**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. P351 of 2016**
**Claim No. CV 2015-03475**

**BETWEEN**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Appellant/Defendant**

**AND**

**DANIELLE ST. OMER**

**Respondent/Claimant**

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. S350 of 2016**
**Claim No. CV 2016-00074**

**BETWEEN**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Appellant/Defendant**

**AND**

**JUSTIN STUART CHARLES**

**Respondent/Claimant**

**PANEL**:
**G. SMITH J.A.**
**P. MOOSAI J.A.**
**P. RAJKUMAR J.A.**

**Date of Delivery: 8 March, 2019**

**APPEARANCES:**
**Mr. F. Hosein S.C., Mr. S. Lalla, Mr. E. Jones instructed by Ms. L. Almarales and Ms. R. Ragbir appeared on behalf of the Appellant.**

**Mr. A. Ramlogan S.C., Ms. J. R. Lutchmedial, Mr. A. S. Pariagsingh instructed by Ms. C. J. Stewart appeared on behalf of the Respondent, Mr. Justin Stuart Charles.**

**Mr.K. Scotland, Ms. A Watkins instructed by Mr. R Morgan appeared on behalf of the Respondent, Ms. Danielle St. Omer.**

I have read the judgment of Smith J.A. and I agree with it.

**……..**

**P. Moosai J.A.**

I too, agree.

**……**

**P. Rajkumar J.A.**

**JUDGMENT**

**Delivered by G. Smith J.A.**

**Introduction**

1. The central issue in this appeal involves the Court resolving an apparent conflict between 2 sections of the Bail Act Chap. 4:60.
   These are section 5(1) and section 5(5)(b)(ii).

2. Section 5(1) is a statutory affirmation of the constitutional right to bail except as provided for in sections 5(2) and 5(4) of the same Bail Act (the Act).
   Section 5(5)(b)(ii) purported to take away the right to bail in certain cases. However, section 5(5)(b)(ii) did not mention or seek to affect section 5(1) above.

3. An interesting twist to this appeal arises because section 5(5)(b)(ii) was one of some temporary amendments to the Act. These amendments were in effect for only about one and a half years. They lapsed on the 15 August 2016. They were part of what is termed a "sunset clause".
   Section 5(5)(b)(ii) was no longer the law at the time of the hearing and determination of this constitutional motion both in the High Court and here on this appeal.
   Nevertheless, these appeals are not academic because:
   i. The Respondents were adversely affected since they were unable to secure bail because of the application of section 5(5)(b)(ii) of the Act to their situations. They claim that their constitutional rights were breached by their failure to secure bail, and they seek damages for these breaches.
   ii. Counsel for the Appellant informed us that the construction of this legislation may provide guidance in respect of future legislation on this very important area.

4. In summary, we find that on the relevant principles of statutory interpretation, the constitutional right to bail in section 5(1) was not taken away by section 5(5)(b)(ii). As a result, neither Respondent was deprived of his/her constitutional rights and we would allow the appeal.

**The Legislative History**

5. It is necessary to set out some legislative history of the relevant provisions of the Act. This colours the entire discussion which is to follow.

   *Section 5(1)*

6. Section 5(1) was part of the original Bail Act of 1994. It also survives the sunset clauses. The original section 5(1) stated that "**Subject to subsection (2), a Court may grant bail to <u>any person charged with any offence</u> other than an offence listed in Part I of the First Schedule.**" (my emphasis)

7. The First Schedule offences where bail could not be granted were the traditional cases of murder and treason and more recently, piracy or hijacking and "**any offence for which death is the penalty fixed by law.**"

8. While section 5(2) is not the subject of challenge in these appeals, I treat with it for the sake of understanding the legislative history.
   Subsection 5(2) of the 1994 Act took away the <u>right</u> to bail in cases where a person who had been charged, had previously been convicted on 3 occasions of certain offences listed in Part II of the First Schedule of the Act.
   That Schedule contained a wide scope of indictable offences and this section had been referred to as the "three strikes rule". However, even in the case where the three strikes rule applied, there was not a flat denial of bail. Bail could only be accessed on application to a Judge, but the accused had to "**show sufficient cause why his remand in custody is not justified**."

9. The 2015 Amendments to the Bail Act modified the 3 strikes rule (It was now 2 strikes, and 1 strike if there were a combination of offences.) It also removed the provision whereby an accused could make an application to a Judge for bail. These amendments lapsed in 2016.

10. Further, the 2015 Amendments to section 5(1) exempted sections 5(2) and now also section 5(4). It stated that "**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**."

The modification to section 2 was just mentioned in paragraphs 8 and 9 above.

Section 5(4) merely stated that only convictions and time spent serving a sentence during the last 15 years would count for the purposes of section 5(2). Section 5(4) was also part of the sunset clause and lapsed on 15 August 2016.

11. In summary, even under the 2015 Amendments section 5(1) affirmed the right to bail where a person was charged with any offence except where sections 5(2) (the modified 3 strikes rule) and 5(4) applied. Notably section 5(5)(b)(ii) was not excepted from the application of section 5(1).

12. Another point to note is that the original 1994 Bail Act was passed by a special majority since it allegedly contained provisions inconsistent with the Bill of Rights contained in sections 4 and 5 of the Constitution. The 1994 Act also declared pursuant to section 13 of the Constitution that it complied with the required special majority necessary to pass such legislation.

*Section 5(5)(b)(ii)*

13. Section 5(5)(b)(ii) was introduced in the 2015 Amendment to the Bail Act. The section read as follows:

> "**Subject to subsections (2), (6) and (7), a Court shall not grant bail to a person who-…**
>
> **(b) … 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 <u>the prosecution informs the Court</u> 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."** (my emphasis)

14. Owing to prior amendments, the list of offences in Part II of the First Schedule now mentioned a broad sweep of offences which were punishable by imprisonment for a term of 10 years or more.

15. The effect of section 5(5)(b)(ii) was allegedly, that a person who was merely charged with one of the scheduled offences would not be eligible for bail once the prosecution informed the court that a firearm had been used in the commission of that offence.

16. By virtue of section 5(6) that alleged denial of bail would be for 120 days if the trial had not started. However, if evidence had been led within the 120 day window but the matter had not been completed, section 5(12) now allegedly rendered an accused ineligible for bail for 1 year.

    Further, after either the 120 day window or the 1 year window had passed, any application for bail had to be made to a Judge. Neither a Magistrate nor a Justice of the Peace nor a Clerk of the Peace could now grant bail in cases where section 5(5)(b)(ii) applied.

17. Like with the 1994 Bail Act, the 2015 Amendment also recited that it had been passed with the special constitutional three fifths majority pursuant to section 13(2) of the Constitution.

18. The conflict arises because by section 5(1) of the Act, the right to bail is affirmed for "any offence" other than those mentioned in sections 5(2) and 5(4). However, by section 5(5)(b)(ii), the right to bail was now purportedly being curtailed for other offences and situations which were not mentioned in section 5(2) or 5(4).

**The Circumstances of the Respondents**

19. There are two (2) Respondents in this consolidated appeal, namely Danielle St. Omer and Justin Charles. These Respondents were denied bail for different periods as a result of the Bail (Amendment) Act 2015.

20. On the 16 July, 2015, Danielle St. Omer was a lady of 21 years. She had a clean record and was pursuing studies toward a business management degree. On the 16 July 2015, she alleged that she happened to be spending the night at her boyfriend's house for the first time. Police raided that house and there was allegedly, an exchange of gunfire. After the gunfire subsided, police found some marijuana, a firearm and one round of ammunition at the house. Although she maintained that she was merely a visitor to the premises, Ms. St. Omer was charged with five (5) offences: (i) shooting with intent to do grievous bodily harm; (ii) wounding with intent to do grievous bodily harm; (iii) being in possession of ammunition not being a person exempt under section 7 of the Firearms Act; (iv) being in possession of a firearm with intent to endanger life; and (v) possession of marijuana. Owing to the existence of the 2015 Bail Amendment, she was remanded into custody without bail and was only able to secure her release on bail on the 24th December, 2015. She had spent some five (5) months in jail before she could access bail.

21. Justin Charles was a police constable. On 25 May, 2015 he was arrested along with another police constable, Ryan Mahabir. It was alleged that on 2 May, 2015 P.C. Charles and P.C. Mahabir stopped one Michael Lewis and had him take a breathalyser test. Mr. Lewis failed the test and was allegedly extorted to pay money to P.C.'s Charles and Mahabir so as to avoid being charged for driving under the influence of alcohol.

    P.C. Charles was charged with corruptly accepting fifteen hundred dollars ($1500.00) as a reward for forbearing to prosecute Michael Lewis and for perverting the course of public justice in concealing two (2) breathalyser certificates.

    At the time of the offences, P.C. Charles was in possession of his service issued machine gun.

P.C. Charles was first granted bail by a Justice of the Peace. This bail was later revoked by a magistrate when he appeared before him on the 28 May, 2015 on the basis that section 5(5)(b)(ii) of the Bail (Amendment) Act 2015 applied to P.C. Charles.

P.C. Charles went to prison until 1 June, 2015 when he appeared before another magistrate. That magistrate was persuaded that he was not caught by section 5 of the Bail (Amendment) Act 2015 and accordingly he secured his release on bail on the same day. He had spent three (3) days in prison.

*The Court Actions*

22. At the hearings before the trial judge, none of the parties referred the court to the issue of the apparent conflict between sections 5(1) and 5(5)(b)(ii) of the Act.

23. Without considering the conflict, the trial judge decided that the denial of bail to the Respondents as a result of the application of section 5(5)(b)(ii), violated their constitutional rights. Further, that even the section 13 constitutional override did not validate the purported denial of bail since such a denial of bail was not shown to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

24. It was only after the matter had been argued on this appeal that we recalled the parties to address us on the apparent conflict between the 2 sections of the Act. They then provided us with further written and oral submission on this conflict.

***Is the Constitutional right to reasonable bail preserved in cases where section 5(5)(b)(ii) applies?***

25. The proper starting point for this discussion is the reference to the constitutional right to bail.

    Section 5(2)(f)(iii) of the Constitution of the Republic of Trinidad and Tobago Chap. 1:01 stipulates that Parliament may not "**deprive a person charged with a criminal offence of the right-....(iii) to reasonable bail without just cause;**".

    Section 4(a) of the Constitution guarantees the right of the individual to liberty.

    The combined effect of these provisions is that an individual has a constitutional right to reasonable bail and a right not to be deprived thereof except for just cause.

26. As stated before, section 5(1) of the Act affirms this constitutional right to bail "to <u>any person charged with any offence</u>" save as excepted in sections 5(2), (4) and the First Schedule.

27. Section 2 of the Constitution stipulates that:

> **"This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."**

28. It is a principle of statutory interpretation that laws passed by Parliament are presumed not to violate the fundamental rights mentioned in sections 4 and 5 of the Constitution. Further, laws must be interpreted so as to be consistent with these rights rather than inconsistent with them.

    As Lady Hale stated in ***The Public Service Appeal Board v Omar Maraj*** **[2010] UKPC 29**, at paragraph 26:

> **"it must be assumed that Parliament did not intend to violate those rights** (sections 4 and 5)**. So far as possible, therefore, the law must be interpreted so as to be consistent, rather than inconsistent, with them."**

Also, at paragraph 29, Lady Hale repeated that:

> **"In short, in interpreting these** (statutory) **provisions, the Board should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them."**

29. Bearing these principles of interpretation in mind, it must be presumed that by preserving section 5(1) of the Bail Act, Parliament intended to legislate in a manner consistent with preserving the right to bail for "any offence" except those mentioned in section 5(1). Or to state the matter in the negative, that Parliament did not intend to take away the right of an individual to reasonable bail for any offence other than what was mentioned in section 5(1).

30. The consequence of preserving section 5(1), is that section 5(5) must be read in such a way that is consistent with a preservation of the right to bail as affirmed in section 5(1). This would involve a reading down of section 5(5)(b)(ii) as conferring a discretion to refuse bail in cases where it applied. The section must be interpreted to read that a court "may not grant bail" in those cases.

31. In this way there is both a preservation of the constitutional right to bail for "any offence" except as provided for in section 5(1) and a recognition of a statutory discretion to refuse bail for the 120 day or 1 year window in cases where a firearm was used in the commission of a scheduled offence.

32. The Respondents raise 3 principles of statutory interpretation which they allege would give section 5(5)(b)(ii) priority over section 5(1). Namely:

    i. The principle of correction of parliamentary error
    ii. The principle of implied repeal
    iii. The principle that a specific provision outweighs a general provision.

*(i) Parliamentary error?*

33. The Respondents allege that Parliament in error omitted to include sections 5(5) and (6) as exceptions to section 5(1). In other words, section 5(1) should have read "Subject to sections (2), (4), (5) and (6)…"

    This argument cannot find traction here for the following 4 reasons.

34. First, unlike in the case of ***Ferguson v The Attorney General*** **[2016] UKPC 2**, there is no evidence that either the draftsman or the Parliament made such an error. Counsel asks us to make this assumption of error as a necessary inference from the facts.

35. Second, it is not proper to infer a Parliamentary intention or error in this case.

    The Respondents argue that such an intention is to be inferred from (a) excerpts from Hansard and (b) the passing of the 2015 Amendment by a special three-fifths majority. However, these do not apply here for the following 2 reasons:

    (a) First, the excerpts of debates on the 2015 Amendments from Hansard are merely excerpts of a general discussion on crime and bail. Parliament did not address the conflict between the express preservation of the right to bail in section 5(1) and the alleged abrogation of this right in section 5(5). One cannot predict the outcome of such considerations or conclude that an error must have been made. In that regard, a quote from the ***Ferguson*** case is apposite:

> **"The test being objective, the motives of Parliamentarians are irrelevant. They are also inconclusive, because statements by individual Parliamentarians in the course of debates are not evidence even of the subjective thoughts of the whole body."**[1]

    We therefore prefer to apply the rules of statutory interpretation instead of speculating on Parliamentary intention or error.

[1] See ***Ferguson v The Attorney General*** **[2016] UKPC 2** at paragraph 33

(b) Second, even though the 2015 Amendment was passed by a special three-fifths majority and there is an endorsement to that effect in the Act, one must remember that the original 1994 Bail Act was also passed in the same manner in Parliament. Further, there was no revocation of section 5(1) in the 2015 Amendments and also section 5(1) itself was part of the 2015 Amendments. Therefore, there can be no necessary inference that Parliament intended to vary or revoke constitutional rights any more than it had already done in section 5(1). The only proper inference about the purpose of the statute is as stated above, namely, that Parliament is presumed to have acted in a manner consistent with the affirmation of the right to bail in section 5(1) rather in violation of it in section 5(5)(b)(ii).

36. Third, the Respondents argue that there must have been an error that cannot be corrected by a reading down of section 5(5) to create a discretion to grant bail in cases where section 5(5)(b)(ii) applied. This is because there was arguably no need to legislate for, or to have a special majority for such a discretion.

However, in the original Bail Act, Parliament did legislate by special majority about the exercise of the discretion in granting or refusing bail as for instance in sections 6 and 7 of the Act. The very existence of sections 6 and 7 of the Bail Act therefore goes against the argument that a reading down of section 5(5) to create or limit the discretion to grant bail is somehow an act that must be an unnecessary act or contrary to Parliamentary intention, or that the only reading of section 5(1) is to assume an error. In this case we have interpreted legislative action based on accepted principles of statutory interpretation and we prefer not to speculate on Parliamentary intention or to assume Parliamentary error.

37. Fourth, it would not be correct to read the exception of section 5(5) into section 5(1) as the Respondents contend. This would only compound the problem or assertion of error. As will be discussed later and, as the trial judge found, section 5(5)(b)(ii), as a stand-alone provision (viz, in the absence of section 5(1)) may have been unconstitutional. If the court were to assume that Parliament in error omitted to include section 5(5) as an exception to section 5(1), then there would have been a presumption that Parliament intended to

act in a manner that was in violation of the constitutional right to bail. As stated before, this is contrary to the presumption of the constitutionality of statutes. In short, it would not be proper to assume an error of drafting that itself would be an error of the draftsman or the Parliament.

*(ii) Implied Repeal*

38. The Respondents argue that there is a principle that where a provision in a statute which is later in time is contrary to an earlier provision in the statute, the later provision is assumed to have replaced or impliedly repealed the earlier one and should be given precedence over the earlier one.

    In the present matter it would mean that section 5(5) would take precedence over section 5(1).

39. The principle of implied repeal is inappropriate to the present case for the following 3 reasons.

40. First, the Constitution is the supreme law of the land.[2] Its provisions must take primacy and precedence over other laws.

    The right to bail is expressly guaranteed in the Constitution and must be given precedence over laws that are contrary to it.[3] It would be contrary to the primacy of the Constitution to give precedence to a law which revokes or substantially waters down the right to bail (section 5(5)) over a law which recognises and affirms the right to bail (section 5(1)).

    In other words, the principle of implied repeal must give way to the primacy of the Constitution. It is section 5(5) which must be read as subject to section 5(1).

41. Second, as stated before,[4] it must be presumed that Parliament intended to legislate for a purpose which is consistent with fundamental rights and not in violation of them.

[2] See section 2 of the Constitution of Trinidad and Tobago cited at paragraph 27 above
[3] See paragraphs 25 to 30 above
[4] Op cit

In this case, the presumption must be that Parliament intended to legislate in a manner consistent with the affirmation of the right to bail (as in section 5(1)), rather than in violation of it (as in section 5(5)).

In this case, the principle of implied repeal cannot be given precedence over the presumption that Parliament legislated consistent with the right to bail.

42. Third, section 5(1) was also part of the "later" 2015 Amendment to the Bail Act and there was no repeal or replacement of an earlier provision by a later one. In short, both sections form part of the same Amendment and one does not impliedly repeal the other.

*(iii) A specific provision versus a general provision*

43. The Respondents argue that there is a principle of interpretation that a specific provision in a statute is to be given precedence over a general provision in a statute. They say that section 5(1) is a general provision on bail while section 5(5) contains specific provisions in respect of bail and should take precedence over section 5(1).

44. For much the same reasons as the case of implied repeal, this argument is inapplicable to the present case.

45. The principles of (a) the primacy of the constitution and (b) the presumption of the constitutional consistency in a statute must take precedence over this other principle. Section 5(1) which recognises and affirms the constitutional right to bail save as provided in section 5(2), (4) and the First Schedule, must take precedence over the alleged abrogation of the right to bail in firearm cases on the "say so" of the prosecution in respect of Part II of the First Schedule.

46. In conclusion therefore, we find that the constitutional right to bail for "any offence" except those mentioned in sections 5(2), (4) and the First Schedule of the Bail Act, as recognised and affirmed by section (5)1, was valid and effective.

In so far as section 5(5)(b)(ii) is in conflict with section 5(1), it is section 5(5)(b)(ii) which must be read down to let section 5(1) be the dominant and effective provision of the Bail Act.

Section 5(5)(b)(ii) should be read as giving a statutory discretion to a court to refuse bail in cases where the prosecution informs the court that a firearm was used in relation to an offence in Part II of the First Schedule of the Bail Act.

47. That being the case, section 5(5)(b)(ii) was not an abrogation of the right to bail but a provision affecting the manner of how that discretion was to be exercised in granting bail. Such a provision was in keeping with the powers of Parliament to make laws for the peace, order and good governance of Trinidad and Tobago. It was not an unconstitutional provision because it was subject to section 5(1) which recognised the Constitutional right to bail.

    Contrary to the findings of the courts before which the Respondents appeared, there was an available discretion to grant bail to them, preserved by section 5(1). The failure of the judicial officers to do so was merely an error of law that did not constitute a breach of a fundamental right or freedom.

    As was stated by Lord Diplock in ***Maharaj v The Attorney General of Trinidad and Tobago No. 2*** **[1978] 2 All ER 670 at 679F**[5]:

> **"...no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair."**

48. For the reasons advanced above, this appeal must be allowed.

[5] And recently affirmed by the Court of Appeal in ***The Commissioner of Prisons and Ors v. Sasha Seepersad and Brian Seepersad (by their kin and next friend Karen Mohammed)*** **Civil Appeal Nos. S093 of 2017, P094 of 2017, P218 of 2016, S219 of 2016, P223 of 2016 & S224 of 2016.** See paragraphs 106, 109 and 111.

However, because of the potential relevance of the decision for possible future legislation, we wish to make certain summary observations with respect to the position if section 5(1) did not exist or had been repealed.

**Section 5(5)(b)(ii) as a stand alone provision**

49. As stated before[6], in the absence of considering section 5(1), the trial judge found that the denial of bail to the Respondents as a result of the application of section 5(5)(ii)(b) of the Bail Act to their situations violated their constitutional rights. Further, that even the constitutional section 13 override did not validate the legislation.

    But for the section 5(1) mandate we would have supported such a decision for the 3 reasons (in summary form) below.

*(a) Section 5(5)(b)(ii) as a stand alone provision would have been contrary to sections 4 and 5 of the Constitution*

50. Section 5(5)(b)(ii) purported to remove the input of a judicial officer in the granting of bail for the 120 day or 1 year window and upon the "say so" of the executive (the prosecution).

    The legislation had directly impinged upon the inherently judicial exercise of granting bail. As was stated by Lord Steyn in ***The State v. Khoyratty (Mauritius)*** **[2006] UKPC 13** at paragraph 8:

> **"The exercise of granting bail is a judicial one…It is a judicial act in the same way as passing sentence and must be left to the judiciary to adjudicate when and in what circumstances it must be granted or refused."**

    More recently and of direct relevance to Trinidad and Tobago Lord Sumption stated in ***Ferguson v The Attorney Genera***l at paragraph 20:

[6] See paragraphs 22 and 23 above

**"Legislation impinges directly on judicial proceedings if the statute itself amounts to the exercise of an inherently judicial power. This may, for example, be because…it determines whether bail is to be granted…"**

51. The Appellant sought to argue that section 5(5)(b)(ii) was merely a lawful exercise by Parliament of its law making powers to deny bail "for just cause" as is permitted by section 5(2)(f)(iii) of the Constitution.

    However, this argument was not sustainable here because section 5(5)(b)(ii) removed all judicial input from the inherently judicial act of granting bail and went beyond the simple law-making power of Parliament.

52. The Appellant also attempted to refer to a trilogy of Canadian cases which affirmed the right of the Parliament to regulate the granting of bail for just cause.[7]

    However, these cases were readily distinguished from the present matter. In those cases, the onus was placed on an accused to show why in certain cases his detention without bail was not justified. Nevertheless, even in those cases the decision on the grant or refusal of bail was ultimately left to a judicial officer.

    In the present matter, the decision on the grant or refusal of bail was being removed from any judicial officer to the "say so" of the prosecution.

53. The Appellant also argued that Parliament could effectively legislate upon the grant or refusal of bail as it had done in sections 6 and 7 of the Act whereby the discretion to grant bail could be limited by statute. Further, there was power to limit such bail to the point of "ring fencing" or circumscribing bail in many cases.

    Again, this argument is not sustainable because there is a vast difference between an attempt to limit the discretion of a judicial officer to grant bail and the complete removal of that discretion from a judicial officer as per section 5(5)(b)(ii).

[7] ***The Attorney General of Quebec v Edwin Pearson*** **[1992] 3 R.C.S 665**; ***R v Morales*** **[1992] 3 R.C.S 711** and ***David Hall v The Queen and the Attorney General of Canada*** **[2002] 3 R.C.S 309**

Further, while it has not been affirmatively decided in Trinidad and Tobago, it may very well be the case that some legislative curtailments of the discretion to grant bail may be unconstitutional.[8]

*(b) The "override" of section 13(1) of the Constitution would not validate section 5(5)(b)(ii) as a stand alone provision.*

54. Even though the relevant provisions infringed rights protected by sections 4 and 5 of the Constitution, the Act was passed in accordance with section 13 of Constitution. Section 13 of the Constitution allows a statute to override the rights guaranteed in sections 4 and 5 of the Constitution unless it is shown that such an Act was "not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."

55. Section 13(1) of the Constitution provides that:

> "**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 a proper respect for the rights and freedoms of the individual.**"

56. The preamble to the Bail (Amendment) Act 2015 and section 2 of that Act declare that it was to have effect even though inconsistent with sections 4 and 5 of the Constitution. Further, it was passed with the special three-fifths majority in both Houses of Parliament as mandated by section 13 (2) of the Constitution.

57. The question which remains is whether this section 13 override does validate the otherwise unconstitutional provisions of the Bail Act, or has it been shown that the relevant Provisions are not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

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[8] ***Adrian Nation v The Director of Public Prosecutions and The Attorney General of Jamaica*** **Claim No. 2010 HCV 5201**

58. In determining this question of reasonable justifiability, a decision of the Court of Appeal in ***Francis v The State of Trinidad and Tobago*** **86 WIR 418** has recognised that there are two (2) tests which have been used. Firstly, a non "formulaic" test and secondly, an assessment of four (4) criteria. The majority decision in the ***Francis*** case expressed a preference for the non-formulaic test,[9] especially since this approach has been applied by the Privy Council in a case from Trinidad and Tobago[10] and a case from Grenada.[11]

    On the application of either test, section 5(5)(b)(ii) was not shown to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

59. In summary, we say this because the removal of all judicial input from the inherently judicial exercise of granting bail is contrary to all democratic norms in respect of the grant or refusal of bail, save and except for the cases of treason, murder and more recently, piracy or hijacking.

    In this regard I adopt the sentiments of Lord Rodger and Lord Mance in the Privy Council decision of the ***State of Mauritius v Khoyratty***.

    At paragraph 30 of the judgment, Lord Rodger stated:

> **"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**

[9] See paragraphs 246 to 257, especially paragraph 252.
[10] ***Morgan v The Attorney General*** **(1987) 36 WIR 396**
[11] ***Worme v Commissioner of Police*** **[2004] UKPC 8**

**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 from 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."**

At paragraph 36, Lord Mance stated:

**"These basic principles were in my opinion infringed, even though only in a limited sphere, by the purported constitutional amendment in 1994 of section 5 to insert subsection (3A)(a). 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 introduce 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)."**

In a similar way, the incarceration of persons for 120 days or 1 year without any right to apply to the court for bail on "say so" of the prosecution with respect to the use of a firearm is liable to operate arbitrarily. It infringes upon the rights of an individual in a way that is not countenanced in a sovereign democratic state, and as enshrined in our constitutional preambles.

60. The Appellant sought to lead evidence on the issue of reasonable justifiability from Mr. Keith Renaud, Director, Office of Law Enforcement; Mr. Stephen Williams, Acting Commissioner of Police; and Hansard Reports.

61. The trial judge at pages 11-23 of her judgment set out this evidence in some detail. We do not propose to do so here. However, we would agree with her conclusions about this evidence, which ~~has~~ have not been seriously contested on this appeal.

    The trial judge concluded that the evidence of the State failed to prove that the objectives of the Bail (Amendment) Act 2015 had been met and in spite of the reasonable and foreseeable opportunity to justify the relevant provisions, the Appellant failed to do so.

62. Further, section 5(5)(b)(ii) extended to a wide standardless sweep of cases mentioned in the Schedule. It was a standardless sweep that had the potential to produce unfairness.

As Lamer C.J. noted in the ***Morales***[12] case in Canada, "**the principles of fundamental justice preclude a standardless sweep…**" This unfairness or arbitrariness was compounded by the fact that bail would be denied solely on the "say so" of a prosecutor that a firearm had been used in the commission of the offence.

63. In the circumstances, section 5(5)(b)(ii) as a stand alone provision, was not shown to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

*(c) Section 5(5)(b)(ii) taken in isolation would have violated the principle of the separation of powers.*

64. Section 13 of the Constitution provides for Parliament to override the Constitutional rights mentioned in sections 4 and 5 of the Constitution. However, the principles that relate to the separation of powers are not part of the rights mentioned in sections 4 and 5 of the Constitution. Without here deciding the point, it is arguable that the section 13 override may not arguably be invoked where the separation of powers is violated.

65. A basic formulation of the separation of powers principle is seen in the following quote from ***Matthew v The State (Trinidad and Tobago)*** **[2004] UKPC 33**[13], where Lord Hoffman stated:

> **"the principle of the separation of powers is not an overriding supra-constitutional principle but a description of how the power under a real constitution are divided. Most constitutions have some overlap between legislative, executive and judicial functions."**

66. The following dicta is of specific relevance to the present appeal from ***Ferguson*** where Lord Sumption stated that:

[12] **[1992] 3 R.C.S 711**
[13] See paragraph 28 of the judgment

**"The separation between the exercise of judicial and legislative or executive powers has been described as a 'characteristic feature of democracies'... In *Seepersad v A-G of Trinidad and Tobago*[2012] UKPC 4, [2012] 5 LRC 194, (2012) 80 WIR 463, Lord Hope of Craighead applied these principles to the Constitution of Trinidad and Tobago. He observed at para [10]:**

> **'The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot, consistently with that principle, transfer from the judiciary to an executive body which is not qualified to exercise judicial powers a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle.'"[14]**

67. The trial judge did declare that the Act violated the principles of the separation of powers by removing the discretion of a judicial officer to grant bail in the cases where section 5(5)(b)(ii) applied.

    In the absence of considering section 5(1), the decision would have been correct.

    As stated before, while Parliament may in some circumstances circumvent the discretion of a judicial officer to grant bail (as in sections 6 and 7 of the Bail Act) the legislative removal of the input of a judicial officer from the intrinsically judicial act of granting bail, as in section 5(5)(b)(ii), would have been an invalid intrusion by the legislature upon a judicial function.

    A fortiori, the vesting of the power to deny bail on the "say so" of the prosecution would have been a further intrusion on the judicial power in respect of bail since the decision on

[14] ***Ferguson v The Attorney General*** **[2016] UKPC 2** at paragraph 15

bail in the listed offences had now purportedly and wrongfully been transferred from a judicial officer to the executive (the prosecution).

**Conclusion**

68. The preservation of section 5(1) in both the original and amending Bail Act provision preserved the constitutional right to bail in cases where section 5(5)(b)(ii) of the 2015 Bail Act applied.

    The Respondents were therefore eligible for bail and were not deprived of their constitutional rights by the 2015 Bail Amendment Act.

    These appeals will therefore be allowed and we will hear the parties on the issue of costs.

…….

G. Smith

Justice of Appeal