THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2015-03229

BETWEEN

RYAN RENO MAHABIR

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr. A. Ramlogan SC leads Ms. J. Lutchmedial and Mr. Pariagsingh instructed by Mr. K. Samlal for the Claimant

Mr. F. Hosein SC leads Mr. R. Hector, Ms. R. Hinds and Ms. L. Sukhan instructed by Ms. L. Thomas for the Defendant

JUDGMENT

1. The background facts to this case are as follows.

    (1) The Claimant and one Police Constable Justin Charles were at all material times members of the Police Service of Trinidad and Tobago and thus servants, and or agents of the Republic of Trinidad and Tobago. On the 27th May 2015 the Claimant was charged with three offences namely corruptly accepting the sum of Fifteen Hundred dollars ($1,500.00) as a reward for forbearing to prosecute Michael Lewis for the offence of driving a vehicle while his breath alcohol level exceeded the prescribed limit; perverting the course of public justice in concealing potential evidence being two (2) breathalyser certificates, and perverting the course of public justice by making a false entry in the Caroni Police Station Diary with the intention of

falsifying potential evidence which could have shown the offence of corruptly accepting the sum of Fifteen Hundred dollars ($1,500.00). Perverting the course of justice is a scheduled offence S. (5) (5) (b) (ii) of the Bail Amendment Act 2015.

(2) At that time of the alleged commission of the offences, both officers were armed with firearms issued by the Trinidad and Tobago Police Service.

(3) The claimant was granted station bail by a Justice of the Peace at the Caroni Police Station.

(4) On the 28th May 2015, the claimant's station bail was revoked by His Worship Magistrate Aden Stroude. He was remanded into custody.

(5) On the 1st June 2015 the claimant reappeared before Senior Magistrate, Her Worship Joanne O'Connor at the Chaguanas Magistrates' Court. He was granted bail.

2. It is noteworthy that:

(a) At the material time, the police officers were on duty and armed with their lawfully issued service firearms.

(b) There is no allegation that their firearms were used in the commission of the offences for which they are charged.

(c) Two Magistrates in the same case interpreted the relevant provisions of the Bail Amendment Act differently. Magistrate Stroude found that the claimant fell squarely within the ambit of S.5 (5) (b) (ii) and was therefore ineligible for bail.

(d) One week later Magistrate O'Connor granted bail on the basis that the claimant had in his possession a lawfully held firearm as opposed to an unlicensed firearm. It appears from the submissions of Counsel for the claimant that the magistrate also considered that there was no allegation that a firearm was used in the commission of the offence.

(e) It is also convenient to state here too, that in the course of his submissions Mr. Ramlogan referred to a report of a case in which the Chief Magistrate Mrs. Ayers Ceasar in similar

circumstances granted bail to six police officers who appeared before her. This was not disputed by the defendant.

3. Against this background the claimant asked for a determination by this court as to whether the relevant Section 5 (5) (b) (ii) of the Bail Amendment Act No.7 of 2015 should be interpreted so as to insert the word "unlawful" to qualify the possession of the firearm and for consequential modification of the text to protect persons in the position of the claimant and others who are entitled by law to carry arms for purposes connected with the execution of their duty. Counsel claimed that such persons were not the intended targets of the amendment, that the intention of parliament was to deal with and penalize persons who are terrorizing citizens with the use of illegal guns.

4. The claimant's application was supported by an affidavit of Inspector Anand Ramesar, Inspector of Police and President of the Trinidad and Tobago Police Social and Welfare Association (TTPS), which is the bargaining body of members of the TTPS. This body represents some 7500 officers.

5. Inspector Ramesar indicated that this matter is of grave concern to the membership since they are all entitled to carry firearms. The automatic deprivation of bail in circumstances where an allegation is made of the commission of a scheduled offence while quite co-incidentally an accused officer happens to be in possession of a licenced firearm, has caused disquiet, protest and objection. He said that as a result police officers have been demoralised, demotivated and worried that while they are performing their duties even allegations maliciously made, expose them to loss of liberty because they happen to be armed while on duty.

General effect of S. (5)

6. Section 5 (5) (b) (ii) of the Bail Amendment Act No. (7) amended S. 5 of the Bail Act of 1994. A person to whom it applies is ineligible for bail in the first instance for 120 days. Judicial discretion has been removed. If no evidence is taken during that first 120 day period, the prisoner may make an application to a judge for bail. If the prosecution begins its case within the 120 day period, but the trial is not completed within one year from the date of the reading of the charge, the prisoner is entitled to apply for bail. The provision can fairly be described as draconian, and no doubt from government's perspective justifiably so, having regard to the crime situation in the country and the proliferation of gun use in the commission of violent crime.

The Legislative provision

7. Section 5 (5) (b) (ii) provides:

> ***"(5) Subject to subsections (2), (6) and (7), a Court shall not grant bail to a person who –***
>
> ***(a) ….***
>
> ***(b) On or after the commencement of the Bail (Amendment) Act 2015, is charged with an offence –***
>
> ***(i) Under Section 6 of the Firearms Act, where the person has a pending charge for an offence specified in Part II of the First Schedule; or***
>
> ***(ii) Specified in Part II of the First Schedule, except an offence under Section 6 of the Firearms Act, where the prosecution informs the Court that the person or any other person involved in the commission of the offence used or had in his possession a firearm or imitation firearm during the commission of the offence".***

The Claimant's case

8. The claimant recognised that His Worship Magistrate Stroude gave effect to the plain and ordinary meaning of the words of the section as he was entitled to do. The magistrate had been informed that the claimant had a firearm in his possession during the alleged commission of the offence. The claimant's case was that in applying the literal rule, however the learned Magistrate exposed a defect in the drafting. The draftsman had failed to limit the scope of the sub-section to persons who were in unlawful possession of a firearm.

9. Mr. Ramlogan submitted further that the failure of the draftsman to make a distinction between illegal firearms and lawfully issued ones, such as the claimant's, resulted in an absurdity. At once, officers such as the claimant are authorised and required to carry arms and they are unfairly exposed to the draconian effect of the section by virtue of the very fact.

10. Mr. Ramlogan invited me in the face of this absurdity to look, on the authority of ***Pepper v Hart [1993] A.C. 593***, at the parliamentary record in Hansard to determine the intention of the legislature. Counsel cited certain parts of the speeches of the promoter of the bill, the then Honourable Attorney General, Mr. Garvin Nicholas, which clearly disclosed the mischief aimed at, and which he claimed supported the construction prayed for by the claimant.

11. Counsel also submitted that on the authority of the **Inco Europe Ltd v First Choice Distribution [2000] 2 All ER 109**, I should correct the obvious drafting error that was identified. From the use of Hansard I could be sure that the draftsman had failed to give effect to Parliament's intention and I could be sure of the provision Parliament would have made had the error been noticed. This involved merely the insertion of the word "unlawful" in the appropriate place,

between "had" and "in his possession". This small modification would cure the defect and make plain that bail is only to be denied to individuals in unlawful possession of a firearm during the commission of an alleged offence.

The State's case

12. Mr. Hosein for the State on the other hand commended the application of the literal rule by Mr. Stroude. He said it produced no ambiguity or inconsistency nor did an interpretation that allowed for the plain and ordinary words used by Parliament result in an absurdity. There being no real ambiguity or absurdity he said that I should limit myself to an objective reading within the four corners of the legislation without resort to external aids.

13. The law did not permit reference to external materials when there was no obvious drafting error. In the circumstances neither **Inco** nor **Pepper v Hart** principles applied. Counsel emphasised however, that if I did consider it appropriate to look to extrinsic sources for the intention of Parliament, the Hansard did not support the claimant's case on legislative intent.

14. Mr. Hosein submitted that the fact that 5 (5) (b) (ii) covers police officers did not render the plain meaning, absurd. The fact that they (officers) consider it oppressive and demoralizing is not a reason to invite the courts to change its scope.

15. To assist me to understand the legislation in context and to support an informed approach, Mr. Hosein provided a comprehensive overview of the relevant provisions of the Bail Act which was originally enacted in 1994, together with all amendments which spanned almost twenty years leading up to the 2015 provision in issue here.

16. He contended that what could be gleaned from it was that there had been regular oversight by Parliament on the bail legislation generally. The number of amendments between 2001 and 2015 evinced a responsiveness to the changing social environment and the worsening crime situation. There was a discernible trend. Parliament had been steadily expanding the categories of cases in which persons would be ineligible for bail. In the circumstances he appealed for judicial restraint. Any interference which frustrated the express intention of Parliament to continue the trend could amount to judicial legislation.

The Cabinet Note

17. It is perhaps convenient to deal with this issue at this juncture. On the 20th April 2016, after the hearing had closed and shortly before the original date for decision in the matter, the State filed an application to introduce further evidence, consisting of a Cabinet Note and Minute dated 19th January, 2015 and 22nd January 2015 respectively. It was to assist in the interpretation exercise in the event I decided to look externally to determine the intention of Parliament.

18. Counsel for the claimant strenuously opposed the application. The objection was raised because there had not been either before or during the substantial hearing, any indication to the court that a request had been made for the Cabinet Note. From the evidence it turned out that the request had been made to the Chief Parliamentary Counsel since January 2016.

19. Mr. Ramlogan expressed grave concern as to the source of the note, issues of immunity, privilege and confidentiality, the delay in the making of the application and the production of the documents, and the absence of any explanation for the tardiness. Counsel also queried whether a "Cabinet Note" qualified as "parliamentary materials" since a Cabinet Note was purely an executive policy document. Mr. Ramlogan urged caution, because no legal authority had been

produced by Counsel for the State to support its application for the use of a Cabinet Note. In response Mr. Hosein would only say that the State had authorised the waiver of privilege and confidentiality and that the documents were produced, albeit at a late stage, in the discharge of the State's ongoing duty of disclosure.

20. I heard the application and indicated that I would rule in the course of my judgment. Having considered it I have decided to admit the materials into evidence. The concerns so forcefully expressed by Mr. Ramlogan are legitimate. I am however prepared to rely on State Counsel's authority to waive privilege and confidentiality. But the delay in making the application as well as the failure to make timely disclosure that a request for the documents had been made did cause a further hearing. I accept that the novelty of the application would have caused the claimant to incur further costs. In the circumstances I think an award of costs to the claimant on the application in any event would be appropriate.

Analysis

21. The first question to be determined is whether there is any ambiguity in the language of the section or whether a purely literal construction results in an absurdity. These are not necessarily mutually exclusive questions as this case shows there is sometimes a measure of overlap.

22. Two magistrates have construed the provisions very differently. In addition, it has been reported and it has not been denied that the Chief Magistrate herself, in a similar matter involving six police officers who were on duty and armed, did indeed grant bail. It has not been suggested that the magistrates are acting capriciously. This state of affairs signals that there is something in the provision which requires clarification, some obscurity which must be removed.

23. In the case of **Chief Adjudication Officer v Foster [1993] AC 754**, Lord Bridge of Harwich found in similar circumstances of a difference of opinion in the courts below, that that factor alone, was sufficient to establish that the words to be construed were "undoubtedly ambiguous". I find similarly that S. 5 (5) (b) (ii) is ambiguous.

24. I have found too, that a plain reading of S. 5 (5) (b) (ii) exposes what I consider to be an obvious drafting error, but it was not the one identified by Mr. Ramlogan. And while I arrived at my conclusion quite independently of the Hansard or the Cabinet Note, I found when I did look at them that they confirmed my finding. But before I expand on that I shall indicate why I have rejected the claimant's construction.

25. The legislative history provided by Counsel for the State demonstrated that Parliament has consistently since the amendment of 2007 maintained a distinction in all references between persons in possession of firearms without licence (illegal firearms in the claimant's case), and persons who while they are in possession of firearms, use them to commit specified offences. In the case of the latter there has been no qualification or requirement of the firearm being "illegal" or the possession being unlawful. When the amendment 5 (5) (b) (ii) is viewed in context it simply maintains the position consistently with the earlier trend, for obviously good reason.

26. A brief summary of the history is helpful both in this regard as well as in relation to the drafting error identified by the court, and discussed later on. (para. 30)

The Bail Act No. 18 of 1994 provided at S. 5 (2)

> *(1) A court shall not grant bail to a person who is charged with an offence listed in Part II of the First Schedule and has been convicted on three separate transactions*

….listed in that part, unless on an application to a Judge he can show sufficient cause why his remand in custody is not justified.
Part II of the First Schedule on specified offences referred to (b) **possession and use** of firearms or ammunition with intent to injure as one of those offences listed.

(2) *Subsequent amendments to Bail Act in particular the Schedule which referred to those offences for which bail was restricted for example the amendment in Act 32 of 2005 where Part II was followed with a new PART III schedule of violent offences adopted the old part II offence of (b) **possession and use** of firearms or ammunition with intent to injure but placed it under the violent offences schedule.*

(3) *The 2007 Amendments Acts No.10 of 2007 and 15 of 2007 made further amendments to the schedule by repealing Part II and substituting a new Part II and including a Part III which in essence retained the (e) **possession and use** of firearms or ammunition with intent to injure offence and for the first time included the offence of (f) **possession of a firearm or ammunition without license, certificate or permit** so that the offences for which bail was restricted now included the later offence.*

(4) *The 2008 amendment, Act 17 of 2008 in essence maintained the separate scheduled offences distinguished in the 2007 amendments i.e., Part III (e) **possession and use** of a firearm or ammunition with intent to endanger life and (f) **possession of a firearm or ammunition without license, certificate or permit.***

(5) *Act No. 22 of 2011 introduced further amendments in particular for our purposes Section 5 (9) A court shall not grant bail to a person who is charged with an offence listed in paragraph (b), (c) or (d) of Part III of the first schedule if the offence involves **the use of a firearm**….*

(6) *A further amendment was made in 2014, Act No. 1 of 2014 which repealed Part II and III and replaced them with a new Part II Specified Offences.*

> *In 2015, Act & of 2015 amended Section 5 again as follows: Section 5 is amended by putting in (b) (ii)*
>
> *(5)Subject to subsections (2), (6) and (7), a Court shall not grant bail to a person who -*
>
> *(b) on or after the commencement of the Bail (Amendment) Act, 2015, is charged with an offence –*
>
> *(ii) specified in Part II of the First Schedule, except an offence under section 6 of the Firearms Act, where the prosecution informs the Court that the person or any other person involved in the commission of the offence* ***used or had in his possession a firearm*** *or imitation firearm during the commission of the offence.*

27. What seems clear is that consistently with its previous forms, the provision above, has once again maintained a distinction between possession of a firearm without license under S (6) of the Firearms (that is unlawful possession simpliciter) Act, and possession of a firearm, (with no qualification of lawful or unlawful possession) where a firearm is used in the commission of an offence.

28. A perusal of the above also establishes that only in the 2015 amendment is the phrase "**use or had**" expressed disjunctively as opposed to possession and use of a firearm in the commission of an offence.

29. The failure to distinguish between a legal or illegal firearm in the context of the history does not lead to an absurdity as submitted by the claimant. It has only to be stated, to be rejected that persons (including police officers) who have been lawfully issued firearms, but use them to commit scheduled offences should escape the ambit of the section. Such an interpretation would

itself result in an absurdity. And while the concerns of the Association as to false allegations are no doubt genuine, and perhaps justifiable, I daresay that equally and perhaps more so, innocent citizens must also share similar concerns about malicious and false charges. This cannot be a sufficient reason to defeat the clear intention of Parliament.

The Drafting error

30. In my opinion, the ambiguity which is evidenced by the inconsistency of approach of the Magistrates and the absurdity, is caused by the appearance of the disjunctive "or" between the words "used" and the words "had in his possession a firearm during the commission of the scheduled offence". I pointed out above (para. 28), that this appeared for the first time in the 2015 amendment which is under consideration here.

31. What has followed from the insertion of the word "or" instead of a phrasing using the conjunctive "and" to indicate possession and use of a firearm, is a hopeless struggle as can be seen from submissions of both sides in this case, to create two strands out of what can only logically relate to one transaction.

32. Simply put, one cannot use a firearm if one does not have it in one's possession. The provision expressly covers, in addition, persons involved in the commission of the offence, that is, those who are not necessarily the ones with the gun, but who are present and who participate when a gun is used in the commission of a scheduled offence. So insofar as the principal, the person who uses the gun is concerned, it would have to be in his possession. If possession "simpliciter" was the mischief aimed at, then there would be need to introduce the element of use.

33. It appears to me the section intended to make the use of a firearm in the commission of an offence an aggravating feature and that was the single object. It was intended to capture persons including police officers who used their lawfully issued firearms in the commission of scheduled offences.

34. I am fortified in my view that the draftsman's error was in using "or" instead of "and" in relation to use and possession of firearms because the legislative history provided by in the submissions of the State shows that consistently throughout its history, beginning with the principal Act in 1994 the words, "use and possession of firearms" have always appeared conjunctively.

35. Left in its present form without amendment, the application of the literal meaning will continue to yield irrational results. So for example if A and B are charged with scheduled offences arising out of separate incidents but identical facts and A is the holder of a lawfully issued firearm while B is not, A is caught by the section and deprived automatically of his right to bail so long as he was in possession of the firearm at the time. This is so even if the firearm was never used, its existence was not known to the victim. B on the other hand is entitled to bail or at least to a hearing before a magistrate. This I consider to be an absurd result. It seems illogical that A and B should in such circumstances be treated differently.

Extrinsic Materials/Intention of Parliament

36. I have considered the submissions and find that both **Pepper v Hart and Inco** conditions are satisfied to allow the use of Hansard as well as the belatedly introduced Cabinet Note. While the latter has been identified by Mr. Ramlogan as a statement of pure legislative policy as opposed to "parliamentary material", the learned authors of Bennion p. 862 have said:

> ***"In interpreting an enactment the court may refer to a line of government policy which Parliament clearly had in mind when framing the enactment".***

37. Both the Cabinet Note and the Hansard confirm the intention of the legislature. The excerpt of the AG's speech in promoting the bill and the Note are almost identical in their content in so far as they indicate the Hon. Attorney General, Mr. Garvin Nicholas said:

> ***Today we ask members of this Honourable Senate to go one step further, that is first to deny bail for 120 days to a person charged with possession of an unlicensed firearm where the person has a pending charge for an offence specified in Part II of the First Schedule. Secondly, to deny bail for 120 days to a person who is charged for an offence specified in Part II of the First Schedule and used a firearm in committing the offence.***

38. Similarly, paragraph 7 of the Cabinet Note dated 19th January 2015 –

> ***The purpose of the Bail (Amendment) Bill, 2015 is twofold. First, a person who is charged for possession of an unlicensed firearm, and who has a pending charge for an offence specified in Part II of the First Schedule, is not entitled to bail, but if no evidence is taken within one hundred and twenty (120) days of the reading of the charge, then the person is entitled to apply to a Judge for bail. Secondly, a person who is charged for an offence specified in Part II of the First Schedule (these are serious offences which carry a penalty of ten or more years of imprisonment) and used a firearm in committing the offence, the person would be denied bail, but if no evidence is taken within one hundred and twenty (120) days of the reading of the charge, then he is entitled to apply to a Judge for bail. This approach was also taken in the Bail (Amendment) Act, 2008 (Act No.17 of 2008), the Bail (Amendment) Act, 2011 (Act No. 9 of 2011) and the Bail (Amendment) Act, 2014 (Act No.1 of 2014).***

39. In the Cabinet Minute of 22nd January 2015 the words "use or possession" appear as opposed to "use and possession". I do not view this as indicating any considered shift in policy. It appears to be yet another error. Both statements confirm the 5 (5) (b) (ii) was meant to capture

"possession and use" and that in directly addressing the issue, no distinction was made between legally issued guns and unlawful firearms. I am confident that had the error been pointed out, Parliament would simply have arrived at a formulation of words which preserved possession and use conjunctively.

40. The section is therefore modified to read -

> ***"(5) Subject to subsections (2), (6) and (7), a Court shall not grant bail to a person who –***
>
> ***(a) ….***
>
> ***(b) On or after the commencement of the Bail (Amendment) Act 2015, is charged with an offence –***
>
> > ***(iii) Specified in Part II of the First Schedule, except an offence under Section 6 of the Firearms Act, where the prosecution informs the Court that the person or any other person involved in the commission of the offence had in his possession and used a firearm or imitation firearm during the commission of the offence".***

41. As I said before this was not the construction advocated by the claimant. Mr. Hosein submitted that in the event that I rejected the claimant's case, I could go no further and find for any other construction. I cannot agree with this submission. It seems only sensible that this being a matter of judicial interpretation, the Court's jurisdiction should not be so circumscribed.

42. The sole objective in statutory interpretation is to arrive at legislative intention. Having done so and especially having found that the draftsman failed to give effect to Parliament's intention, I could not leave the matter there. That would only allow the ambiguity and absurdity

to survive this application. There would be every likelihood that magistrates would continue to apply the law inconsistently, leading to unequal justice. Persons who were not intended to be targets of this far reaching provision, would be at risk of losing their liberty for substantial periods of time. Persons who were intended targets could escape its application.

43. On this point Mr. Ramlogan provided the authority of **The Queen (on the application of Gene Gibson) v Secretary of State for Justice [2015] – EWCA Civ. 1148.** The Court in that case rejected the applicant's construction of the legislative provision but proceeded to modify it in terms which accorded with its own finding as to the intention of Parliament. This decision accords with common sense and endorses the important role of the court in statutory interpretation

Costs

44. I have rejected the construction claimed by the claimant as well as that advocated by the State. This case did however raise a matter of importance with implications for the justice system, the liberty of the subject, the protection of the public. The claimant's application afforded the occasion to clarify the law. I therefore award 60% of the claimant's costs on the substantive claim fit for Senior Counsel and one junior and instructing attorney. On the application for the admission into evidence of the Cabinet Note, the defendant shall pay the claimant's costs of the application fit for senior counsel. Costs are to be assessed in default of agreement.

Dated the 20th day of May 2016

CAROL GOBIN

JUDGE