**TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL, PORT OF SPAIN**

**Civ. App. #140 of 2008**
**Claim No. Cv 2007-01296**

**BETWEEN**

**INSHAN ISHMAEL**

***Appellant/Claimant***

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD & TOBAGO**

***Respondent/Defendant***

**PANEL: MENDONÇA, JA**
**JAMADAR, JA**
**BEREAUX, JA**

**APPEARANCES: A Ramlogan for the Appellant**
**R. Martineau, SC and M. Quamina for the Respondent**

**DATE DELIVERED: 27th July, 2012**

I have read the judgment written by Bereaux J A. I agree with it and have nothing to add.

.....
**A. MENDONCA**
**Justice of Appeal**

# JUDGMENT

**DELIVERED BY; BEREAUX JA**

[1] The appellant, Inshan Ishmael was arrested at 9.20 am on 24th January, 2007, under the Anti-Terrorism Act ("the Act"). He was subsequently charged but under section 105 of the Summary Offences Act, Chap. 11:01. On 25th March, 2007, the charge was withdrawn without explanation. He has challenged the constitutionality of the Act, which was passed by a simple parliamentary majority, on the ground that it is inconsistent with sections 4 and 5 of the Constitution and required a special parliamentary majority pursuant to section 13 of the Constitution. In the alternative, he has challenged the constitutionality of sections 23, 24, 32, 33, 34, 36 and 37 of the Act for the same reasons. He has also sought damages, including exemplary damages.

[2] In his affidavit in support of the motion, the appellant gave a detailed account of the aggravating circumstances of his arrest and detention. But despite his complaints, counsel's submissions on his behalf have proceeded purely on the constitutionality of the Act. His allegations however, were not denied by the respondent who put in no affidavit in response. Consequently, the appellant would ordinarily have been entitled to damages for his arrest and detention if he had succeeded in this action. But, because he has failed, it is unnecessary to address in detail the aggravating circumstances of his arrest and detention.

[3] I shall thus address only the legal submissions advanced in support of and in defence of the motion. I say at the outset, that the respondent is entitled to succeed. The Act is constitutional and so too all of its sections. In fact, I find that the Act has struck a proper balance between two competing interests; to wit; the public interest on the one hand and the rights of the individual on the other.

[4] The appellant contends broadly, that the entire Act is inconsistent with sections 4(a), 4(b), 4(i) and 5(2)(a), (b), (c), (d), (f) and (h) of the Constitution and was not passed in accordance with section 13 of the Constitution. Section 13(e) requires that an Act which

is inconsistent with sections 4 and 5 must be passed by both Houses of Parliament with at least a three-fifths majority vote in each House. Once that majority is achieved, then, pursuant to section 13(1) such an Act of Parliament is effectual unless it can be shown not be reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual. Sections 4(a), 4(b), 4(i) and 5(2)(a), (b), (c), (d), (f) and (h) provide as follows:

> ***4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:***
>
> > ***(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;***
> >
> > ***(b) the right of the individual to equality before the law and the protection of the law;***
> >
> > ***(c) the right of the individual to respect for his private and family life;***
> >
> > ***(d) …***
> >
> > ***(e) …***
> >
> > ***(f) …***
> >
> > ***(g) …***
> >
> > ***(h) …***
> >
> > ***(i) freedom of thought and expression.***
> >
> > ***(j) …***
> >
> > ***(k) …***
>
> ***5 (1)***

***(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not –***

***(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;***

***(b) impose or authorize the imposition of cruel and unusual treatment or punishment;***

***(c) deprive a person who has been arrested or detained –***

***(i) of the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention;***

***(ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him.***

***(iii) of the right to be brought promptly before an appropriate judicial authority;***

***(iv) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful.***

***(d) authorise a court, tribunal, commission, board or other authority to compel a person to give evidence unless he is afforded protection against self-incrimination and, where necessary to***

***ensure such protection, the right to legal representation;***

***(e) …***

***(f) deprive a person charged with a criminal offence of the right –***

***(i) to be presumed innocent until proved guilty according to law, but this shall not invalidate a law by reason only that the law imposes on any such person the burden of proving particular facts;***

***(ii) …***

***(iii) …***

***(g) …***

***(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.***

[5] The grounds upon which the allegations of unconstitutionality are based are that:

(a) Section 23 permits arbitrary detention of a person and authorizes the deprivation of liberty without due process of law and the right to the protection of the law contrary to sections 5(l), 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(d) and 5(2)(h) of the Constitution .

(b) Section 24 allows the interrogation of a person and compels that person to produce documents and items which may be given into the custody of the police. It thus contravenes the right to liberty

and the enjoyment of property, the right to the protection of the law and the right to freedom of thought and expression.

(c) Section 24 also contravenes:

(i) the protection against arbitrary detention guaranteed by section 5(2)(a) by requiring a person to be held for interrogation before a Judge;

(ii) the protection against cruel and unusual treatment guaranteed by section 5(2)(b) by requiring involuntary submission to interrogation;

(iii) the right to be brought promptly before an appropriate judicial authority when detained, as guaranteed by section 5(2)(c)(iii), because, under the Act, the Judge before whom an interrogation is to take place, is not an appropriate authority;

(iv) the right to habeas corpus guaranteed by section 5(2)(c)(iv) during the course of the interrogation;

(v) the right guaranteed by section 5(2)(d) of the Constitution, because the Act authorises a person to be interrogated before a Judge, during which such person may be compelled on oath to answer questions which may be incriminating;

(vi) The right guaranteed by section 5(2)(h);

(a) due to the absence from the Act of any safeguard which permits the person to be interrogated to know the reason for the order made against him, and

(b) due to the absence of a provision by which the validity of the interrogation may be challenged;

(d) Sections 32 and 33 make it a criminal offence to fail to disclose information required to be disclosed by those sections. This offends the right to freedom of thought and expression as well as the right to silence.

(e) Section 34 allows the making of a restraint order in respect of property without proof of the commission of a crime in properly constituted criminal proceedings. It contravenes section 4(a). It also contravenes section 4(b) by subverting the presumption of innocence.

(f) Sections 36 and 37 which allow the property of a person to be seized, controlled, managed and forfeited without proof of the committing of a criminal offence, is a denial of the right to the use and enjoyment of property contrary to section 4(a). The right to liberty in section 4(a) is also denied where a person is denied the right to use his talents and his property in any manner which does not contravene the law. Due process of law is subverted because no crime is proved to have been committed such as to warrant the seizure and detention of the property of free men. Belief on the part of an officer or servant of the State or on the part of a judge that property is terrorist property, applying the civil test of balance of probabilities where no offence is alleged or proved, is a denial of due process against the accused.

**The issue**

[6] The short question therefore is whether the Act as a whole, or in the alternative, any of the impugned sections, is inconsistent with sections 4 and 5. Pemberton J. dismissed the

action adopting the reasoning she gave in **Chandresh Sharma v The Attorney General of Trinidad and Tobago** H.C. No. 150 of 2005, a case in which the constitutionality of the Act, and the identical sections were also challenged on identical grounds. Both counsel consented to the judge's approach. The **Sharma** decision was attached to her judgment as an appendix and adopted as the judgment of the court, mutatis mutandis.

**Trial judge's finding**

[7] Pemberton J, in dismissing the application, found that the Act did not offend sections 4 and 5 of the Constitution. She asserted that the drafters of the Act sought to observe the sections 4 and 5 constitutional safeguards by providing:

> (a) A definition of the purpose of the Act and the actions which are likely to trigger an offence, prosecution and penalty;
>
> (b) Guidelines for the investigation of offences under the Act and for the disclosure and sharing information;
>
> (c) Section 31 specifically recognized and preserved the fundamental right expressed at section 4(c) of the Constitution.

She found reasonableness to have been mandated throughout the Act. No provision authorized the arbitrary exercise of power by any state functionary. The Act as a whole covered the fundamental bases necessary for a fair system of justice.

**Short conclusion**

[8] I agree entirely. The Act as a whole is imbedded with safeguards which protect the rights of the person whose affairs are, or whose property is, under investigation. A more than sufficient balance is struck between the individual rights of the citizen and the interest of the State.

My approach will be to consider first the constitutionality of the Act itself and go on to examine individually the respective sections.

***The constitutionality of the Act***

*Background*

[9] It is important, in order to understand the purpose of the Act, that the background against which the necessity arose for its enactment, be examined. These facts are matters of international notoriety. The long title of the Act describes it as *"An Act to criminalise terrorism, to provide for the detection, prevention, prosecution, conviction and punishment of terrorist activities and the confiscation, forfeiture and seizure of terrorists' assets."* The need for such legislation is beyond controversy. Certainly, since the early 1970's, terrorism has bedeviled the international community resulting in loss of thousands of lives, serious injuries, billions of dollars in damage to and destruction of property. Its negative impact on the manner in which we live has been immeasurable.

[10] Terrorist acts have been directed at aircraft, ships, homes, office buildings, houses of parliament, hotels and have been generally perpetrated through a network of persons operating across international borders. No country is free from risk. Such acts are intended not only to destroy lives and property but also to disrupt, to sow fear and disquiet and to undermine public confidence in the manner of governance. This can lead to loss of investor confidence and capital flight and can thus impact negatively on the economy of a city or country.

[11] Some organizations which perpetrate terrorism are multinational in scope. Terrorist acts thus constitute serious threats to international peace and security. The international community has responded by agreeing to a number of Conventions which place responsibility on States to fight terrorism in its various manifestations. This responsibility includes the enactment of local legislation to address and criminalise terrorist acts and to dismantle such organizations existing within and without state boundaries. There is an obvious public interest which requires the passage of such legislation.

[12] In order to further their purpose and to execute their acts of destruction, stealth and secrecy are essential to the terrorist existence. Small, close-knit groups, known as cells which are less likely to be infiltrated or detected, are a feature of such organizations. Real property is required to provide a base and money is needed to fund their operations. It follows therefore that the obtaining of information on the membership, funding and property of these organizations is an important weapon in the fight against terrorism. Modern legislation is thus directed not just at criminalizing terrorist acts but also at ferreting out information on the operations of such organizations and at stifling their sources of funding.

[13] Not only are terrorist acts themselves criminalised but so too the withholding of information which can assist in the detection of an organization and its modus operandi. Necessary interventions require that assets, including bank accounts, are frozen. Money and property may ultimately be seized. Information obtained within a State may be exchanged among States. The transfer of money internationally is also monitored.

[14] Anti-terrorism legislation is thus quite common, certainly to modern democracies and because they are directed at the same purposes, legislation among states is usually quite similar in nature and scope. Because quick action is often necessary to save lives and prevent destruction of property, proof of criminality may not always be readily at hand. In providing for arrests of persons and seizure of property, anti-terrorist legislation can therefore impinge upon and even collide with fundamental rights and freedoms.

[15] But it does not always follow that, because anti terrorist legislation may impinge upon them, such legislation is always inconsistent with the fundamental rights and freedoms set out in section 4 and 5(2) of the Constitution. It is now trite that most fundamental rights and freedoms are qualified and not absolute rights and are subject to legislative regulation and control. Such control will not run afoul of the fundamental rights and freedoms set out in sections 4 and 5 of the Constitution if the legislative provisions are proportionate to the legitimate aims and objectives of the legislation. The legislation will also be constitutional if, to the extent that liberty and property are in fact taken away, it conforms

to *due process.* An Act of Parliament which conforms to either of these constitutional norms will not be inconsistent with the fundamental rights and freedoms set out in sections 4 and 5 of the Constitution. In my judgment the Act does so conform.

[16] To the extent that it has impinged upon fundamental rights and freedoms, the Act has done so in a manner that is balanced, rational and proportionate to its aims and objectives. In my judgment, the aims and objectives of the legislation are legitimate. They promote the public interest. There is no constitutional infringement. To the extent that the Act does in fact deprive the subject of his or her liberty, property or security of the person, or that it impinges upon section 4(i) or section 5(2), it does so in conformity with the requirements of *due process*. Central to the achievement of its balance and rationality on the one hand and to its conformity with *due process* on the other, is the role given to the judiciary in the processes set out in the Act. Additionally, the Act does not contravene the provisions of section 5(2) of the Constitution, which specifically prohibits Parliament from passing legislation which breaches its provisions. I shall next address each of these issues starting with the section 5 prohibitions.

***(A) Conformity with section 5 provisions***

[17] Section 5(2) of the Constitution is directed at Parliament and section 5(2) specifically enjoins Parliament from passing legislation which infringes certain rights set out in section 5(2). It is also trite that the 5(2) rights which Parliament is specifically prohibited from abrogating are also further and better particulars of the fundamental rights and freedoms set out in section 4. Some of the specific prohibitions set out in section 5(2) have been prayed in aid by the appellant in his motion. But, in my judgment, they do not assist him. On a clear reading of the Act, none of the prohibitions of section 5(2) has been breached by the Act.

[18] The Act does not provide for arbitrary detention neither does it impose punishment or treatment which is cruel and unusual. There is no denial of the right to counsel. Indeed, there is specific provision in section 24(11) of the Act for the retention and instructing of counsel at any stage of information gathering proceedings before a judge in chambers.

Additionally, section 24(10) prohibits the use of any self-incriminating evidence obtained from any person in criminal proceedings other than in a prosecution for perjury.

[19] While section 23 does not expressly provide for retention of counsel, the fact that there is no express prohibition against it, would bring, by implication, the provisions of section 5(2)(c) into play in respect of any detention under section 23 or in respect of any other provision in the Act where the right can be implied.

[20] The dictum of Phillips JA in **Bazie v Attorney General of Trinidad and Tobago** (1971) 18 WIR 113 at 123 is relevant. He was there speaking of the object of section 2 of the 1962 Independence Constitution, which is the equivalent of section 5 of the present Constitution. He said:

> ***"The object of s 2 is to secure the protection of all the rights and freedoms which are enshrined in s 1. Since the administration of justice is the instrument by means of which the citizen seeks to enforce or to prevent encroachment on those rights, the scheme of s 2 is to prohibit the enactment of legislation which may have the effect either of (a) abrogating, abridging or infringing any of those rights, or (b) depriving the citizen of the benefit of any of several procedural safeguards established for the purpose of ensuring the due administration of justice. The observance of these safeguards is, in my view, an essential requirement for the preservation of all the substantive rights and freedoms guaranteed by s 1 of the constitution."***

In my judgment, the safeguards intended by section 5 of the Constitution have been honoured and maintained in the Act.

***(B) Rationality of the Act***

[21] More importantly, the prohibitions set out in section 5(2) do not affect legislation which control and regulate rights in a manner which is balanced and proportionate to its aims and objectives. That section 4 and 5 rights are not all absolute requires no great exposition of the law. The cases are numerous. See for example **Collymore and Abraham -v- Attorney General of Trinidad and Tobago**, (1967) 12 WIR 5; **Suratt and others v The Attorney General of Trinidad & Tobago** (2007) 71 WIR 391; **The Public Service Appeal Board of Trinidad and Tobago v Omar Maraj** 2010 UKPC 29 at paragraph 31 and 32; **Hayden Toney v P C Joseph Corraspe** Mag. App. #68 of 2008 **R v Director of Serious Frauds Office Ex parte Smith** [1993] AC 1 at 40D; **Brown v Stott** [2003] 1 AC 681. In almost all these cases, the rights under review in the present case were held to be qualified rights and subject to reasonable statutory restriction.

[22] **Suratt** was a decision which upheld the constitutionality of the Equal Opportunities Act 2000. Baroness Hale, at paragraph 58, commented that, *"legislation frequently affects such rights as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it."* She added that, *"it is for Parliament in the first instance to strike the balance between individual rights and the general interest"* and that *"the courts may on occasion, have to decide whether Parliament has achieved the right balance."* Lord Bingham dissented on the main question of whether that Act derogated from the jurisdiction of the Supreme Court. But on this issue, he accepted that the section 4 and 5 rights under review were qualified rights. In the **Public Service Appeal Board v Omar Maraj**, (at paragraphs 31 and 32) Baroness Hale, giving the decision of the Board of the Privy Council, stated emphatically that the fundamental rights under review were not absolute.

[23] The dicta in **Collymore**, **Suratt**, **R v Director of Serious Frauds Office, Ex parte Smith** and **Brown v Stott** were all considered in **Toney** by Court of Appeal (Weekes,

Soo Hon, Bereaux JJA). One of the questions to be resolved in **Toney** was whether section 28 (1) of the Firearms Act infringed the right to silence and the privilege against self incrimination, by requiring the holder of a firearm licence, to report at a police station, the loss or theft of his or her firearm, within twenty four hours after the discovery of the loss or theft of the firearm.

[24] The appellant in that case contended that section 28(1) (A) made it an offence for the holder of a firearm licence to negligently lose his or her firearm and therefore, the requirement that the details of that loss be reported at a police station was an infringement of his right of silence and the privilege against self incrimination. In delivering the judgment of the Court of Appeal, I noted at paragraph 32 that *"the mere curtailment of fundamental rights by the enactment of laws which, in the public interest, may criminalise certain categories of behaviour, does not per se render the law unconstitutional, if it is reasonably directed to a clear and proper public purpose."*

[25] Mr. Ramlogan submitted that in respect of sections 32 and 33 of the Act, the criminalising of a failure to give information over to the police, offended the right to freedom of thought and expression (section 4(i)) as well as the right to silence. He submitted that these rights were infringed by section 32 which made it mandatory for a person to disclose to a police officer, any information he or she may have which would assist:

(a) in preventing the commission of a terrorist act; or
(b) in securing the arrest or prosecution of another person for a terrorist offence.

[26] He added that for the same reasons, section 33 also offended those rights. Section 33 similarly requires a person to disclose to a designated authority the existence of property in his possession which he knew to be terrorist property. Under section 33, he or she must also disclose information regarding any transaction or proposed transaction in respect of terrorist property or any transaction reasonably suspected to involve terrorist property.

[27] The same argument arises in respect of section 24, particularly, 24(1), 24(3), 24(4), 24(7), 24(9) (Section 24 is fully set out and addressed at paragraph 55 below) which empowers a judge to order the giving of information, under oath, in proceedings over which the judge presides.

[28] In my judgment, freedom of expression and thought and the right of silence cannot justify the withholding of information which it is in the public interest to disclose. Individual rights must yield to the overriding public interest even to the extent of criminal prosecution. The right to freedom of thought and expression and the right of silence (to the extent that the latter is a further and better particular of the *due process* provision in section 4(a)) are subject to reasonable statutory restriction.

[29] This has been so even at common law. In this regard, the decision of the House of Lords in **R v Director of Serious Frauds Ex parte Smith** (supra) is relevant. That was a decision in which the House of Lords held that the Director of Serious Frauds was entitled to compel answers to questions, on pain of the commission of a criminal offence under section 2(13) of the English Criminal Justice Act 1987. The decision of the House of Lords was delivered by Lord Mustill who gave a very careful and detailed analysis of the evolution of the right of silence and the privilege against self incrimination.

[30] Lord Mustill's dictum in **R v Director of Serious Frauds Office Ex parte Smith** was extensively quoted in **Toney** not just for the guidance he gave on the law but also for the history he provided of the evolution of the right of silence and the privilege against self incrimination. He noted those rights were always subject to legislative restriction even as they evolved. (See **Toney** at pages 12 to 14, 15 to 18 and 26 to 28). At page 30F of his speech, (See **Toney** at page 12) he noted that the right of silence consists of a bundle of immunities, among them the following, which are pertinent to this appeal (particularly in respect of section 24 proceedings):

***(i) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.***

***(ii) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.***

***(iii) A specific immunity, possessed by all persons under suspicion of criminal responsibility, whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.***

[31] At page 40, he noted that while *"there was a strong presumption against interpreting a statute as taking away the right of silence, at least in some of its form … Nevertheless, it was clear that statutory interference with the right is almost old as the right itself".* He then went on to specifically address the history of legislative interference with the right. At page 40 letter D, he looked at examples of the manner in which the right of silence had been overriden by the British Parliament. He said:

***"Since the 16th century legislation has established an inquisitorial form of investigation into the dealings and assets of bankrupts which is calculated to yield potentially incriminating material and in more recent times there have been many other examples, in widely separated fields, which are probably more numerous than is generally appreciated.***

***These statutes differ widely as to their aims and methods. In the first place, the ways in which the overriding of the immunity is conveyed are not the same. Sometimes, it is made explicit. More commonly, it is left to be inferred from general language which contains no***

***qualification in favour of the immunity. Secondly, there are variations in the effect on the admissibility of information obtained as a result of the investigation. The statute occasionally provides in so many terms that the information may be used in evidence; sometimes that it may not be used for certain purposes, inferentially permitting its use for others; or it may be expressly prescribed that the evidence is not to be admitted; or again, the statute may be silent. Finally, the legislation differs as to the mode of enforcing compliance with the questioner's demands. In some instances failure to comply becomes a separate offence with prescribed penalties; in others, the court is given a discretion to treat silence as if it were a contempt of court.***

***In the light of these unsystematic legislative techniques there is no point in summarising the various statutes drawn to our attention. They do no more than show that the legislature has not shrunk, where it has seemed appropriate, from interfering in a greater or lesser degree with the immunities grouped under the title of the right of silence."***

See also **Toney** at paragraph 34.

[32] These comments ought to put to rest, any notion that the right of silence and the privilege against self incrimination, were absolute at common law. To this, I would add the right to freedom of expression and thought. Such rights were always subject to reasonable legislative encroachment. Some of the examples given by Lord Mustill are deployed in the Act. Section 24(9) for instance, specifically requires an answer to questions even though such answers may incriminate the subject who is under interrogation. Section 24(10) however, expressly exempts the subject from criminal prosecution in respect of such answers, except for a prosecution for perjury. Section 24(11) provides further protection by permitting the subject to retain and instruct counsel at any stage of the proceedings.

[33] The rights set out in section 5(2) (including the right of silence), are of course further and better particulars of the *due process* clause in section 4(a) and the right to the protection of the law in section 4(b). *Due process of law* and the right to the protection of the law are terms of wide and overarching import. The section 5 rights are examples of what these overarching rights comprise. They are constituent parts of what *due process* and the protection of law entail and are also subject to reasonable restriction by legislation. Such reasonable legislative restriction will not necessarily undermine the overarching right to *due process* or to the protection of the law provided for by sections 4(a) and 4(b). See **The State v Brad Boyce** (2006) 68 WIR 437, discussed later at paragraph 47 et seq below.

[34] In this regard, the comments of Lord Bingham in **Brown v Stott** (supra) are also apposite. The facts of that case also touch on the right of silence. The proportionality test was also applied. The Board of the Privy Council, sitting in an appeal from Scotland, upheld the use of an oral admission in the criminal prosecution of the maker of the admission. The admission was made pursuant to section 172(2)(a) of the Road Traffic Act 1988. The driver of a motor vehicle was suspected of theft at a superstore. She was charged with theft and taken to the Police Station where, because she was also suspected of drunk driving, she was required, by section 172(2)(a) of the Road Traffic Act, to say who had driven the car to the store. Failure to comply with section 172(2)(a) was a criminal offence punishable, *inter alia*, by a fine.

[35] After admitting to having driven the vehicle to the store, the driver then failed a breath test and was charged with an offence under section 172. She contended that the use in evidence of the oral admission infringed her right to a fair hearing under article 6(1)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998). This was rejected by the Board which held that the overall fairness of the trial process was not compromised by the statutory requirement for the subject to provide information which may have incriminated her. At page 704, Lord Bingham noted that:

> ***"The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur jus. The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35, 52, para 69; Sheffield and Horsham v United Kingdom (1998) 27 EHRR 163, 191, para 52.***

[36] I do not consider that it will always be necessary to resort to proportionality in determining the constitutionality of an Act of Parliament. There will be occasions where the arguments as to unconstitutionality can be disposed of without resort to the proportionality test. See **Steve Ferguson & Ishwar Galbaransingh –v- Attorney General & Mc Nicholls**, Civil Appeal #185 of 2010 (unreported) per Mendonça JA at paragraph 32. In this case, however, I consider that the test is appropriate. The provisions of the Act are directed at protecting the public interest by thwarting terrorist activity. The manner by which this is sought to be achieved is by obtaining information from persons

who have knowledge of such operations, by seizing terrorist property and by criminalising acts which may constitute terrorist activity.

[37] This is consistent with the approaches of other Commonwealth states. A comparison with legislation in Canada, Jamaica and the United Kingdom, for example, reveal similar approaches to the issue, subject of course to variations in the terms of the provisions themselves.

[38] To the extent that information may be obtained under the Act by some form of coercion, or, that liberty or property may be restricted or confiscated, a proper balance is struck by providing appropriate safeguards in the Act itself. Pivotal to that balance is the important role played by the Judiciary in the making of restraint orders, detention orders and forfeiture orders. Such a balance, having been appropriately struck, there is no inconsistency with the fundamental rights and freedoms in sections 4 and 5 of the Constitution. The Supreme Court of Trinidad and Tobago, as the guardian of the Constitution will always have the final say in whether such balance has been achieved in any given case.

***(C) Conformity with due process***

[39] I turn then to my finding that the Act also complies with the *due process* provisions of section 4(a) in so far as it may cause a subject to be deprived of his or her liberty, property or security of the person. Before doing so, I must address an argument raised by Mr. Ramlogan as to the correctness of the proportionality test applied by the Privy Council in **Suratt**. It is appropriate to address it at this juncture because the argument ultimately embraces the *due process* concept and is best disposed of here.

[40] Mr Ramlogan submitted that the proportionality test as propounded in **Suratt** is wrong. He contended that even if the section 4 and 5 rights were not absolute, it meant that the law contemplated exceptions to their supremacy. Those exceptions were exceptions which were recognised by the common law. If the legislation fell within an exception recognised by the common law, then the law was constitutional. If it did not, then, it was

inconsistent with sections 4 and 5 and required a section 13 majority. These exceptions were hard and fast and could not be enlarged beyond their pre 1962 and 1976 scope when the Independence and Republican Constitutions were respectively passed. He did not elaborate or provide examples of what these exceptions were, neither did he provide authority to support his submission.

[41] In answer, I say three things. Firstly, we are bound by the decision of the Board in **Suratt**. But a consequence of this binding precedent must be that the decision of the Court of Appeal in **The Attorney General –v- Northern Construction Limited**, Civ. Appeal No. 100 of 2002 must be reviewed. In that case, Archie C J, delivering the judgment of the Court applied the proportionality test in upholding the effectuality of section 33 of the Proceeds of Crime Act 2000 as being reasonably justifiable (in a society that has a proper respect for the rights and freedoms of the individual) under section 13 of the Constitution. The section had been found to be inconsistent with sections 4 and 5 but was upheld under section 13.

[42] One of the questions to be considered will be whether the proportionality test is appropriate, both to the question of the inconsistency of an Act of Parliament with sections 4 and 5 and to the question of reasonable justification under section 13. Any discussion on that issue must also embrace the question whether the introduction of section 13(1) into the Constitution of Trinidad and Tobago, renders the proportionality test more appropriate to reasonable justifiability under section 13(1) rather than to the issue of inconsistency with sections 4 and 5.

[43] Secondly, the proportionality test is a valid principle of long standing. See the decision in **Belfast Corporation v O.D. Cars** [1960] All ER 65 which is in effect a variation of the same principle. One of the questions for consideration by the House of Lords was whether section 10(2) of the Planning and Housing Act (Northern Ireland) 1931 contravened section 5(1) of the Government of Ireland Act 1920 and was unconstitutional. The House of Lords held that the 1931 Act was a *"regulatory"* measure

and not confiscatory and was not a law made *"so as to ... take any property without compensation within section 5(1) of the 1920 Act."*

[44] In that case, the discussion turned on the scope of the phrase *"take any property without compensation"* within the meaning of Section 5(1) of the 1920 Act. Viscount Simonds, in coming to the conclusion that the refusal was not a *"taking of property",* quoted at page 69 with approval, the following passage from Brandeis J in **Pennsylvania Coal Co. v Mahon** (1922) 260 US 393 at p. 417:

> ***"Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use".***

Viscount Simonds, speaking of the dictum of Brandeis J, then added:

> ***"that very learned judge indicates in clear terms the distinction which should guide us in determining whether or not legislation which diminishes the owner's free enjoyment of his own property is a "taking" of that property. It is clear that such a diminution of rights can be effected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed. I will say only one thing more about the American cases. The day may come when it will be necessary to consider the relevance to the constitution of Northern Ireland of the observation of HOLMES J., in the case already cited (4):***

> *'The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking'*
>
> ***If the question is one of degree, I am clearly of opinion that the day did not arrive with s. 10(2) of the Act of 1931."***

While the passage does not speak of *"proportionality"* per se, in my judgment, the learning derives from the same principle.

[45] In **Ong Ah Chuan -v- Public Prosecutor** [1981] A.C. 648, the proportionality test was deployed by Lord Diplock in upholding the constitutionality of sections 15 and 29 of the Misuse of Drugs Act (as amended) of Singapore. Section 15 provided that a person proved or presumed to have had in his possession more than 2 grammes of heroin, contained in any controlled drug, shall be, *"presumed to have had such controlled drug in his possession for the purpose of trafficking therein."* Section 29 provided for a mandatory death sentence for persons convicted of trafficking in more than 15 grammes of heroin. Both appellants, when arrested, were found to have had more than 15 grammes of heroin and were sentenced to death.

[46] The Board held that the presumption created by section 15 did not offend the equality provisions of Article 12 of the Constitution of Singapore and that in differentiating between persons dealing in more than 15 grammes of heroin and those dealing in less, section 29 also did not conflict with Article 12 nor was it arbitrary. The relevant dictum of Lord Diplock begins at page 673 letter G. He said:

> ***The discrimination that the defendants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15 grammes of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals***

***who traffic in less than 15 grammes of heroin. The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in the offence. The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with article 12(1) of the Constitution.***

***The social object of the Drugs Act is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine. The social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. (emphasis mine) There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the legislature to determine in the light of information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers."***

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[47] Thirdly, the mode and manner of legislative regulation cannot be immutably fixed by existing law but will always depend on existing societal needs and requirements. Mr. Ramlogan's submission borrows from a similar but better constructed argument which was rejected by the Privy Council in **The State of Trinidad and Tobago v Brad Boyce** (supra). In that case, the Administration of Justice (Miscellaneous Provisions) Act 1996 amended the Supreme Court of Judicature Act to provide the Director of Public Prosecutions with a right of appeal (on a point of law) against a *"judgment or verdict of acquittal"* which was *"the result of a decision by a trial judge to uphold a no-case submission or to withdraw a case from the jury."*

[48] The Director duly appealed against such a decision and before the Court of Appeal it was argued, on behalf of the accused that the amended section was unconstitutional because it was inconsistent with the fundamental human right not to be deprived of liberty except by *due process of law* and also infringed the fundamental right to the protection of the law. That contention was upheld by the Court of Appeal but was reversed on appeal to the Privy Council. In allowing the appeal, the Board of the Privy Council drew a distinction between *due process of law* as a fundamental principle necessary for a fair system of justice and *due process of law* which requires that all the mandatory requirements of a criminal procedure be observed. A change in the latter procedure does not result in a breach of *due process* in terms of the former.

[49] The judgment of Lord Hoffman, delivering the decision of the Board, provides an effective answer to the Mr Ramlogan's submissions as to the immutability of common law exceptions. The dictum quoted below from paragraphs 12 to 15 of the judgment of Lord Hoffman, also encapsulates the argument put forward by the accused against the constitutionality of the amendment, as well as the reasoning of the Court of Appeal in upholding those submissions:

> ***[12] In essence, the reasoning of the Court of Appeal was that under the common-law rule as it existed at the time of the Constitution, a second trial of an accused who had been***

***acquitted by a jury would have been a denial of due process of law. It follows that immunity from the possibility of such a trial formed part of the right to due process which was entrenched by s 4 of the Constitution.***

***[13] This proposition was skilfully and persuasively deployed before the Board by Mr Hudson-Phillips QC, but their lordships think that it is wrong and that it derives plausibility only from an ambiguity in the term 'due process'. In one sense, to say that an accused person is entitled to due process of law means that he is entitled to be tried according to law. In this sense, the concept of due process incorporates observance of all the mandatory requirements of criminal procedure, whatever they may be. If unanimity is required for a verdict of a jury, a conviction by a majority would not be in accordance with due process of law. If the accused is entitled to raise a defence of alibi without any prior notice, a conviction after the judge directed the jury to ignore such a defence because it had not been mentioned until the accused made a statement from the dock would not be in accordance with due process of law.***

***[14] But 'due process of law' also has a narrower constitutional meaning, namely those fundamental principles which are necessary for a fair system of justice. Thus it is a fundamental principle that the accused should be heard in his own defence and be entitled to call witnesses. But that does not mean that he should necessarily be entitled to raise an alibi defence or call alibi witnesses without having given prior notice to the prosecution. A change in the law which requires him to give such notice is a change in what would count as due process of law in the broader sense. It does not however mean that he has***

***been deprived of his constitutional right to due process of law in the narrower sense. Lord Millett made this point in <u>Thomas v Baptiste</u> (1999) 54 WIR at p 415, when he said (at pp 421 and 423) that the term 'due process' in the Constitution –***

> ***'does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law … It does not guarantee the particular forms of legal procedure existing when the Constitution came into force; the content of the clause is not immutably fixed at that date.'***

***[15] It is therefore not sufficient that the law at the time of the Constitution gave one a right to be immune from further proceedings after an acquittal by a jury. Section 4 entrenched only 'fundamental human rights and freedoms' and the question is therefore whether the old common-law rule which prevented the prosecution from appealing against an acquittal formed part of 'due process' in its narrower sense as a fundamental right or freedom. Their lordships do not think that it did. They would accept that the broad principle that a person who has been finally convicted or acquitted in proceedings which have run their course should not be liable to be tried again for the same offence is a fundamental principle of fairness... But they do not think that the principle is entirely without exceptions (see, for example, art 4(2) of Protocol 7) and they certainly do not think that it is infringed by the prosecution having the right to appeal against an acquittal.***

[50] In applying this principle to the present case, one does not look only to the provisions of section 5(2) in order to determine whether a subject has been deprived of his liberty or property by *due process of law*. Just as the legislature can reasonably restrict or regulate the right of silence or the section 4 rights to liberty or property, so too it can augment those rights by the provision of procedures in ordinary legislation which would satisfy the *due process* requirement. As held in **Brad Boyce** (supra), the fundamental and overarching right is to *due process of law* in respect of a deprivation of liberty, life and security of the person and as well as to the right to the protection of the law. There is no fundamental right to any specific form of procedure.

[51] Thus, where legislation expressly provides a procedure which sufficiently encompasses *due process* in the narrow sense as defined in **Brad Boyce,** there is a sufficient compliance with the substantive provision for the purposes of sections 4 and 5 of the Constitution. In this regard, several of Mr. Ramlogan's submissions are misconceived. He submitted for instance that section 23 offended sections 4 & 5 of the Constitution because the remedy of habeas corpus was unavailable in the case of a detention which was authorized by a judge of the High Court. He added that such a detention was outside the ordinary common law criminal process and was unconstitutional because a judge did not have the power to order detention where the subject is not charged, arrested, or detained on suspicion of having committed a criminal offence.

[52] But *due process* is quite clearly manifested by providing for a judge made order. Detention will not be ordered unless the judge is satisfied that there is a proper and reasonable basis for it. A review by the judge of the basis upon which the detention is sought, is done before any order is made. Such a judge ordered detention is not arbitrary or capricious and in those circumstances, an order of habeas corpus is superfluous. A habeas corpus order is itself judge made and is a form of judicial review, by which the facts and circumstances of a subject's detention by the State are brought before the court and its legality examined and pronounced upon.

[53] Indeed, section 5(2)(c)(iv) which provides for the habeas corpus remedy speaks precisely in those terms. The fact that it is rendered unavailable because the basis of the subject's detention has already been found by a judge to be reasonable is no indictment on the provision in the Act and certainly founds no credible basis for asserting lack of *due process*. A subject is therefore not *"deprived"* of the remedy of habeas corpus. The right to habeas corpus continues but the remedy is unlikely to be granted in respect of orders made under the Act. Further, in cases of detention, restraint or forfeiture under the Act, the executive decision that a detention, restraint or forfeiture order is required, is judicially reviewed before any final decision is made and in this case it is made by a judge. Moreover, the Director of Public Prosecutions, who holds an independent office, has an important role in any decision to initiate action in respect of orders under section 23, 24 and 36.

[54] Another misconception is the submission that section 24 of the Act contravenes section 5(2)(h) because there are no safeguards in section 24 which permit an interrogated person *"to know the reason for the order against him".* The order referred to is the order made by a judge in chambers for gathering of information from the person affected, he being specifically named in the order. But, if even there is no specific provision in the Act which so provides, section 24 no doubt allows such a procedure, if not initially, then during the course of such information gathering which is conducted before a judge. The subject of the order is expressly entitled to retain counsel at any stage of proceedings. Surely, counsel can enquire into the basis upon which the order is made, as well as challenge the validity of the order itself. The safeguards are inherent in the provision for judicial oversight of the information gathering exercise.

I then turn to a brief examination of the individual sections under challenge.

**Sections 23**

[55] Section 23 of the Act provides:

> ***(1) Subject to subsection (2), a police officer may, for the purpose of preventing the commission of an offence under this Act or preventing interference in the investigation of an offence***

***under this Act, apply ex parte, to a Judge in Chambers for a detention order.***

***(2) A police officer may make an application under subsection (1) only with the prior written consent of the Director of Public Prosecutions.***

***(3) A judge may make an order under subsection (1) for the detention of the person named in the application if he is satisfied that there are reasonable grounds to believe that the person is –***

***(a) interfering or is likely to interfere with an investigation of;***

***(b) preparing to commit; or***

***(c) facilitating the commission of an offence under this Act.***

***(4) An order under subsection (3) shall be for a period not exceeding forty-eight hours in the first instance and may be extended for a further period provided that the maximum period of detention under the order does not exceed fourteen days.***

***(5) Every order shall specify the place at which the person named in the order is to be detained and conditions in respect of access to a medical officer.***

***(6) An accurate and continuous record shall be kept in accordance with the Schedule, in respect of any detainee for the whole period of his detention.***

Under this section there are more than sufficient safeguards for the rights of the subject. A police officer who wishes to obtain a detention order must apply to a judge in

chambers; that is to say, independent judicial oversight of the basis upon which a detention order is sought is provided for. Even before the application is made, the consent of the Director of Public Prosecutions is required. Both the Director of Public Prosecutions and a high court judge are independent public functionaries.

[56] Both are expected to bring independent and impartial points of view to bear in the decision making process. The decision to seek a detention order is thus reviewed by two independent functionaries. The judge must satisfy himself that there are reasonable grounds to believe that the subject of the detention order is interfering with the investigation of an offence or preparing to commit an offence or facilitating the commission of an offence. A detention made pursuant to an order of a judge in those circumstances cannot in any way be described as arbitrary. It is consistent with the definition of *due process of law* given by Phillip JA in **Lassalle v Attorney General of Trinidad and Tobago** (1971) 18 WIR 379 at 391 as being *"the antithesis of arbitrary infringement of the individual's right to personal liberty".*

[57] Further, the fact that the application is made ex parte, is of no great moment. The judge may, in his discretion adjourn the matter inter partes (although I expect this would be extremely rare) or fix a return date after the grant of the detention order in which the subject may have an opportunity to have the order discharged. The subject's attorney at law can also apply inter partes to discharge the order. Either way, the judge will have the benefit of legal argument pro and con. The detention is limited to a maximum period of 48 hours in the first instance. Any extension beyond that cannot exceed 14 days and this extension can be made only by the judge in chambers.

**Section 24**

[58] Section 24 provides as follows:

> ***(1) Subject to subsection (2), a police officer of the rank of Inspector or above may, for the purpose of an investigation of an offence under this Act, apply ex parte to a judge in chambers for an order for the gathering of information from named persons.***

***(2) A police officer may make an application under subsection (1) only with the prior written consent of the Director of Public Prosecutions.***

***(3) A judge may make an order under subsection (1) for the gathering of information if he is satisfied that the written consent of the Director of Public Prosecutions was obtained and –***

***(a) that there are reasonable grounds to believe that an offence under this Act has been committed and that –***

***(i) information concerning the offence, or***

***(ii) information that may reveal the whereabouts of a person suspected by the police officer of having committed the offence,***

***is likely to be obtained as a result of the Order, or***

***(b) that –***

***(i) there are reasonable grounds to believe that an offence under this Act will be committed;***

***(ii) there are reasonable grounds to believe that a person has direct and material information that relates to the offence referred to in subparagraph (i); or***

***(iii) there are reasonable grounds to believe that a person has direct and material information that may reveal the whereabouts of a person who the police officer suspects may commit the offence referred to in a subparagraph (i); and***

***(iv) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) or (iii) from the person referred to therein.***

***(4) An Order made under subsection (3) may –***

***(a) include conditions or terms which the Judge considers reasonable;***

***(b) order the examination on oath of the person named in the Order;***

***(c) order the person to attend at a time and place fixed by the Judge, for the purpose of being examined; and***

***(d) order the person to bring and produce any document or thing in his control or possession for the purpose of the examination.***

***(5) An Order made under subsection (3) may be executed anywhere in Trinidad and Tobago.***

***(6) The Judge who made the order under subsection (3), or another Judge of the same Court, may vary its terms and conditions.***

***(7) A person named in an Order made under subsection (3), shall answer questions put to the person by the Director of Public Prosecutions or the Director of Public Prosecution's representative and shall produce to the presiding Judge documents or things that the person was ordered to bring but may, subject to the ruling of the Judge under subsection (8), refuse to do so if answering a question or producing a document or thing would disclose information that is***

***protected by the law relating to to non-disclosure of information or privilege.***

***(8) The presiding judge shall rule on every objection or issue relating to a refusal to answer any question or to produce any document or thing.***

***(9) A person shall not be excused from answering a question or producing a document or thing on the ground that the answer, document or thing may incriminate him or subject him to any penalty or proceedings.***

***(10) Notwithstanding subsection (9) any –***

***(a) answer given;***

***(b) document or thing produced; or***

***(c) evidence obtained,***

***from that person shall not be used or received against him in any criminal proceedings other than in a prosecution for perjury.***

***(11) A person may retain and instruct an attorney at law at any stage of the proceedings under this section and the attorney at law so retained may attend and represent the person named in the order when he is being examined.***

***(12) The presiding Judge, if satisfied that any document or thing produced during the course of the examination is likely to be relevant to the investigation of any offence under this Act, shall order that the document or thing be given into the custody of the police officer or someone acting on the police officer's behalf.***

***(13) Subject to subjection (8), nothing in this section requires the disclosure of any information which is protected by privilege.***

Mr. Ramlogan submitted that this provision allows for the making of an ex parte order by a judge on the application of a police officer above the rank of Inspector so that information may be gathered from named persons. This, he contended, was a breach of sections 4(a), 4(b), 4(i), 5(2)(b) and 5(2)(c)(iii).

[59] The submissions are entirely without merit. In my judgment, section 24 is unexceptionable. A police officer, seeking an order for the gathering of information from named persons must apply ex parte to a judge in chambers. He must however be of the rank of Inspector or above. The application must again be approved by the Director of Public Prosecution. The judge may grant the order upon reasonable grounds to believe that an offence under the Act has been committed but there is the added requirement that information concerning the offence is likely to be obtained as a result of the Order. The Act also specifies other reasonable bases upon which the judge must be satisfied before he decides to grant the order. There is the added requirement that he be satisfied that the consent of the Director of Public Prosecution to the application had been granted.

[60] Subsection 4 provides even greater safeguards for the subject. The judge can specify terms and conditions he considers reasonable. It is the judge who can order the subject to be examined about the information sought and can require him to produce documents or anything in his control or possession for examination. Any such examination is subject to judicial oversight. Documents or information or anything which is protected by non-disclosure laws or by privilege can be refused by the subject.

[61] It is true that a subject may be required to provide information which may incriminate him or submit him to a penalty but an appropriate balance is struck in subsection (10) by prohibiting criminal proceedings against the subject in respect of the information provided other than perjury proceedings. A further balance is struck by permitting the subject to retain an attorney at law at any stage of the section 24 proceedings.

**Sections 32 & 33**

[62] Sections 32 and 33 have been adequately addressed at paragraphs 25 to 35 above.

**Sections 34 and 36**

[63] Section 34 provides as follows:

> ***(1) Any Customs officer, Immigration officer or Police officer who has reasonable grounds to believe that property in the possession of any person is –***
>
> > ***(a) intended to be used for the purpose of a terrorist act; or***
> > ***(b) terrorist property,***
>
> ***may apply to a Judge in Chambers for a restraint order in respect of that property.***
>
> ***(2) This section applies to property that is being –***
>
> > ***(a) brought to any place in Trinidad and Tobago for the purpose of being exported from;***
> > ***(b) exported from; or***
> > ***(c) imported into,***
>
> ***Trinidad and Tobago.***
>
> ***(3) Subject to subsection (4), a restraint order made under subsection (1), shall be valid for a period of sixty days and may, on application, be renewed by a Judge of the High Court, for a further period of sixty days or until such time as the property referred to in the order is produced in Court in proceedings for an offence under this Act in respect of that property whichever is the sooner.***
>
> ***(4) A Judge of the High Court may release any property referred to in a restraint order made under subsection (1) if -***

***(a) he no longer has reasonable grounds to suspect that the property has been, is being or will be used to commit an offence under this Act, or***

***(b) proceedings are instituted in the High Court for an offence under this Act in respect of that property within one hundred and twenty days of the date of the restraint order.***

***(5) No civil or criminal proceedings shall lie against an officer for a seizure of property, made in good faith, under subsection (1).***

***(6) An appeal from a decision of the judge made under this section shall lie to the Court of Appeal.***

Section 36 provides:

***(1) Where on an ex parte application made by the Director of Public Prosecutions to a Judge in Chambers, the Judge is satisfied that there are reasonable grounds to believe that there is in any building, place or vessel, any property in respect of which an order of forfeiture may be made under section 37, the judge may issue –***

***(a) warrant authorizing a police officer to search the building, place or vessel for that property and to seize that property if found, and any other property in respect of which that police officer believes, on reasonable grounds, that an order of forfeiture may be made under section 37, or***

***(c) a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, that property, other than as may be specified in the order.***

***(2) On an application made under subsection (1), the judge may, at the request of the Attorney General and if the judge is of the opinion that the circumstances so require -***

***(a) appoint a person to take control of and manage or otherwise deal with the whole or a part of the property, ;in accordance with the directions of the judge; and***

***(b) require any person having possession of the property to give possession thereof to the person appointed under paragraph (a).***

***(3) The power to manage or otherwise deal with property under subsection (2) includes in the case of perishable or rapidly depreciating property, the power to sell that property; and in the case of property that has little or no value, the power to destroy that property.***

***(4) Before a person appointed under subsection (2) destroys any property referred to in subsection 3, he shall apply to as the Judge of the High Court for a destruction order.***

***(5) Before making a destruction order in relation to any property, the judge shall require notice to be given, in such manner as the judge may direct, to any person who, in the opinion of the judge, appears to have an interest in the property and may provide that person with a reasonable opportunity to be heard.***

***(6) A judge may order that any property in respect of which an application is made under subsection (4), be destroyed if he is satisfied that the property has little or no financial or other value.***

***(7) A management order under subsection (2) shall cease to have effect when the property which is the subject of the management order is returned to an applicant in accordance with the law or forfeited to the State.***

***(8) The Director of Public Prosecution may at any time apply to a Judge of the High Court to cancel or vary a warrant or order issued under this section.***

Mr. Ramlogan submitted that section 34 allows a judge to make a restraint order on suspicion or belief. He contended that suspicion on reasonable grounds equals belief. That seizure of property may take place without proof of the commission of an offence is alien to the common law and contrary to the meaning of *due process* of law in section 4(a) of the Constitution and to section 5(2)(e) which require that a criminal offence must be proven before seizure. Seizure cannot be justified in the absence of a conviction.

[64] In my judgment both these sections speak for themselves and there is nothing in these provisions which infringes section 4 and 5. The orders are made by a judge in chambers upon satisfying himself that there are reasonable grounds to do so. The necessity for reasonable grounds for suspicion is nothing new to the law. It is precisely because there is not yet actual proof, that there must be reasonable grounds for suspicion or belief. Anything other than reasonable suspicion or belief would render the orders arbitrary and capricious. The cases are numerous of arrests having been made on reasonable grounds for which there was no actual proof of a commission of a crime but which were upheld by the courts as having been reasonably made.

[65] As to section 36 specifically, there is further protection for the citizen since the issuing of the warrant by the judge is made on the ex parte application of the Director of Public Prosecutions. It is correct that such property can be taken from the possession or control of the owner and placed in the possession under the management and control of a stranger. While such an order can be made at the request of the Attorney General, the final decision is at the discretion of a judge of the high court.

[66] Power to manage the property includes, in the case of perishable or rapidly depreciating property, power to sell that property and in the case of property which has little or no value power to destroy it. The apparent harshness of that rule however is ameliorated by the requirement that the manager must first apply to a judge for a destruction order who, before making any such order, shall direct that notice be given to any person he considers has an interest in the property and may provide that person with a reasonable opportunity to heard. The final decision to destroy is made by the judge. The Director of Public Prosecution has power to apply to a Judge of the High Court to vary or cancel a warrant or order issued under section 36.

**Section 37**

[67] Section 37 provides:

> ***(1) The Attorney General may make an application to a Judge of the High Court for an order of forfeiture in respect of terrorist property.***
>
> ***(2) The Attorney General shall be required to name as respondents to an application under subsection (1) only those persons who are known to own or control the property that is the subject of the application.***
>
> ***(3) The Attorney General shall give notice of an application under subsection (1) to the respondents named in the application, in such manner as the judge may direct.***
>
> ***(4) Where a judge is satisfied, on a balance of probabilities, that the property which is the subject of the application is terrorist property, the judge shall order that the property be forfeited to the State to be disposed of as directed by the judge.***
>
> ***(5) Where a judge refuses an application under subsection (1), the judge shall make an order that describes the property and declare that it is not terrorist property.***

***(6) On an application under subsection (1), a judge may require notice to be given to any person not named as a respondent who in the opinion of the judge, appears to have an interest in the property, and any such person shall be entitled to be added as a respondent to the application.***

***(7) Where a judge is satisfied that a person –***

***(a) has an interest in the property which is the subject of the application and***

***(b) has exercised reasonable care to ensure that the property is not the proceeds of a terrorist act, and would not be used to commit or facilitate the commission of a terrorist act,***

***the judge shall order that the interest shall not be affected by the order made under subsection (4) and the order shall also declare the nature and extent of the interest in question.***

***(8) A person who claims an interest in property that has been forfeited and who has not been named as a respondent or been given notice under subsection (6) may make an application to the High Court to vary or set aside an order made under subsection (4), not later than sixty days after the day on which the forfeiture order was made.***

***(9) Pending the determination of an appeal against an order of forfeiture made under this section, property restrained under section 37 shall continue to be restrained, property seized under a warrant issued under that section shall continue to be detained, and any person appointed to manage, control or otherwise deal with the property under that section shall continue in that capacity.***

***(10) The provisions of this section shall not affect the operation of any other provision of this Act respecting forfeiture.***

Mr. Ramlogan submitted that these sections contravene section 4(a) by allowing property to be forfeited to the State without guilt. The common law did not allow such forfeiture. The rule of the common law which disallows such forfeiture is a rule within the meaning of *due process of law*. He added that the application of a civil standard contravenes an *"entrenched"* rule of the criminal law which requires proof beyond reasonable doubt. Forfeiture under section 37 is a penal sanction. It is criminal in nature.

[68] I do not agree. The requirements of *due process* are also observed in section 37. The decision to order forfeiture of property which is found to be terrorist property is made by a High Court Judge. The Attorney General who is empowered to apply for the order of forfeiture, must name as respondents to the applicants those persons known to own or control the property which is subject to the forfeiture order. They are given an opportunity to be heard. He is also required, at the direction of the judge, to give notice of the order to the owners or controllers of the property at the direction of the judge. The forfeiture order is thereafter made only after the judge is satisfied that the property is terrorist property.

[69] The judge is also empowered to give notice to any person who, though not known to be the owner or controller of the property (and thus not named as a respondent) in his opinion, has an interest in the property and to add such person as a respondent to the application and also to order that his or her interest shall not be affected by any forfeiture order made in respect of the property, if he is satisfied such person has exercised reasonable care to ensure that the property is not the proceeds of a terrorist act and would not be used to commit or facilitate the commission of a terrorist act.

[70] An innocent third party who has an interest in the property which has been forfeited but who was not named as a respondent or was not given notice may apply to the High Court to vary or set aside the forfeiture order but not later than sixty days after the date of the forfeiture order.

**Order**

[71] For these reasons, I consider that the Act is valid and constitutional and so too all its sections. The appeal is dismissed. We shall hear arguments on costs.

**…….....**
**NOLAN P.G. BEREAUX**
**Justice of Appeal**

**Delivered by Jamadar, J.A.**

[72] I agree with the reasoning, decision and outcome in this case, on the limited basis that this court is bound by the decision of the Privy Council in **Suratt and others v The Attorney General of Trinidad and Tobago**.[1] However, I note my reservations in relation to the clear intention of Parliament, consistently held and indicated since Independence in 1962 and confirmed in 1976 with the attainment of Republic status, that legislation that is or is likely to infringe, abridge or abrogate the entrenched fundamental rights of the citizen must secure a special majority in both houses to be enacted as law in Trinidad and Tobago[2]

[73] This was a position specifically negotiated and agreed upon by the various social and political interests that emerged and existed at Independence and that continue to exist even to this day in Trinidad and Tobago. In this regard, Lord Diplock in **Hinds v R**[3] seems to have clearly recognized and appreciated this need and requirement for a special majority, once legislation contains provisions which "however reasonable and expedient, are of such character that they conflict with an entrenched provision of the Constitution". I remain troubled by the apparently divergent approaches of the Privy Council to this question (Hinds v Suratt), despite the attempt by Kangaloo, J.A. to reconcile them in

[1] (2007) 71 WIR 391.
[2] Section 13 (1) of the 1976 Constitution.
[3] [1977] AC 95.

**Steve Ferguson & Ishwar Galbaransingh v Attorney General and Mc Nicholls**.[4] Thus, the decision of the Privy Council in **Suratt** raises a fundamental question (and apparent dilemma) as to what is the appropriate test in relation to the section 13(1) override, that the Constitution reserves for the courts in determining the constitutionality of legislation on the basis of whether it is "reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."

[74] Is it the same proportionality test that one applies in the first instance to decide whether there is a need for a special majority at all (as has been done in this matter). And if so, what is the practical effect on the test applied in the **Attorney General v Northern Construction Limited**[5] in relation to the section 13 (1) override? Are we now in a 'chicken and egg' conundrum in relation to the intention, purpose and effect of section 13 of the Constitution, whereby the same aims-means proportionality test is being used to determine whether there is an infringement of constitutional rights and also, when there is an infringement, whether it is reasonably justifiable?

[75] All of these questions have been raised by Bereaux, J.A., but I reiterate them because the time will soon come when they will have to be revisited and resolved, hopefully in light of the particular constitutional arrangements agreed to in Trinidad and Tobago and in the context in which this was done.

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**PETER JAMADAR**
**Justice of Appeal**

[4] Civil Appeal No. 185 of 2010.
[5] Civil Appeal No. 100 of 2002