REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV 3475 of 2015

IN THE MATTER OF THE BAIL ACT CHAPTER 4:60 OF THE LAWS OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN

DANIELLE ST. OMER

Applicant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

Before The Hon. Madam Justice C. Gobin

Appearances:

Mr. K. Scotland leads Mr. R. Morgan
instructed by A. Watkin for the Claimant

Mr. F. Hosein S.C., Mr. R. Ramcharitar,
Ms. T. Toolsie instructed by Ms. L. Almarales,
Ms. S. Ramoutar for the Attorney General

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV 74 of 2016

IN THE MATTER OF THE BAIL ACT CHAPTER 4:60 OF THE LAWS OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN

JUSTIN STUART CHARLES

Applicant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

Before The Hon. Madam Justice C. Gobin

Appearances:

Mr. A. Ramlogan S.C., Mr. G. Ramdeen,
Ms. J. Lutchmedial instructed by
Mr. K. Samlal for the Claimant

Mr. F. Hosein S.C., leads Ms. S. Sukhram,
Mr. E Jones instructed by Mr. S. Julien,
Ms. R. Ragbir for the Attorney General

JUDGMENT

1. In these cases the claimants challenged the constitutionality of S 5 (5) (b) (ii) of the Bail (Amendment) Act 2015. The Act was passed into law on 29th April 2015. It lapsed on 15th August 2016. By the close of the hearing of the matters on 27th July 2016, there were signals that the government may not have been able to secure the support of the opposition to extend the life of the legislation beyond the sunset date and that in those circumstances the issues raised in this litigation would have been rendered academic. Counsel for the parties nevertheless agreed that the court should proceed to consider and to rule on them because of the public importance of the issues and for the determination of the core question as to whether it is constitutional for Parliament to legislate for the denial of bail, albeit for a period of 120 days in the first instance.

2. S 5 (5) (b) (ii) provided:-

(5). (1) Subject to subsection (2) and (4), a Court may grant bail to any person charged with any offence other than an offence listed in Part I of the First Schedule.

(2) A Court shall not grant bail to a person who is charged an offence listed in PART II of the First Schedule and has been convicted-

- ***(a) on two occasions of any offence arising out of separate transactions; or***
- ***(b) of any combination of offences arising out of a single transaction, listed in that Part.***

(5) Subject to subsections (2), (6) and (7), a Court shall not grant bail to a person who 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, <u>where the prosecution informs the Court that the person of any other person involved in the commission of the offence used or had in his possession a firearm or imitation</u> firearm during the commission of the offence." and

(12) For the purposes of this section, except subsection (5) (a), where a person is charged with an offence listed in Part II of the First Schedule and evidence has been taken within one hundred and twenty days of the reading of the charge but the trial is not completed within one year from the date of the reading of the charge, that person is entitled to make an application to a Judge for bail."

3. In **Ryan Reno Mahabir v. The Attorney General CV 2015-03229** an application for construction of S.5 (5) (ii) (b) at paragraph 40 page 16 this Court ruled that the S. 5 (5) (2)(b) was to be modified as follows:

"(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 <u>had in his</u>

possession and used a firearm or imitation firearm during the commission of the offence"

The general effect of S 5 (5) (b) (ii)

4. Section 5 (5) (b) (ii) of the Bail Amendment Act No. (7) was contained in the last of eleven amendments to the Bail Act 1994. Persons who fell within the ambit of the provision as did the claimants, were ineligible for bail in the first instance for 120 days. If no evidence was taken during that first 120 day period, the prisoner was entitled to make an application to a judge for bail. If the prosecution began its case within the 120 day period but the trial was not completed within one year from the date of the reading of the charge, the prisoner was entitled to apply for bail.

5. The factual matters which gave rise to these two claims demonstrate how the law operated to deny bail to two differently circumstanced individuals. Both were charged with specified offences under Part II the schedule to the Act which listed a number of serious offences. Both had previously clean records.

P.C. Justin Charles

6. On Saturday 2nd May 2015 P.C. Charles, a police officer since 2013, was on patrol duty in the St. Helena area at about 3.00 am. P.C. Ryan Mahabir was the driver of their marked police vehicle. The claimant said they came upon Michael Lewis at the St. Helena Gas Station. There was a conversation, in the course of which, they asked why he was there at that time and P.C. Mahabir warned him of the offence of loitering. The claimant made it known that his

father was an Inspector of Police Archie who had trained them. He said the officers had let power go to their head, but he knew how to fix that. Following this exchange P.C. Charles said they watched Mr. Lewis go to his van and drive away. They subsequently returned to the station and P.C. Mahabir made a routine entry in the station diary.

7. In an affidavit filed in response to the claimant's, the charging officer P.C. Rampersad gave a very different account of P.C. Charles's and P.C. Mahabir's encounter with Mr. Lewis. The latter had reported shortly after their interaction that the officers had stopped his vehicle, subjected him to two breathalyser tests and claimed that he was over the legal limit. He was asked to get into the back seat of the vehicle with P.C. Mahabir, who then asked him to pay some money to avoid the charge and he gave $700.00 to him. At this time the claimant was standing outside the vehicle with a machine gun in his hand. The officers subsequently took him to an ATM where Mr. Lewis withdrew and paid a further $800.00.

8. On 25th May, 2015 the officers were arrested. P.C. Charles was charged for perverting the course of justice and for receiving a bribe. On both accounts, it was accepted that at the material time the claimant and P.C. Mahabir were in possession of their service issued weapons. The claimant was first granted bail by a Justice of the Peace but this was revoked when he appeared before Magistrate Stroude on 28th May 2015. He was subsequently granted bail when he appeared before a different Magistrate.

9. Both informations were attached to the affidavit of P.C. Rampersad. Neither charge mentions the use of a firearm. P.C. Rampersad referred to several statements made by the virtual complainant in his report, but none of them was attached. No written statement from Mr. Lewis was produced which alleged that P.C. Charles actually used a firearm in the commission of the alleged offences. More importantly, the endorsements at the back of the informations do not reflect any note that the Magistrate was informed by the Prosecutor as required by S 5 (5) (b) (ii) that the claimant used a firearm in the commission of the offence. There is no statement even in these proceedings that the claimant actually did so. The bare statement that the claimant was standing outside with a machine gun in his hand without more did not necessarily bring him within the section, but that would have been a matter for the prosecutor and the Magistrate.

10. It was therefore not unreasonable to assume, as the claimant alleged, and the State did not deny, that the claimant was automatically denied bail or was thought to have been caught by the amendment simply because he happened to have been in possession of his service weapon at the material time.

Danielle St. Omer

11. Danielle St. Omer is a young woman of 21, she is a student at ROYTEC studying for a business management degree. Her case is that on 16th July 2015 she happened to be spending the night for the first time, at the home of her boyfriend D.C. at Rock City Circular, Upper Erica Street, Laventille. Police

raided his home and "let go a barrage of gunshots," forcing her to hide under a bed and to fear for her life. She emerged when the bullets stopped and police entered the house. She claimed that no ammunition, no gun, no marijuana was found on her. She was merely a visitor to the premises and had no control over them.

12. The police response was contained in an affidavit of P.C. Natasha Williams. Prior to 16th July, the officer had what she considered to be credible information, that D.C. and his brother B. C. were gang members. On the night in question a group of some 20 officers went to the home of D.C. to execute a warrant. When they announced that they had come to execute a warrant, verbal threats to the police were made by a male voice from within the house. This was followed by shots from inside, then an exchange of gunfire. Two police officers were injured.

13. The police "breaching team" eventually managed to gain entry. D.C. and B.C., Ms. St. Omer and an older gentleman were inside. A search was conducted. It produced some marijuana, a firearm and one round of .38 ammunition. D.C. had six prior convictions recorded from the year 2010 including, for insulting language, possession of an offensive weapon and robbery with aggravation. B.C. had one conviction.

14. The State does not dispute that Ms. St. Omer had a clean record. She was charged with several offences – including possession of a firearm with intent to endanger life, shooting with intent to endanger life, possession of a

dangerous drug. In the circumstances, she fell under the amendment and was automatically denied bail. P.C. Williams had no evidence to lump her together with the alleged gang members. Ms. St. Omer, unlike them had no previous convictions but under the law she was treated no differently.

The Claims

15. Both claimants were remanded to prison and alleged unlawful deprivation of their liberty, suffering and humiliation, made worse by appalling conditions at the respective police stations and in both remand facilities. Each filed a claim for a declaration that the provision was unconstitutional in that it automatically deprived them of their liberty, their right to reasonable bail for a period of 120 days and that it was not reasonably justifiable in a democratic society under S. 13 (1) of the Constitution. They alleged that insofar as the amendment removed the traditional jurisdiction of the Court generally to grant bail which was preserved in the 1994 Bail Act, it breached the separation of powers.

16. S.13 (1) provides

> ***"an act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections (4) and (5) and if any such act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has proper respect for the right and freedom of the individual."***

17. It establishes that Parliament can pass laws which seriously curtail fundamental rights and freedoms with a specially required three fifths majority of all

members voting in each house. The Bail Amendment Act 2015 was unanimously passed in the House of Representatives and with 27 votes in the Senate. On the face of it the Act declared its provisions to be inconsistent with S. (S) (4) and (5) of the Constitution. To the extent that these things were done, it was compliant with the Constitution.

18. The sole question for determination in the proceedings therefore, was whether the provision was shown not to be reasonably justifiable in a democratic, society that is one that has a proper respect for the rights and freedoms of the individual.

The burden of proof

19. The burden of proof under S 13 (1) challenge is on the claimant. What does a claimant need to do to discharge the burden? Bereaux J.A. pointed out in **Barry Francis, Roger Hinds v. The State C.A. Nos. (5) & (6)/2010** that there are circumstances in which very little evidence is required. Legal principles and societal norms are sufficient. The burden of proof in these circumstances would be little more than "procedural" as **Gubbay C. J.** described it in **Nyambirai v National Social Security Authority [1996] 1 LRC 64.** In my opinion in these circumstances the claimants needed to show no more than the law operated to deprive them of their liberty while it deprived the court of jurisdiction in the matter. The matters having been raised, a rebuttal from the State was required.

The Evidence of the State

20. On the main issue, affidavits were filed by Mr. Keith Reneaud, Director, Office of Law Enforcement, and Mr. Stephen Williams, the Commissioner of Police (Ag). Mr. Reneaud produced substantial volumes of papers and studies, essentially to establish the gravity of the current crime situation, to explain its origins and the reasons for its growth, the sociology of it, and the policy behind the bail legislation.

The papers annexed were: -

(i) The 2011 paper by the Council on Hemisphere Affairs entitled Illicit Drug Trafficking;
(ii) The 2013 Report by the Committee on Young Males and Crime in Trinidad and Tobago – (The Ryan Report) which was commissioned by the Government.
(iii) The Scott Drug Report
(iv) The Coup Commission Report
(v) Gangs, Guns and Governance – by Dorn Townsend of the Small Arms Survey, General a 2009 report on the challenges posed governance by guns and gangs in Trinidad.

21. The State also produced Revised Hansard Reports for the period 1994 to 2015 which recorded debates which included contributions made by the respective promoters of the original Bail Bill and all the subsequent amendments as well as those which related to the 2011 Anti-Gang legislation. The Hansard Reports provided the background that explains the thinking behind the actions of successive Attorneys' General which resulted in and informed the policy behind legislation, the effect of which was to progressively increase the curtailment of

the right to bail. The policy has been consistent through successive governments formed by different political parties and alliances. The Hansard importantly contextualised the introduction and the implementation of increasingly hard measures.

22. The State's evidence which sought to explain the response of Government must be viewed in the context of what continues to be a disturbing reality which threatens our national security and the safety and welfare of our citizens. The several papers and reports attached to Mr. Reneaud's affidavit provided well researched and insightful theories and conclusions about the reasons for the exponential growth of the crime problem and the correlation between the trade in firearms, illicit drugs and more recently criminal gang activity.

23. Mr. Reneaud laid out the history of the Bail Act 1994. It initially implemented a four strike rule which shifted the onus to the accused to show cause where he or she had four previous convictions within the 10 preceding years for certain specified serious offences (paragraph 29). He went on to point out that the legislation has been consistently reviewed since 1994. He stated:

> ***"in an attempt to tailor the bail system to deal effectively with the challenges posed by rising levels of violent offence and repeat offenders the Act has been amended a total of 11 times. Many of these amendments have introduced "Sunset Clauses" whereby the legislature has tried particular approaches for limited periods of time and has sought to assess their effectiveness in addressing the levels of criminal activity in the country."***

24. The successive amendments reduced the number of strikes to four, then three, then two, then one until it implemented provisions denying bail in respect of persons charged with serious offences, kidnapping in 2003, gang offences in 2011 and the 2015 amendment, the subject of these proceedings in relation to gun charges. He said (para 32): -

> ***"In 2015, these restrictions on bail were extended to persons charged with possession of an unlicensed firearm with a pending charge for the commission of a specified offence and also to those charged with a specified offence who used a firearm in the commission of the said offence.***

25. Finally, as to the justification for the policy – he said in **paragraph 33 of the affidavit of Keith Reneaud filed on 17th May 2016: -**

> ***"a holistic look at these amendments over time reveals a recognition by the Legislature that a more restricted system of bail is required for specific offences, due to the seriousness of their nature and their potential for having a deleterious effect on society. In this regard, the normal system of bail has been viewed as allowing repeat offenders to continue their criminal behaviour after their release on bail, especially where the accused is released in a short period of time after being charged. Furthermore, there is an evolving pattern which has been apparent for some time namely that witnesses and suspected informants are intimidated or murdered. This is particularly so in instances when members of gangs are granted bail after being charged for firearm or gang offences. This not only reduces the rates of conviction but has resulted in a general under-reporting of crime and a reluctance of victims to give evidence. In particular, many of the amendments have been targeted toward offences committed with the use of firearms and have***

<u>been implemented as a means of arresting the increasing levels of firearm violence within the country."</u>

26. Mr. Stephen Williams, Acting Commissioner explained what law enforcement is dealing with on the ground. I shall cite several paragraphs of his affidavit filed on 13th May 2016 because I think they indicate the magnitude of the problem: -

(10) There is a direct linkage between the importation of illegal firearms and narcotics. Illicit firearms frequently accompany shipments of narcotics into the country. The challenge however is that whilst most shipments of dangerous drugs stay very briefly within our borders, firearms and high powered weapons which enter alongside them, remain long after the narcotics have left our shores. Illicit firearms which arrive with drug shipments enter into circulation locally and are traded amongst criminal elements as a tool to support drug operatives, human trafficking, the commission of robberies, kidnappings and murders fuelled by drug deals gone awry, and in strengthening the armoury of existing gangs in their turf wars and their perpetuation of criminal activity.

(12) Despite a general increase in the number of firearms seized per annum, firearms continue to account for rising levels of violent crime in society. Firearms remain the predominant choice of weapon used in the commission of murders and other violent offences such as wounding, shootings and robberies. For example, in 2009 there were 507 murders of which 364 were committed with the use of a firearm. That represented a total of 71.4% of all murders. In 2010, the number of murders committed with the use of a firearm rose to 75.3% even though the murder rate fell from 507 to 473 in 2010. In 2013, firearms accounted for 78.4% of all murders committed in Trinidad and Tobago, whilst in 2014, the figure stood at 75.3%. Levels of firearm violence in Trinidad and Tobago now stand as the

highest in the Caribbean, with 81% of all murders in 2015 committed with a firearm.

(13) In 2011, the Firearms Act was amended to increase the penalties for certain offences committed with the use of a firearm or prohibited weapon. Notwithstanding the increase in penalties however, the number of persons arrested and charged as being in possession of a firearm has generally increased since 2011. In other words, the increase in penalty for firearm offences has therefore not served as a deterrent to committing such offences.

(14) Possession of firearms and the commission of violent offences with the use of firearms present the greatest challenge to policing in Trinidad and Tobago and to the maintenance of law and order. Firearms related violence is the most crucial factor which influences the public's perception of crime and the fear of crime. In this regard, it is clear that the strategies and actions implemented over the years, have not resulted in any significant impact on the level of firearm violence in the country. The Police Service's number one priority for 2016 is the reduction of firearm related violence, particularly shootings, woundings and murders. It is envisaged that this will be achieved through the strengthening of key specialist units including the CGIU and the OCNFB, along with greater monitoring of points of entry and coastal areas, increasing stop and search exercises, supported by a hotspots policing strategy. Furthermore, the imposition of bail conditions and restrictions on the grant of bail in respect of firearm offences go a long way in reducing the incidence of firearm violence in society.

27. Mr. Williams dealt with the correlation between the demand for firearms and gang culture: -

(17) The use of illegal firearm and specifically high-powered weapons are particularly prevalent amongst gang members. In addition, the increase number of gangs and gang related activity in the country has fuelled an increased demand for

illegal firearms and sophisticated weapons. Intelligence from the CGIU suggests that gangs are acquiring grenades and submachine guns. Rival gangs use these weapons to protect their territory and narcotics trade, to engage in violent conflict to increase their dominance, and to intimidate and take revenge on those who oppose them. Gang-related members ate the most common motives for the murders in Trinidad and Tobago. As of 2014, gang related murders accounted for 35% of all murders. This percentage has remained fairly steady with 33.6% of all murders in 2015 being gang-related. As of April 30, 2016 there have been 49 gang related murders in the country.

Repeat offenders

(18) In many instances, criminal activity is targeted against persons who are suspected to be informants to the police, victims who have come forward and reported offences to the police, witnesses who are assisting the police in their investigation, investigating officers within the Police Service and also prison officers. Continued criminal activity therefore threatens to completely undermine successful prosecution and to subvert the entire criminal justice system. Where the criminal justice system fails and there are unsuccessful prosecution, the result is that criminal elements feel free to operate with little risk of being held accountable by law for their action.

(20) There is a clear link between the importation and distribution of drugs and firearms and the need for the gangs to protect these activities. Furthermore, this had endangered an increase in firearm-related murders. One major initiative in reducing all of these activities is to monitor the persons who are involved in them. This upsurge in crime has resulted in the need to increase the manpower requirements. Furthermore, the restrictions on bail contained in several Acts of Parliament between 1994 and 2015 is just one limb of a multi-faceted strategy to reduce the incidence of violent crimes.

28. The matters contained in the Commissioner's affidavit though alarming were not entirely surprising. But the sheer scale of the problem that he disclosed and the notable absence of any hint of success so far of the multi-faceted strategy to control crime, regrettably did little to reduce the sense of hopelessness of the population. Indeed, what does not appear on the affidavits of either Mr. Reneaud or Mr. Williams is any data which indicates how the curtailment of bail through amendments over the past has actually impacted on the crime situation.

29. It is clear from Hansard Reports that over the period that successive governments have all had to grapple with the problem of serious crime, increasing gun violence, murders, repeat offenders and the rise of gang culture. At some time or other since 1994 all Attorneys General have promoted the curtailment of individual rights for the greater good of the security and safety of law abiding citizens. Indeed the record shows that successive regimes in debating the issue recognized that the legislation which progressively imposed greater restrictions on the right to bail, breached the fundamental rights guaranteed by the Constitution. All appeared to accept that the state of affairs which was only worsening, required draconian measures and this is what legislators were seeking to effect. A conscious decision was taken by our lawfully elected representatives to pass the legislation. They were acting within the limits of the Constitution when they voted so to do.

30. So for example on Friday 18th July 2008 then Hon. Attorney General – Mrs. Brigid Annisette George said in relation to the amendment that was then before the House:

> ***"The Bill before us this afternoon seeks to further those goals. Our legal system strikes a balance between, on the one hand, the principle that no one shall be deprived of his liberty unless and until his guilt is proved and on the other hand, the wider societal interest that persons accused of criminal offences should not easily avoid trial.***
>
> ***Our Constitution guarantees the right of an accused to be granted bail. That right is also well established in international law, especially in the domains of Human Rights Conventions and Charters.***
>
> ***Section 5 (2)(f) (iii) of our Commission states, among other things, that Parliament may not:***
>
> ***"deprive a person charged with a criminal offence of the right--***
>
> ***(ii) to reasonable bail without just cause."***
>
> ***However, as I have made the point before, constitutional rights are not absolute rights. The very provision, that is section 5(2)(f)(iii) of the Constitution which creates the right, states that the right may be denied with just cause. That is to say that the court may deny a person charged for an offence of the right to bail if the court considers that in all the circumstances of the case, it is reasonable to believe to do so. This may be reasonable, for example, in a case where an offender may be a repeat offender or if it is likely that the offender may flee the jurisdiction, prior to conviction.***
>
> ***In fact, section 6 of the <u>Bail Act, Chap. 4:60,</u> enumerates a number of circumstances in which bail may be denied, such as failure to surrender to custody, committing an offence while on bail, where it is necessary for the***

personal protection of the defendant and a whole host of other circumstances set out in section 6.

Also, the Constitution itself makes provision, under section 13, for our entrenched rights, which include the right to bail, to be infringed or abridged if the amending legislation is enacted with a specified majority vote. Hence, the very Constitution which gives such a fundamental right also acknowledges the need to allow for is restriction, provided the constitutional procedures are followed.

While it is clear that the decision to grant or not to grant bail must ultimately be discretionary, the Bail Act was enacted so that the identification of relevant criteria in legislative form would provide assistance to judicial officers in making informed and rational decisions.

The Government accepts that the consequences of a remand in custody are substantial, as it means that loss of liberty for the accused with possible resultant negative consequences for the accused and his family. Nevertheless, the denial of an accused liberty before the conviction has to be balanced against the benefit to be derived for the society from the removal of these persons from the general public. It also has a deterrent effect on those who may consider committing these offences. Today the serious and violent offences have reached such proportions that it necessitates the denial of bail in the limited circumstances set out in this Bill.

Furthermore, the increasing levels of other violent offences cannot be ignored. The Government is fully cognizant of its duty to take whatever steps as are deal seriously with the issues at hand.

31. Then on Friday 10th December 2010 on the Bail Amendment Bill 2010 the then Honourable Attorney General Mr. Ramlogan said: -

"This balancing exercise that is necessary to ensure that the legislative measure is reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual, is one that we say is met. This criterion is met. There is just cause in this country to interfere with the fundamental human rights of those who wish to interfere and take away altogether the fundamental human rights of law-abiding citizens. We cannot, as a society, countenance anymore being held to ransom by a minority in this country.

There is compelling justification for this intervention to impose some restriction and limitation on the rights of those who wish to exploit others. We think that denying bail to gang members and persons charged with offences involving the use of a firearm, ultimately strikes the right balance between the right of the individual and the right of the defendant. The overriding public interest to protect law-abiding citizens from repeat offenders and the onslaught of criminal terrorism in this society is one that we must act on. There is a clear and present danger posed by the tsunami of crime that will wash away all of us if we do not stand together now and speak with one voice."

Mr. Speaker, this Bill requires a special majority vote of three-fifths of the Members of each House. There is a clear indication that the framers of our Constitution were cognizant of the fact that mechanisms must exist for it to adapt to the evolving needs of society. Accordingly, although the tenets of the Constitution must be treated with utmost respect, it is my respectful view that we cannot allow the fundamental human rights given to all citizens to be enjoyed by a select few who take advantage, exploit and hold to ransom the rest of the country.

The Constitution is not a grave or dead, but rather a living and growing instrument. It must be capable of responding, not just embodying, but also be capable of responding of the hopes, aspirations and challenges of our people. The

challenge we are facing now to deal with crime is one that allows us to invoke and use the very Constitution to give us a weapon in the fight against crime. That is why we invite Members of the other side to support this measure without reservation.

32. On Friday 13th March 2015 the then Hon. Attorney General Mr. Garvin Nicholas (on the targets of the amendment in issue) said this: -

"The persons who would be targeted by these proposals are the persons who either already having a pending charge for a serious offence, and then they were arrested and charged for possession of an unlicensed firearm or, alternatively, they were actively using an unlicensed firearm during the commission of a serious offence.

To further allay the fears which persons may have in respect of these proposals, I wish to emphasize that there are two important safeguards in this Bill to protect the rights of individuals. The Government must strike a balance between the need to protect the public from violent criminals and the need to ensure that the constitutional rights of an accused person is not trampled into the dust. We must balance the need to protect citizens from firearm-related crimes while still respecting the rights of the accused. An accused retains the presumption of innocence. We simply cannot lock them and throw away the key without a final determination of their guilt.

The sunset clause ensures that this Bill, if enacted, will only be in effect for about 17 months. This is less than a year and a half. We hope that this short 17-month period would help to allay the fears of some who may worry about the seriously harsh of the seemingly harsh effects of these provisions. Mr. Speakers, at the end of this period, should Members feel that this law was wrong for our country, then we will be able to put an end to these measures but, at least, we would have tried.

> ***This Government remains committed to grappling with the crime situation in this country. We stand ready to protect each and every law-abiding citizen in this country. It is time that good and decent law-abiding citizens must not be afraid to walk the streets in this country."***

33. The excerpts above which contain only few of many important statements, reflect what in my view appeared to be a commitment on the part of elected representatives to dealing with the problem of crime. They, along with several other statements also demonstrate that government was at all times aware that the provisions would raise constitutional questions and that they acted lawfully in doing what they thought was required for the protection of the public. It has not been suggested that the responses of the legislature were reckless or neglectful of the rights of accused persons. Members of both Houses appeared to test the proposed legislation against constitutional values. ***(per Jamadhar J.A. in Barry Francis)***

34. The 2015 Bail Amendment Act was unanimously passed in the Lower House. In **Barry Francis v. The State 86 WIR 418 at 505 (para 200)** the Court reminded:-

> ***"….the requirement of a three fifths majority to pass legislation which overrides the fundamental rights and freedoms was no doubt taken to ensure that the decision to pass such legislation was not lightly made. It was done to protect the primacy and sanctity of the rights set out in ss. (4) and (5) of the Constitution. But it is also drafted so as to permit Parliament to enact legislation which for reasons of policy and social or economic necessity needed to be***

enacted even though inconsistent with ss (4) and (5)…."

In these proceedings the significance of the unanimous support in the Lower House was not a matter to be overlooked. The Court was required to accord due regard to the clear intention of Parliament.

The Role of the Court - S. 13 assessment

35. Judicial deference to the intent of Parliament does not however exclude the important jurisdiction of the Court in matters such as these. While the fact of overwhelming support for legislation does impose a higher degree of restraint on the part of the Court, it does not compel it to yield to the will of Parliament. The solemn duty of the Court to fulfil its guardianship role prevails. So while Parliament may decide that desperate times call for desperate measures, as it may have done in the case of this and earlier bail amendments, the constitutionality of the measures is ultimately for the Court.

36. Bereaux J. A. affirmed it in ***Barry Francis at page 506 para 200*** in these words: -

"The Constitution, by the proviso in S 13 (1) entrusts the courts as guardian of the constitution, with the final decision and the efficacy of the legislation.

The learned judge said further at page 506 paragraph 203:

The inclusion of S.13 (1) of the Constitution is in recognition of the fact that the majority view may not necessarily be the right view. It reposes in the judiciary the heavy responsibility of declaring legislation

undemocratic despite the views of a majority of those elected to represent the people."

37. Guidance on how S.13 challenge should be approached was also recently provided in ***Francis***. The Court of Appeal declared that the analysis of the section was not to be confined to the personal circumstances of the claimants and that a wider and more general assessment of the consequences to any citizen affected was required. This is obviously and eminently sensible.

38. In ***Francis***, ***Jamadar J.A. at page 478 paragraph 126*** summed up the ultimate test for S. 13 in these words: -

> ***"We therefore say that the final standard of justification for limits on the ss 4 and 5 rights and freedoms refers the court in its inquiry back to the constitutional values entrenched in those very sections. This is because the standard set in s 13 for reasonable justification is 'a society that has a proper respect for the rights and freedoms of the individual'. Therefore, in any s 13 analysis, a court must be guided by the values and principles which are embodied in due regard for the rights and freedoms of the individual. Examples of these overarching constitutional values are also to be found in the Preamble to the Constitution. It is these and other overarching constitutional values and principles (such as respect for the dignity of the human person, the rule of law and the separation of powers) that are the final standard against which limitations on and restrictions of the rights and freedoms must be shown not to be reasonable and demonstrably justified.***

In my opinion it follows from the above, that in dealing with a S. 13 challenge, a Court must of necessity factor in alleged violations of the separation of powers and the extent of such breaches in determining the ultimate test.

39. In **Garvin Sookram v. Conrad Barrow, Commission of Prisons CV 2014-02199,** this Court applied the ruling of the Privy Council in **The State v Khoyratty (Mauritius) [2006] UKPC 13** which declared that S. (1) of the Mauritius constitution (which mirrors ours) and which declares that "Mauritius shall be a democratic state" was not a mere preamble to the constitution, but it was an operative and binding provision, a separate and substantial guarantee. The concepts fundamental to a democratic state include the separation of powers and the rule of law. The decision of this Court in ***Sookram*** above, is not inconsistent with pronouncements of the Court of Appeal in ***Francis.***

40. Applying the guidance of the Court of Appeal, I begin the analysis, recognising fully that the objects of the amendment and the social policy were a well-intentioned response to the crime situation. Crime remains the No. 1 concern of our citizens. It is the responsibility of the democratically elected representative to address the situation and a vote to do so which limits and derogates from fundamental rights for the greater good of public safety and security is not unlawful.

41. We are besieged by daily reports of senseless and vicious bloody murders, most of which involve the use of guns of all levels of sophistication, gruesome

discoveries of bullet ridden bodies, reports of armed robberies and terrifying home invasions. Our innocents are maimed or lose their lives as what has been termed "collateral damage". We now have a phenomenon of citizens, who simply disappear, they leave their homes never to return or to be seen or heard of again. No one is immune to the effects of crime and there is a growing sense of insecurity spawned by the recognition as it continues to strike closer home, that anyone is fair game.

42. While I remained sensitive to the feelings of the population in the prevailing climate of fear, lack of confidence in law enforcement and seeming hopelessness in the ability of successive governments to effectively control crime, the court was required to approach the assessment with a level of dispassion and detachment and against norms and accepted standards of civilised nations which subscribe to democratic principles. At the end of the exercise I found that the amendment which deprived citizens of their right to bail even for the initial period of 120 days was not reasonably justifiable in a democratic society for the following reasons.

Violation of Separation of Powers/Breach of S.1 of the Constitution

(a) The effect of the Bail Amendment Act 2015 was to remove a power traditionally exercised by the judiciary – to determine whether bail should be granted even applying the comprehensive provisions of S (6) (1) of the 1994 Act. This removal excessively breached the enjoyment of the substantial guarantee of a system of government

which reserved judicial powers in the judiciary, as well as the right to due process of law.

(b) In ***The State v Khoyratty*** the Court was dealing inter alia with a question which arose in sufficiently similar circumstances. The facts as set out in the headnote are:

> ***"The respondent was charged with an offence of drug dealing. On his application for bail, the police objected on the ground that by virtue of section 5 (3A) of the Constitution, as inserted by section 2 of the Constitution of Mauritius (Amendment) Act 1994, and section 32 of the Dangerous Drugs Act 2000, the court had no power to grant bail pending trial in such a case. By section 5 (3) of the Constitution a person arrested or detained on suspicion of having committed a criminal offence was entitled to a determination of the court as to whether he should be remanded in custody or granted bail pending trial. But by section 5 (3A), where the offence was one of a number related to terrorism or drugs, including those specified in the Dangerous Drugs Act, and the suspect had already been charged with or convicted of a similar offence, he could not be granted bail pending trial. On a constitutional reference by the district magistrate, the Supreme Court held, inter alia, that section 5 (3A) represented an interference by the legislature into functions which were intrinsically within the domain of the judiciary and that it therefore infringed the provision in section 1 of the Constitution that "Mauritius shall be a democratic state."***

(c) The question which arose was:

> ***"Is it constitutional to allow the Executive to detain a citizen indefinitely on a provisional charge of 'drug dealing' for instance without the judiciary being in a position to control the Executive and afford protection to the citizen as regards his personal liberty and his fundamental human rights of being protected from inhuman or degrading or other such treatment as prohibited by section 7 of the Constitution?"***

(d) Lord Rodger answered it at paragraph 30 of his judgment and I consider his answer to be helpful and generally applicable to the central issue in this case:

> ***"I have come to the view that section 2 of the 1994 Act did indeed purport to make a fundamental, albeit limited, change to this component of the democratic state envisaged by section 1 of the Constitution. The crucial problem lies in the absolute nature of section 5 (3A). Where applicable, it would completely remove any power of the judges to consider the question of bail, however compelling the circumstances of any particular case might be. By contrast, a provision, for example, that persons of the type envisaged in the subsection should not be admitted to bail unless in exceptional circumstances would not create the same problems because the judges would still have a significant, even if more restricted, role in deciding questions of bail and of the freedom of the individual. Unfortunately, however, as Mr. Guthrie QC stressed on behalf of the respondent, precisely because it is absolute in form and effect, subsection 5 (3A) is liable to operate arbitrarily and so, it may well be, to create potential difficulties in relation to section 3 (a) of the Constitution. Moreover, there is***

a risk that, by choosing to charge an offence which falls within section 32 of the Dangerous Drugs Act, the relevant agent of the executive, rather than a judge, would really be deciding that a suspect should be deprived of his liberty pending the final determination of the proceedings. In these respects, the executive would be trespassing upon the province of the judiciary: Ahnee v DPP [1999] 2 AC 294, 303. In my view a state whose constitution permitted accused persons to be locked up until the termination of the proceedings against them without any right to apply to the court for bail would be, in this essential respect, different form the kind of democratic state which section 1 declares that Mauritius is to be. To that extent, section 2 of the 1994 Act purported to water down the guarantee in section 1."

(e) In his Judgment in the matter Lord Mance opined at paragraph 36 that:

The effect of the amendment was to remove from the judiciary any responsibility for and power in respect of the liberty of any individual, prior to any trial for a prescribed drug offence upon reasonable suspicion of which the prosecuting authorities might arrest and detain him. The scheme of section 5 prior to such amendment permitted a person to be arrested upon reasonable suspicion, and then required him or her to be brought without delay before a court, for remand in custody or on bail pending trial as the court determined. To remove the court's role – and in the process to prescribe automatic detention in custody pending trial whenever prosecuting authorities have reasonable grounds to arrest for a prescribed drug offence – is not merely to amend section 5, it would be to introduced an entirely different scheme. The new scheme would contradict the basic democratic principles of the rule of law and the separation of judicial and executive powers which serve as a

primary protection of individual liberty and are entrenched by the combination of sections 1 and 47(3).

(f) While the provision under consideration here prescribed imprisonment initially for 120 days I do not consider the statement of broad principle to be less relevant or applicable. In ***Sookram*** this court concluded that no express entrenchment was necessary to provide the substantial guarantee contained in S (1) of our Constitution. We, as citizens of Trinidad and Tobago are entitled to all that the guarantees that flow from the declaration in S.1 of our Constitution that Trinidad and Tobago shall be a democratic state. By virtue of that guarantee we are entitled to the protection of individual liberty and the right not to be deprived of it save by the exercise of judicial power after due process of law.

Undermining the Presumption of Innocence

(g) State Counsel described the presumption of innocence until proven guilty and the right not to be deprived of reasonable bail without just cause as cornerstone liberty rights which are fundamental to any democratic system of government. It is clear that the denial of bail effectively imposed punishment before the determination of guilt.

‘Just Cause’ a matter for the Court

(h) The State also accepted that due process has come to represent more than just the law of the land but the universally accepted standards of justice observed by civilised nations which observe the rule of law, (**Thomas v. Baptiste [2000] 2 AC 1**). While reciting these propositions, Mr. Hosein S.C. relied on two Canadian Authorities **Attorney General of Quebec v. Edwin Pearson [1992] 3 S.C.R. 665** and**, Queen v. Maxima Morales [1992] 3 S.C.R. 711** to support his argument that the legislature as well as and the judiciary has a role to play in determining what is “just cause”. I understood Mr. Hosein to suggest that Parliament was entitled to legislate away the right to reasonable bail if there was sufficient cause in the view of legislators, but I respectfully disagree. This comes down to a construction of S. 5 (2) (f) of the constitution which provides that Parliament may not deprive a person charged with a criminal offence of the right to reasonable bail without just cause.

(i) In ***Pearson*** Lamer C.J. ruled that the words “not to be denied reasonable bail without just cause” were to be construed as containing two distinct elements namely the right to reasonable bail and the right not to be denied bail without just cause. The Court held that the “just cause” requirement imposed constitutional standards.” A reading of the cases shows clearly that the legislation

which was under consideration in them did not exclude a judicial process. They dealt with a clause that provided for detention "unless the accused could show cause why his detention in custody is not justified". The following extract makes it clear: ***(Pearson [1991] 3 R. C. S) at p. 691)***

"Section 515 (6) (d) must be placed in context

> ***"In general, a person charged with an offence is produced before a justice, unless he or she pleads guilty, is to be released on an undertaking without conditions. However, the Crown is to be given a reasonable opportunity to show cause why either detention or some other order should be made: S 515 (1)."***

(j) In ***R v. Pearson the C.J.*** at page 698 stated:-

> ***Section 515 (6) (d) does not mandate denial of bail in all cases and therefore does allow differential treatment based on the seriousness of the offence. Moreover, the onus which it imposes is reasonable in the sense that it requires the accused to provide information which he or she is most capable of providing. If a person accused of trafficking or importing is "small fry" or a "generous smoker", then the accused is in the best position to <u>demonstrate at a bail hearing that he or she</u> is not part of a criminal organization engaged in distributing narcotics.***

What is clear from this is that even when the Canadian Parliament legislated for the denial of bail, in accordance with the constitutional safeguard the issue of just cause was left to be determined by a court. In my view these cases did not assist the State.

Legislation unnecessary

(k) The provision was in my view wholly unnecessary. The concern highlighted in the evidence of the Commissioner and Mr. Reneaud when they are examined closely, related to repeat offenders, fear of interference with the administration of justice, and the need to "monitor" persons suspected of gang-related violence. A perusal of S 6 (1) of the Bail Act 1994 would show that all of the legitimate concerns identified by these gentlemen could properly be met by simply utilizing the existing law.

(l) ***Among the circumstances specifically provided for under S (6) (2) in which the discretion of the Court to deny bail to a defendant may be exercised are:***

(a) where the Court is satisfied that there are substantial grounds for believing that the defendant, if released on bail would --
(i) fail to surrender to custody;
(ii) where he or she would commit an offence while on bail; or
(iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
(e) where, having been released on bail in or in connection with the proceedings for the offence, he is arrested in pursuance of section 13;
(f) where he is charged with an offence alleged to have been committed while he was released on bail; or
(3) In the exercise of its discretion under subsection
(2)(a) the Court may consider the following:
(a) the nature and seriousness of the offence or default and the probable method of dealing with the defendant for it;

(b) the character, antecedents, associations and social ties of the defendant;

(d) except in the case of a defendant whose case is adjourned for inquiries or a report; the strength of the evidence of his having committed the offence or having failed to surrender to custody; and

(e) any other factor which appears to be relevant.

(m) As the bail law stands, S (6) allows for judicial considerations to refuse bail in the case of repeat offenders or persons likely to commit another offence, if they are gang members or suspected to be because of their associations and social ties, if they are persons who are likely to tamper with witnesses and interfere with the administration of justice. There is enough law on the statute books. What may be required for this to actually work to protect the public and the administration of justice in the way it was intended is a serious shift in the way objections to bail are dealt with on the part of the police or prosecution. The implementation requires the police and prosecution to do the work that is required of them. This contemplates full and fair investigations into the background of accused persons and more importantly proper reports of the strength of the evidence of the accused having committed the offence. Section 7 allows for a magistrate, on the further application of the prosecution to impose conditions where none had been attached initially.

(n) The Bail Act (S 11 (1) – introduced the right of appeal to the prosecution against the decision of a magistrate or judge to grant bail. It also introduced the requirement for written reasons by magistrates and judges. These are extremely valuable provisions. They mandate an important element of accountability on the part of the judiciary and they allow for review by a higher court. These provisions if properly utilized should meet any concerns about unreasonable decisions on the part of magistrates and judges where they grant bail over the objections of the police.

Capricious

(o) The provision was capricious. The automatic denial of bail disallowed consideration of the personal circumstances, the level of involvement alleged, or treatment of the accused as an individual. The fact that Ms. St. Omer and DC were both denied bail as a result of the incident at the latter's home, against the background of their antecedents, demonstrates the unfairness of it. In the case of P.C. Charles, if, as he claimed he was denied bail because coincidentally he happened to have been carrying his firearm at the time, then that too makes the point. Lamer C. J. in ***Pearson*** noted that such a clause imposed "a standardless sweep". He pronounced, **"the principles of fundamental justice preclude a standardless sweep which authorises imprisonment"**. This applies in my opinion, whether it is for a period of 120 days or until trial.

Oppressive/Remand Condition

(p) It was oppressive - it condemned persons presumed innocent to remand prisons in which conditions are notoriously subhuman. In these proceedings from the Bar table, Mr. Hosein S.C. for the State confirmed that conditions are equally appalling at all Remand centres. Indeed conditions at the Remand Yard, Port of Spain were declared to cross the threshold of cruel and unusual punishment by this Court in **Colin Edghill v. Carlo McHoney No. 3178 of 2004 at page 29 paragraph 38**. In determining that an award of compensation was necessary because deterrence was an imperative in that case this Court said:

> ***"The executive needs to be reminded that treatment at the Remand Yard Port of Spain cannot continue, not only because it is treatment which is debasing and dehumanizing to prisoners and to prison officers who are duty bound to participate in the process, but because it is treatment which, if after having been exposed, is allowed to continue, threatens to redefine us as a people.***

Since the date of that judgment there has been no improvement. Indeed the conditions have only worsened. New Prison Rules which were expected to ameliorate the conditions and were promised since about 2000 – have still not been made law. Our prison rules were made in the year 1838.

(q) In Dr. Ryan's paper entitled **"Beyond the Pail"** which the State produced, he observed:

> ***"conditions in our overcrowded prisons are inhumane, degrading and unacceptable. This is particularly so in the remand yard which houses persons whose matters have not yet been decided. In sum, they are full citizens until a court determines otherwise. Prisons which were meant to "house" hundreds now warehouse thousands. Shocking is perhaps the only appropriate term to describe the conditions found there, and it is surprising that there are not more prisoner breakouts or suicides on a routine basis. The remand facilities are primitive. Conditions for getting rid of bodily waste and for performing basic hygiene routines are unbecoming. Pails which are used to urinate and defecate share crowded and unlit cells with cots and hammocks that can barely fit what passes for rooms.***"

Such are the conditions that Dr. Ryan questioned whether a year spent in our prisons should count as two, instead of nine months in the calculation of periods for remission. Any law which prescribes mandatory detention to persons presumed innocent in these circumstances for 120 days and with the possibility of at least one year's detention cannot in my view pass constitutional muster.

Arbitrary

(r) It was arbitrary in that 120 day period for the start of proceedings in the contemplation of a trial within a year of the reading of the charge bore no relation to the reality of the notoriously slow pace

of the administration of criminal justice. The Director of Public Prosecution reportedly described it recently as "teetering on the brink". The Ryan study addressed this issue too: The learned Professor said: -

> ***"What often happens is that persons are arrested and charged before supporting evidence is forthcoming. The prisoner has to wait months while police gather the needed evidence which they may never succeed in doing in a timely manner or not at all. Delays in the judicial system compound the problem. They system is given to unacceptable delay and frustration."***
>
> ***Not surprisingly, matters coming before the Court have to be postponed, either because all the pieces are not in place to allow schedules matters to proceed, or because lawyers have a pecuniary interest in causing the matter to be postponed.***
>
> ***We note the statement of the Chief Justice that the backlog in the High Court would remain unmanageable even if parallel courts are put in place and the old system of preliminary trials are abolished. Doing so would merely transfer the problem from juries to the judiciary. As he observed, "if every matter went to trial in the High Court, each judge would have to do over 400 trials a year, a clear impossibility." The problem is of course worse in the Magistrate's courts to which most of the matters go. (Express, May 30th, 2012).***

(s) The Hansard report of 20th December 2006 provided a stark reminder of the state of the administration of criminal justice. On that date, the then Hon. Ag. Mr. John Jeremie in the course of the debate referred to the Naipaul kidnapping which had occurred the night before.

Senator Wade Mark who followed began his contribution, by

> ***"extending the fullest solidarity and support to the Naipaul family whose daughter … was snatched from her home by gun toting criminals a few hours ago."***

It is now known Mrs. Naipaul Coolman was in fact killed. Ten men were accused of her murder. The trial ended on 30th May 2016 with eight of them being acquitted by a jury and two having to face a retrial. The family of the victim as well as the accused persons had to wait almost 10 years for a conclusion. This case is highlighted only because it recently brought into public focus the systemic problem of delay. There are many more which escape attention.

(t) It is near impossible with what we all know of the current state of the administration of justice that any criminal trial would begin within four months from the date of charge. As to where these prosecutions had reached in July 2016, in Daniel St. Omer they were still awaiting disclosure from the prosecution one year after the first appearance, and in both cases the exhibits were till at the

forensic examiners. In reality, the 120 day statutory detention would have served only to impose extreme pre-trial punishment.

No proof objectives achieved

(u) Finally, there is no evidence that the measures which denied bail in the circumstances covered by the amendment, achieved the objectives of the legislation. In his affidavit Mr. Reneaud referred to the purpose of sunset clauses to allow for review of the efficacy of the legislation. Former Hon. Attorney General, Mr. Nicholas (para 32 above) indicated clearly that the purpose of the sunset clause in the 2015 amendment was a constitutional safeguard. Even as the date loomed, the State failed to produce evidence by way of statistical reports or scientific analysis to establish that any of the objectives had been achieved. The denial of bail in relation to gang offences was introduced in 2011. Any government which intended to seek the extension of the provision beyond the sunset date, must have been preparing to persuade not just Parliament but the population that the extension was justified. In the case of the anti-gang legislation almost five years had passed. In the case of S 5(5) (2) (b) – during the course of the trial a specific request was made by the court for information. None was available.

(v) The result is that no evidence was produced to show how the provision actually operated, how many dangerous offenders had been kept off

the streets, how many trials had actually started if at all, how many convictions of gang members who had been detained actually been secured. The omission as well as the evidence of the Commissioner appears only to confirm that these measures have made little difference in the fight against crime. In his words, and this is against the alarming picture he presented **"it is clear that the strategies and actions over the years have not resulted in any significant impact on the level of firearm violence in the country".**

(w) In the light of this admission and disclosure by him of what was the police priority for 2016, and especially in the light of the upsurge in gun violence and murders that we have seen between March 2015 and August 15th 2016, the Commissioner's statement that the imposition of bail conditions and restrictions go a long way to reducing the incidence of firearm violence might be based on optimism, but it is hardly persuasive.

43. I have concluded that the S 5 (5) (2) (b) was not reasonably justifiable in a society that has respect for the rights of individuals, justifiable in a society that has respect for the rights of individuals. I am compelled however to make some further observations in the light of recent developments.

44. Since the lapse of the "no bail" provisions in the Bail Amendment and Anti-gang legislation there have been several comments in the public domain as to its effect on crime fighting initiatives. Those who are familiar with how bail

actually operates would readily appreciate that on 15th August 2016 persons who were previously detained did not automatically get a free pass to go back on the streets to re-offend. They became eligible for bail. Their constitutional right to a hearing was restored. They would have had to retain Counsel in most instances. They would have then had to appear before a magistrate who under the law continues to have a very wide discretion in appropriate cases to deny bail. I have tried to emphasize that if the police have good grounds to object to bail they have every opportunity do so.

45. But even when bail is actually granted, it is not so easy to access it. The system has always been hard and oppressive to the poor and disadvantaged. Magistrates routinely grant bail in serious cases in the sums of not less than $75,000 and impose conditions when granting bail which require the provision of a surety. This generally requires a bailor or surety who can provide a deed for real property which is to be used to secure the bail. Stringent conditions usually require approval by a Clerk of the Peace or a magistrate. The deed which has to be produced is what in layman's terms is a "clean deed", one which relates to property which is not encumbered or mortgaged. A valuation report of the property is sometimes required. Although cash bonds are now provided for and not as an alternative everytime, it would be readily appreciated that only in rare cases would such be available or even up for consideration given the sums that are usually fixed.

46. The majority of people who appear before the magistrates courts on criminal charges are poor people whose families are unable to provide sureties. They own no land. They have no deeds, clean or otherwise. They are still left to rely on "professional bailors" to whom they pay a percentage of the bail sum to secure release. This is the only way that the majority can actually access bail and their freedom. It exposes accused persons and their family to extortion, there is no choice. The system has turned a blind eye to this illegality for decades. Without its operation our prisons would be even more crowded.

47. Public attention was recently drawn to the harshness of how it works in the case of Jerome Franklyn, a father who was charged with wilful neglect of a child which allegedly resulted in the death of a two year old, his son. In early September Mr. Franklyn's bail was fixed in the sum of $75,000.00 or alternatively by way of cash bond of $15,000.00. Mr. Franklyn was only able to access bail after a month's detention because according to newspaper reports, supporters were willing and able to raise the cash. For every Jerome Franklyn there are dozens of other men, who have desperate relatives, no clean deeds and no cash. For those who are forced to remain inside the system inflicts punishment, misery and oppression.

48. Insofar as the executive has had concerns about the effect on crime of the lapse of the no bail provisions, it should perhaps afford some measure of comfort that the court would have found the measures to be unconstitutional even if they had survived. New strategies other than "no bail" ones may be necessary

in order to deal with current situation which Professor Ramesh Deosaran succinctly described in these words:-

> ***"while law abiding citizens fear crime, criminals fear neither detection nor punishment."***
> ***(Guardian Newspaper 5th October 2016)***

49. I think it is fitting to conclude by reverting to the contribution of the late Honourable Attorney General, Mr. Keith Sobion, in the Senate in 1994.

It is a fairly lengthy extract and I apologize for it but I think it reminds us that we have understood for at least two decades what needed to be done. It may well provide the basis for an assessment of where we have fallen short or gone wrong.

Tuesday, September 06, 1994 (Bail Bill)

> ***"In our approach to this problem, we have said that one has to look at the phenomenon of crime in its three phases. There is a fourth phase which is perhaps the earliest phase of all, but I would not deal with it at this point. There are really three phases. For brevity, I would try to incorporate the earlier into what would be the second. If one analyses it into three stages- there is the pre-trial stage, the trial stage and post-trial stage.***
>
> ***The pre-trial stage would involve several preventive aspects. There are those who have argued quite eloquently that what is needed is an analysis of the economic circumstances of the country; that poverty needs to be addressed, and a number of other factors which lead, perhaps, to a person turning to a life of crime. There are those who are more greatly influenced by the religious aspect of things and would say there is a need to return to a higher degree of morality and religious teaching. There are those also who would argue that there is a breakdown of family life, and that there are a number of causative factors. One has to address those measures not only in terms Government; the other institutions within the society***

have to address, as well, given their sphere of activity, those areas of causation which have been identified.

Over the last few years, the Government for its part has sought to introduce some measures which would go some way in addressing some of those causative factors. I would mention briefly the expansion, increase and intensification of programmes such as YTEPP, on-the-job training, the Civilian Conservation Corps and the Apprenticeship Schemes. These are measures by which the young people are brought together within the kind of environment where they can be taught social and moral values, in addition to productive skills. The approach of the Government has been to start with even the causative aspects of crime.

The pre-trial stage would necessarily involve the question of the arrest and apprehension of persons who commit offences. Of course, you would recognize immediately that no amount of legislation could deal effectively with the question of increasing the efficiency of the investigation and arrest stage. What the Government has recognized very early is that one of the problems with the enforcement agency, and specifically, the police service which is charged with that civil responsibility, is the major problem of management.

For that organization to effectively perform its functions, there must be an improvement in its management capability. We recognize that in two areas. In the hands-on area, there was a dearth of management in matters such as human resources, finance, fleet management and, most importantly, the management of the transportation arm of the police service.

Quite apart from those hands-on areas, I have identified the question of human resources management, transportation and finance. We have also embarked on the computerization of the police service to aid in the tracing and tracking of criminals, and ensuring generally and basically that the needs from an investigation point of view are met.

We have also sought to improve the level of equipment in terms of weaponry which is available to the police service. We have sought to introduce improvements in communication equipment. In the pre-trial stage of the crime phenomenon, there are a number of initiatives by this Government, quite apart from legislation, which have been put in place. That is what we call the reasoned and measured approach.

At the higher level of management we have recognized that there is a problem relating to and which affects the whole question of morale. It starts with the operation of Service Commission which is the higher level of management of the police service. We have introduced legislation, as Members would be aware, to deal with that area of management in the police service.

In the trial stage, after post apprehension of the criminal-you would recall that in March 1992, we made recommendations for the appointment of a committee to look into the question of delays in the administration of justice, and to report within six weeks of its being so commissioned. Since that time we reported to this Parliament from time to time that the report of that committee is now subject to an implementation team within the office of the Attorney General. That implementation is proceeding as fast as we hope to achieve it, having regard to the financial constraints which the Government faces, and some of the problems which arise in dealing with institutional change at the administrative level.

10:50 a.m.
We have recognized that in order to deal with the phenomenon of criminal activity, attention must be paid to the area of implementation as well, in order to ensure that justice is meted out as expeditiously and as effectively as possible to persons who turn towards areas of activity outside the norms and regulations established by the society.

In that connection, I mentioned that the Indictable Offences (Preliminary Enquiry) (Amdt.) Bill, which had its first reading here in this House today, is a measure which is of some

significance in that regard, because it introduces—and I do not want to be accused of pre-empting a debate on the matter—a machinery whereby the hearings of preliminary inquiries can be expedited, dependent, of course, on the human element, the persons who man the courts, and the persons who represent accused persons appearing before the courts.

We are well aware that any system can be abused, and I can only urge that, once that legislation is passed, there is a degree of maturity in the way the legal profession approaches the application of that machinery.

Administratively as well, after consultation with the Honourable the Chief Justice, we have increased the number of judges available to those courts, and we have seeking to increase the number of judges available to those courts, and we have sought, administratively as well—after discussions with the Director of Public Prosecutions and the Chief Justice—to establish a priority system whereby matters of greater urgency can be dealt with and expedited through the system.

I could go on and on. You would note that the one-way mirror facility has been established in order to ensure greater protection of witnesses and so forth. There are a number of administrative measures which have been put in place at the trial stage to ensure the expediting of matters at that level.

The post trial stage deals with conviction and sentence. There have been concerns over the years about the ability and capability of the prison service to perform a rehabilitative function. It is a problem which is well recognized, but which, because of the inadequacy of the present facilities, has been very difficult to implement in as ideal a manner as one would have liked.

50. **Disposition**

The Court holds that the S. 5 (5) (2) (b) of the Bail Amendment Act was not reasonably justifiable in a society that has respect for the rights of individuals.

I shall hear the parties on the issue of costs.

Dated this 7th day of October, 2016

CAROL GOBIN
JUDGE

Addendum

1. On Friday 7th October 2016 I delivered my S.13 ruling in this matter. Before I moved on to hear submissions on costs, Mr. Ramlogan S.C. invited me to formally amend my ruling to add the reliefs specifically claimed in Justin Charles' fixed date claim form. Up until then I did not think it was necessary because the consequences of my ruling though implicit would have been clear. Counsel reminded me however that a formal declaration that the claimants' detention was unlawful, was essential for the recovery of damages.

2. State Counsel was asked to assist on whether it necessarily followed from the S.13 ruling that the detention of the claimants was unlawful even when I had found that legislators acted within the law when they passed the amendment and I had found specifically that they were well-intentioned and there was no suggestion that Parliament had been reckless or neglectful of the rights of accused persons. State Counsel accepted that as a consequence of the ruling, the claimants' detention pursuant to the S. 5 (5) (b) (ii) was unlawful and that damages would flow. In those circumstances I reviewed the fixed date claim forms in both cases and indicated that I would formally include the several declarations and reliefs in the final orders as follows:-

3. **In the case of Danielle St. Omer:**

It is hereby ordered and the Court declares: -

1. That S.5 (5) (b) (ii) of The Bail Amendment Act. No. 7 of 2015 was unconstitutional because it was not reasonably justifiable in a society which has proper respect for the rights and freedoms of the individual.

2. That the detention of Danielle St. Omer without bail pursuant to S.5 (5) (b) (ii) was unconstitutional and illegal and in violation of the due process rights of the Claimant.

3. That the Bail Amendment Act No.7 of 2015 violated the principle of separation of powers by removing the jurisdiction and discretion of the Magistrate's Court and the High Court to grant bail for 120 days in circumstances caught by the legislation.

And it is further ordered

4. (a) That the Respondent do pay to the Claimant damages for unlawful detention to be assessed by a Master sitting in chambers.

   (b) That the Respondent do pay the Claimant's costs to be assessed in default of agreement.

<u>In the case of Justin Stuart Charles: -</u>

It is hereby ordered and declared:

1. That the denial of bail to the Claimant was unconstitutional and illegal null and void and that the following constitutional rights of the claimant have been infringed:

(i) The right to liberty and the right not to be deprived thereof except by due process of law;

(ii) The right not to be subject to arbitrary detention and imprisonment;

(iii) The right not to be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(iv) The right not to be deprived of the right to reasonable bail without just cause;

(v) The right to protection of the law.

2. That the detention without bail of the Claimant was illegal.

And it is further ordered:

3. (a) The respondent is to pay damages for unlawful imprisonment to be assessed by a Master sitting in chambers.

(b) The Respondent is to pay to the Claimants' costs certified fit for Senior and Junior Counsel to be assessed by this court in default of agreement.

CAROL GOBIN
JUDGE