons should be involved in the process.

66. The nature of the use that may be made of information obtained by a wire tap may be seen, by analogy, in the case of **HELLEWELL v. CHIEF CONSTABLE OF DERBYSHIRE** [1994] 4 ALL E.R. 473, where the concern was the taking of the plaintiff's photographs at a police station in connection with offences alleged against him. The plaintiff subsequently learnt of plans to disseminate his photographs, and he sought declaratory reliefs and an injunction to restrain the police from doing so.

67. The plaintiff's claim was struck out on the ground that the defendant had

successfully launched a public interest defence which overrode any claim of confidentiality that the Plaintiff had in the photographs. Support for the rejection of the claim was taken from the MALONE case. (at page 479 , F)

> "The better analysis is in terms of the public interest defence, which is always available where the facts support it against a confidence claim. The short point, at all events, is that common sense and law alike dictate that the police should be subject to no legal sanctions if they make honest and legal use of a suspect's photograph in the fight against crime. I take Megarry, V.C. to be of the same view in *Malone* ... which was concerned with telephone tapping. Where the use made of such photographs lies within these bounds, the police will have a public interest defence brought against them to any action brought against them for breach of confidence.

68. But while HELLEWELL was unsuccessful, it is clear that wire taps made not by the police, nor presumably, by agents of the state, may be impugned for being in breach of the confidentiality of the person eavesdropped on.

69. This principle was demonstrated in the case **FRANCOME v. MIRROR GROUP NEWSPAPERS LTD** [1984] 2 ALL ER 408, where the plaintiff sought an injunction to restrain the defendant from publishing conversations between he and his wife, which conversations tended to implicate him, as a jockey, in certain breaches of the rules of racing and indeed in criminal offences. These conversations were the product of wire taps made not by the police nor by the defendant itself. The injunction was granted and this was upheld in the Court of Appeal. There, Sir John Donaldson,

M.R. (at page 411, D – F) distinguished *Malone* in these terms:

> "The Defendants accept that the Plaintiffs may have various causes of action against the eavesdroppers but rightly say that this is not directly relevant. They go on to say that the plaintiffs have no right of action against them. So far trespass was concerned, they were not parties to it. This may well be right. They go on to say that there is no cause of action against them or the eavesdroppers for breach of an obligation of confidentiality. The authority for this rather surprising proposition is said to be *Malone.* Sufficeth to say that sir Robert Megarry expressly stated that he was deciding nothing on the proposition when tapping was effected for purposes other than the prevention, detection and discovery of crime and criminal or by persons other than the police. This is thus a live issue."

70. In Jamaica, the present practice regarding wire taps made by or on the request of the police or other agents of the state, so far as is publicly known, or so far as has been publicly reported, if not indirectly attributed to the Minister of National Security and Justice, is that:

> "an application is made to the Attorney General, who in his discretion must deem that it is reasonable for the purpose stated. The request is then passed to the prime minister for final judgement. Approval must also be given by the telephone company, and limitations are placed on the number of persons involved so that the process is not misused." (See THE SUNDAY OBSERVER newspaper of March 19, 2000, page 3)

71. There is no ascertainable statute law under which wiretaps are effected in this country. It could hardly be said in Jamaica, as it was in MALONE where no written

constitution was involved, that the wiretap may be carried out without breaching any law, and therefore, on the principle that everything was permitted except that which was expressly forbidden, did not need any law to authorize it. It is submitted that subject to the "existing laws savings clause" in the Constitution, wiretaps are unlawful here as there is no law which authorizes it.

72. The aforesaid newspaper report quoted the Minister of National Security and Justice as addressing a graduating class of regional drug enforcement officers at the Caribbean Regional Drug Law Enforcement Training Centre, to say that the government is studying a draft of an act, the INTERCEPTION OF COMMUNICATIONS ACT which will be laid before parliament next year. The main proposal is that applications will made *ex parte* before a Judge in Chambers who will stipulate a time limit for the wire tap. This would be a welcome removal of such a sensitive issue from the control of the political directorate.

INTERNATIONAL HUMAN RIGHTS REMEDIES

73. Actual and perceived breaches of the provisions of the Constitution regarding body searches, the right to silence and wire taps may be litigated in the international arena. Jamaica still is for the time being, and has since August 7, 1978 been, a party

to the AMERICAN CONVENTION OF HUMAN RIGHTS (ACHR) of 1969. While Jamaica has accepted the jurisdiction of only the INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, and not to the more powerful INTER-AMERICAN COURT OF HUMAN RIGHTS, the jurisdiction of the Commission is hardly invoked to challenge any breach of human rights except those suffered by death row inmates. [It is this lack of use that may have allowed the Jamaican Government to withdraw as it did from the jurisdiction of United Nations Human Rights Committee, and to do so with the tacit support of the majority of Jamaicans, who saw the withdrawal as a way of more quickly hanging murderers, in much the same way as they now see the imminent removal of the jurisdiction of the Privy Council]

74. Article 44 of the ACHR governs *locus standi* in these terms:

> "Any person or group of persons, or any non-governmental legal entity legally recognized in any one or more member states of the organization, may lodge petitions with the Commission, containing denunciations or complaints of violation of this Convention by a State Party".

75. Article 46 sets down the basic requirements for the admissibility of a petition, which are essentially that: subject to certain exceptions, internal remedies under domestic laws must have been exhausted; the petition must be presented within six months of the date when the party was notified of the final judgment of the local court; and the subject of the petition must not be pending before another international

tribunal.

76. Relevant to the issue of wire taps, is Article 11 which provides that:

> (2) no one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation. (3) Everyone has the right to the protection of the law against such interference or attacks.

77. In MALONE, it was advanced for the Plaintiff that a provision in the EUROPEAN CONVENTION ON HUMAN RIGHTS, securing the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers", should be applied by the court, or used as an aid to interpret the English common law. This was expressly rejected on the ground that the convention had not been legislated into domestic law, and so the court had no instrument before it that could either be interpreted itself or use as an aid to interpretation.

78. Maybe that submission was just about 20 years before its time. By the HUMAN RIGHTS ACT 1998 (HRA), the English courts are required to respect and if appropriate apply the rulings of the European Court, which presumably will not be timid to declare the provisions of the Convention as enforceable in the domestic laws

of member countries. Section 2(1)-(3) of the HRA provide, inter alia, that:

> "(1) A Court or tribunal determining a question which has arisen in connection with a Convention right must take into account any:
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights ..."

79. In the case of **X AND Y v. NETHERLANDS** (1986) 8 E.H.R.R. 235, it was held that member states are required to take positive action to enforce the provisions of the Convention, which was not merely a negative document forbidding breaches of the rights contained therein. In terms of reform, it goes without saying that in Jamaica, we are in the business of either abandoning or imposing time tables on international human rights tribunals; not more tightly embracing them. The arrival of the Caribbean Court of Justice will not change this – only the departure of the death row population will. We are not likely to see here, any equivalent of the English HRA.

80. Regarding body searches, it should be noted that the Convention does not specifically prohibit unlawful searches of the person, and does so only indirectly in Article 7 (3) which says that "no one shall be subject to arbitrary arrest or imprisonment". (The absence of a specific prohibition against body searches is to be contrasted against the presence of specific clauses granting the right to vote, to a

name, not to be enslaved, and not to be imprisoned for debt except "duties of support".)

81. Regarding the right to silence, Article 8 (2) provides that "every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law". Presumably, "proven according to law" includes a plea of guilty which is expressly covered by the Constitution.

DONALD A. GITTENS
MAY 7, 2000

CORRECTIONS, COMMENTS AND SUGGESTIONS, WHETHER OR NOT MADE AT THE SEMINAR WHERE THIS PAPER IS PRESENTED, ARE INVITED TO BE SENT TO THE WRITER AT 62 DUKE STREET, KINGSTON OR 14 PARK CRESCENT, MANDEVILLE, MANCHESTER, OR E-MAILED TO jamlex"cwjamaica.com