IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CONSTITUTIONAL COURT

BEFORE: THE HONOURABLE MR JUSTICE MARSH
THE HONOURABLE MR JUSTICE BROOKS
THE HONOURABLE MR JUSTICE PUSEY

CLAIM NO 2010 HCV 5201

BETWEEN	ADRIAN NATION	CLAIMANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT

CONSOLIDATED WITH CLAIM NO 2010 HCV 5202

BETWEEN	KERREEN WRIGHT	CLAIMANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT

Marcus Greenwood instructed by Lettman Greenwood & Co. for Adrian Nation.

Norman Godfrey instructed by Brown Godfrey and Morgan for Kerreen Wright.

Jeremy Taylor and Mr Adley Duncan for the Director of Public Prosecutions.

Curtis Cochrane instructed by the Director of State Proceedings for the Attorney General of Jamaica.

Constitutional Law – Human rights and Fundamental freedoms - Bail, entitlement to – Amendments made by Parliament to the Bail Act – Amendments removing entitlement to bail for certain offences - Whether amendments infringe on the constitutional right to liberty – Whether amendments infringe on the principle of the separation of powers - Constitution of Jamaica sections 2, 13, 15, 16, 17, 20, 25, 48, 49, 50 – Bail Act sections 2, 3, 4 and 10 – Bail (Amendment) Act 2010 – Bail (Interim Provisions) Act 2010

2nd, 3rd, 4th May and 15 July 2011

MARSH J

[1] On December 29, 2000, the Bail Act a revolutionary piece of legislation came into force in Jamaica. Among other things, it stated, for the very first time, that every person charged with a criminal offence was entitled to be granted bail. If the dictionary meaning of the word "entitled" was intended, then it meant that every person charged with an offence was "qualified for by right according to law" to be granted bail." This was against a background of a burgeoning murder rate, a proliferation of illegally held firearms and an increasing level of gun violence.

[2] There were loud appeals by citizens of Jamaica for government to take further steps to reduce the frightening crime rates. In response to the appeal of the people, Parliament acted by passing into law six Acts, called cumulatively "the Anti-Crime bills." Two of these sought to amend the Bail Act 2000 and came into effect on the 23rd of July, 2010.

These two Amending Acts were –

i. The Bail Amendment Act 2010 (Act 20/2010) and

ii. The Bail (Interim Provisions for Specified Offences Act 2010 (Act 22/2010).

[3] With the coming into force of these Acts,-

i. The entitlement to bail in Section 3 of the Bail Act 2000 was altered with regards to certain specified offences as contained in a Second schedule;

ii. The burden of proof as to whether a person charged with an offence should access bail was reversed – it was the person charged who now bore the burden of "satisfying" the Court that bail should be granted.

iii. There were set periods, a minimum of seven days and a maximum of fourteen days when a person held in custody should be brought to court, up to sixty days, before Section 22 of the Bail Act could come into force. This section referred to procedure on arrest and detention where a person is not charged within twenty four hours of such charge or arrest.

iv. A right of appeal was granted to the prosecution where bail was granted.

v. A Second Schedule containing a list of eleven serious sets of offences for which there were special provisions for the grant of bail.

[4] It was as a result of these two Amending Acts that the claimants, Mr Adrian Nation and Miss Kerreen Wright, have approached this Court. They have each filed a claim impugning the said Amending Acts, contending that when the learned Resident Magistrate in the Resident Magistrate's Court for Manchester, refused to allow them to apply for bail, because of the said Amending Acts they were each denied their Constitutional right to liberty. They also contend that the requirement to be brought before the Court for the stipulated periods during the sixty days, not knowing if they would be granted access to bail, amounted to inhuman or degrading treatment. They maintain that by virtue of these two Amending Acts they have suffered grave violation of their constitutionally guaranteed rights.

[5] The Court is therefore asked to find that both Acts are violations of the Constitution and that consequently each should be struck down as void. These claims were consolidated. The respondents are the Director of Public Prosecutions and the Attorney General respectively.

[6] There is no contest that the facts outlined in the claimants' affidavits happened other than in the way they have stated. The sole issue, the first respondent suggested, 'seemed' to be the constitutionality of the provisions of the Bail (Interim provisions for specified Offences) Act.

[7] On different dates and arising out of different allegations, each claimant was charged with the offence of murder. The claimant Mr Adrian Nation was charged on the 9th day of July, 2010 and taken to the Manchester Resident Magistrates' Court being held in Mandeville. He was remanded in custody to the 21st July, 2010 and the Resident Magistrate cited the Bail Act as a reason for the remand of the accused. On the 21st July, 2010 he was further remanded to the 4th August, 2010 and again to the 1st September, 2010, then again to the 29th September 2010. The continuous remand was attributed to the said Bail Act.

[8] The claimant Ms Kerreen Wright was arrested on the 31st day of July, 2010 and charged on the 5th day of August, 2010. When Ms Wright appeared before the Learned Resident Magistrate 5th August, 2010, the Magistrate refused to assume jurisdiction to hear an application for bail, again citing the Bail Act.

[9] It was later that there was a report of the grant of bail to a policeman charged with offence of murder. It was only after this event that bail was offered to both claimants.

Claimants' *Locus Standi*

[10] Counsel for the 1st Respondent Mr Jeremy Taylor strongly contended that the claimants were not entitled to seek Constitutional Redress. Section 25 of the Constitution is the section which permits a person aggrieved by any provisions of the Constitution to seek redress. This Court should not, however, exercise any of its power under this section, if it is satisfied that adequate alternate means of redress are available to the person so aggrieved.

[11] Mr Taylor further submitted that the claimants each have alternate means of redress. Each has a right to appeal the Resident Magistrate's decision as to bail as provided in sections 8 – 11 of the Bail Act. He relied for the submission on a number of authorities:-

Harrikssoon v. Attorney General of Trinidad and Tobago [1979] 31 W.I.R. 348 at p. [349], in which Lord Diplock, stated, among other things-

> "The right to apply to the High Court…for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedom; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for making judicial control of administrative action. In an originating application to the High Court the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

(As persuasive authority from the United States Supreme Court):

Ashwander v. Tennessee Valley Authority (1936), 297 U.S. 288 at 348

per Justice Blanders -

> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

Doris Fuller v. Attorney General (1998) 56 WIR 337 at 396 – 397 in

which Patterson J.A. as a preface to considering Lord Diplock's dictum in

Harrikissoon v. Attorney General of Trinidad and Tobago (*supra*),

held:

> "There can be no doubt that this evidence established that the deceased was subjected to inhuman and degrading treatment. That was not contested. So I turn again to the provisions of section 25 of the Constitution. It is the section that provides for the enforcement for the protective rights and freedoms included in Sections 14 – 24. Section 25 (2) bestows original jurisdiction upon the Supreme Court to bear and determine any application made by any person who alleged that any of the protective provisions "has been or is being or is likely to be contravened in relation to him." But it goes further by stating in a purposeful proviso 'that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.'"

The proviso to section 25 (2) of the Constitution which reads:-

> "Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have

been available to the person concerned under any other law."

(Lord Diplock in ***Harrikissoon v. Attorney General for Trinidad and Tobago*** (*supra*) had already outlined the same rationale for the proviso to section 6 of Trinidad's Constitution which is almost mirror similar to section 25 of the Jamaican Constitution.)

[12] The law as stated by Mr Taylor is sound and unimpeachable with regards to the expressed meaning of section 25(2) of the Constitution regarding the powers of the Court, where an application is made to it by any person claiming to be aggrieved by a breach of any rights or fundamental freedoms, guaranteed by the Constitution. Referring to the 'adequate remedy' which the claimants would have had under sections 8 – 11 of the Bail Act, Mr Taylor submitted that "The learned Resident Magistrate, in refusing to admit the claimants to bail would have, after July 25, 2010, in accordance with the law in force at the time the issue of bail came before him for consideration…acted properly in the exercise of his discretion to refuse to admit the claimants to bail."

[13] The facts of the instant case are such that if the alternate remedy, i.e. an appeal against the magistrate's decision, submitted by Mr Taylor to be available, were to be employed, and the Magistrate was "acting in accordance with the law in force at the time", the claimants' appeal would be an exercise in futility. The flaw in Mr Taylor's submission is that it is this law in force which the claimants

have found objectionable and have challenged in the declarations they have sought of this Court.

[14] The constitutional right to liberty has been so affected by these two impugned amendments that the issue has gone beyond merely affecting these two claimants but potentially affects every citizen of this country. It can not be successfully denied that the effect of the passage of these two Acts is of such consequence that the issues generated by their passage must be considered to be of great public importance. The claimants are well within their rights to approach the Court by applications under section 25 of the Constitution.

[15] My support for this view is strengthened by expressions in the judgment of Rawlins JA in the case of ***Attorney General of St. Lucia v. Theophilus*** Civil Appeal No. 13 of 2005 (delivered on 20th March, 2006). There the legislation in question affected the right to bail. He expressed himself in paragraph 9 thus–

> "The charge against Mr. Theophilus was subsequently withdrawn. In relation to him, therefore, this appeal is merely academic. However the issue, which arises, remains one of great public importance. It is still necessary for the citizenry as well as for the organs of the state to know, with certainty, whether the impugned provisions are consistent with the Constitution or whether they are unconstitutional and therefore of no effect…."

It is my view that the claimants can make the applications as they have done under section 25 (2) which gives this Court its jurisdiction.

[16] All laws which were in force in Jamaica immediately prior to the 6th of August, 1962 continued to be in force after that date; subject to amendment or

repeal by the appropriate authority. (See section 4 of the Jamaica (Constitution) Order in Council 1962.) The above was further underpinned by section 26(9) of the Constitution itself as it stated "for the purposes of subsection (8) of this section, a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of -

(a) any adaptations or modifications made thereto or under section 4 of the Jamaica (Constitution) Order in Council or

(b) its reproduction on identical form in any consideration or revision of laws with any such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consideration or revision.

[17] In ***Noordally v. Attorney General and another*** (1987) LRC (Constit) 2599, the Court of the Republic of Mauritius, per Moollan CJ (Glover J concurring) stated approvingly that -

> "It has been established for centuries in England that the proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial and that bail is not to be withheld merely as a punishment…..
>
> Further we find as far back as the time of Blackstone's Commentaries the Laws of England saying that Refusal or delay by any judge or magistrate to bail any person bailable is at common law an offence against the liberty of the subject."

The Republic of Mauritius, from whence came the abovementioned authority, is similar in relevant legal history and constitution to ours. The above stated law, by Moollan CJ, essentially represented the state of the law immediately prior to August 6, 1962, in Jamaica.

[18] Chapter III of the Constitution of Jamaica deals with the fundamental rights and freedoms of "every person in Jamaica," and contains sections 13 – 26 of the Constitution. In ***Director of Public Prosecutions v. Nasralla*** (1967) 10 JLR 1, the Privy Council, in reference to Chapter III of the Jamaican Constitution stated that Chapter III

> "…proceeds upon the presumption that the fundamental rights which it covers are already secured to the people by existing law."

[19] Section 13 indicates what all the fundamental rights and freedoms are guaranteed to "every person in Jamaica" and specifically dictates that among those which are guaranteed are life and liberty. Section 15 establishes the citizen's right to personal liberty, a right that is subject only to lawful detention and arrest. Section 15(3) sets out the method by which persons detained or arrested are to be dealt. They are to be brought without delay before a Court and if not tried within a reasonable time, they should be released either conditionally or unconditionally to ensure their attendance at a later trial. This includes a right to bail as indicated in section 15(3). Section 20(5) states, *inter alia*-

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.

The liberty of the subject and his right to freedom of movement are guaranteed in section 16 (1) of the Constitution.

[20] In ***Hurnam v. The State*** PCA 52 of 2004 (delivered on 15th December 2005), the Privy Council considering a provision in the Mauritius Constitution, which is similar to Section 15 of Jamaica's, quoted with approval for ***Noordally's*** case (supra).

> "That the subject remaining at large is the rule: his detention on the ground of suspicion is the exception, and even then if he is not put on his trial within a reasonable time, he has to be released."

[21] Derogation from these fundamental rights is allowable only in particular and special circumstances as outlined in section 16(3) (a) of the Constitution. Section 16 (3) (a) specifies that "which is reasonably required in the interests of defence, public safety, public order, public morality or public health".

[22] The common law and the provisions of the Constitution of Jamaica have firmly established that where a person is deprived of his liberty having been arrested or detained by the State then that person is entitled to be brought without delay before a Court and where the case is not to be tried within a reasonable time, he is entitled to make application to that Court to have that Court consider his release with or without conditions reasonably necessary to secure his attendance at Court at a later date for trial.

[23] The Constitution is the supreme law. Section 2 of the Constitution reads thus:

> "Subject to the provisions of sections 49 and 50 of this Constitution, if any, other law is inconsistent with this Constitution, this Constitution shall prevail, and the other law shall, to the extent of the inconsistency shall be void."

Sections 49 and 50 provide the means by which the Constitution can be altered and set out the majority in the legislature required to pass any alteration of the Constitution.

[24] By section 3 of the Bail Act 2000, every person charged with an offence, was entitled to be granted bail by a Court, a Justice of the Peace or a police officer as the case maybe. A person charged with an offence should not be held in custody for longer than twenty four hours without the question of bail being considered. Subject to section 4(4) of the Bail Act, bail shall be granted to a defendant who is charged with an offence which is now punishable with imprisonment. A person charged with murder, treason or treason felony may be granted bail only by a resident magistrate or a judge. Nothing in the Act shall preclude an application for bail being made by a defendant on each occasion he comes before the Court in relation to the relevant offence. Section 4 states:

> "4. – (1) Where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with imprisonment, bail may be denied to that defendant in the following circumstances-
>
> a. the Court, a Justice of the Peace or police officer is satisfied that there are substantial grounds (emphasis mine) for believing that the defendant, if released on bail would-
>
> (i) fail to surrender to custody;
>
> (ii) commit an offence while on bail; or
>
> (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

> b. the defendant is in custody in pursuance of the sentence of a Court or any authority acting under the Defence Act.
>
> c. the Court is satisfied that it has not been practicable to obtain sufficient information for the purposes of taking the decisions required by this section for want of time since the institution of the proceedings against the defendant.
>
> d. the defendant, having been released on bail in or in connection with the proceedings for the offence, is arrested in pursuance of section 14 (absconding by person released on bail).
>
> e. the defendant, is charged with an offence alleged to have been committed where he was released on bail.
>
> f. the defendant's case is adjourned for inquiries or a report as it appears to the Court that it would be impracticable to complete the enquiries or make the report without keeping the defendant in custody.

[25] The whole scheme of section 4, in outlining those circumstances in which bail may be denied where the defendant has been charged, obviously places an onus on the person wishing that bail be denied to show why this should be so. In fact, it places a burden of proof on the prosecutor.

[26] Where the person is detained or arrested but not charged, within twenty four hours of such arrest or detention, section 22 states that he should be brought forthwith before a Resident Magistrate or Justice of the Peace, who shall order that the person be released or make such order as the Resident Magistrate or Justice of the Peace thinks fit, having regard to the circumstances. Where it is contemplated to hold an identification parade then the person should not be brought before the Resident Magistrate or Justice of the Peace.

[27] In an area where local decisions relating to bail are scanty, I am the beneficiary of the judgment of my brother Sykes J in the case ***Stephens v. the Director of Public Prosecutions*** 2006 HCV 0520 (delivered on January 23, 2007). He was dealing with the Privy Council's reasoning in the case ***Hurnam v. The State*** PCA 53 of 2004 (delivered December 15, 2005). At paragraph 16, Sykes J stated

> "The European Court of Justice formulated the criteria against the backdrop that the liberty is the normative position and his detention has to be justified by those who would deny him his human right. It is not for him to justify why he should be set free. A criminal charge does not change this normative position. Subject to any legislation to the contrary a person is entitled to his liberty, unless the state can show relevant and sufficient reasons to justify the continued detention of the person."

[28] Act 20/2010 the Bail (Amendment) Act stated at Section 2 that "Section 3 of the Principal Act is amended by inserting next after subsection (4) the following as subsection (4A)-

> "(4A) Bail shall be granted to a defendant in relation to an offence specified in the Second Schedule only if the defendant satisfied the Court that bail should be granted." (Emphasis mine)

Act 20 also afforded for the first time, a right to the prosecution of an appeal, where bail is granted. A second schedule was also created in Act 20 and these outline offences such as murder, firearm, illegal possession of firearms and dealing in illegal drugs. Act 22 provided another tier on Act 20, although it is to have a life of one year from the 23rd of July, 2010, means its duration may be extended by resolution of each house of Parliament. Section 3 of the Act

inserted sections 3A and 3B into the principal Act. Section 3A (1), partially provided that where a person is charged with certain offences set out in the second schedule (See Act 20 in which this second schedule was created), that person "shall be entitled to be granted bail only if a period of sixty (60) days, commencing on the date on which the person is first charged with that offence has elapsed and the person satisfies the Court that bail should be granted." (Emphasis mine)

[29] It was possible for a person charged with certain of the offences in the second schedule to apply for bail before the sixty days period had elapsed but could only be granted bail, if he satisfied the Court that bail should be granted. Section 3A (3) makes provisions for what would be the situation after the statutory sixty days shall have expired.

[30] The change caused by these provisions was extreme and jurisprudentially a completely different approach to that of the common law, the Constitution and the principal Act, the Bail Act. Section 3B states-

> (1) A person who is held in custody without bail under section 3A shall be brought before the Court at intervals specified in subsection (2) for the Court to review the question of whether the person should continue to be held in custody or the grant of bail should be considered, in relation to the offence by virtue of which the person has been held in custody under that section.
>
> (2) The intervals at which a person referred to in subsection 1 is to be brought before the Court for the purposes of that subsection are-

(a) not more than seven days after the person is first charged with the offence concerned.
(b) thereafter, subject to the determination of any review under subsection (1) at intervals not exceeding fourteen days, until the sixty day period referred to in section 3A (1) expires.

[31] This difference in approach was mentioned in the memorandum of Objects and Reasons which accompanied the Bill. It stated that "However, the sixty days period in custody is subject to the right of the person so held to be brought before the Court at intervals not exceeding 14 days for the Court to review the question of whether the person should continue to be held in custody or the grant of bail be considered."

[32] The entitlement to bail guaranteed by the Constitution and extended by Bail Act is no more and the person charged has "a right...to be brought before the Court at intervals not exceeding 14 days and it is for the Court to decide whether bail should be granted. If the sixty days period expires and that person charged becomes entitled to bail then an onus is on him to satisfy the Court that he should be granted bail.

[33] If the effect of the Amending Acts was to remove from the person charged with an offence or detained, an entitlement to bail, then the question which falls to be answered is whether Parliament was acting in compliance with authority provided it by the Constitution when these Acts were passed. The submission of the first respondent is that there is a very heavy burden cast on any person challenging the validity of any piece of legislation as there is a presumption that

the legislature understands and correctly appreciates the needs of the people and that its laws are directed at problems made manifest by experiences. It was further argued that the Court will only declare a statute invalid if it conflicts with the Constitution and so the onus is on anyone seeking to impugn a statute to show that in the circumstances which existed at the time it was passed, the legislation violated rights enshrined in the Constitution. (Emphases mine). See ***Mootoo v. Attorney General*** (1979) 1 WLR 1334 at 1338 a.

[34] The Australian case of ***Federal Commissioner of Munro*** (1926-1927) 38 CLR 153, a decision of the High Court of Australia, puts the question in this way.

> "…Has Parliament, in the true construction of the enactment, misunderstood and gone beyond its Constitutional powers?"

I am in total agreement with the submissions of counsel for the first respondent on the heavy onus placed on the person who seeks to impugn a statute as being invalid.

[35] Mr Cochrane appearing for the second respondent submitted, among other things, that the impugned Acts were passed in accordance with authority given to Parliament. He relied upon section 48(1) of the Constitution to support his submission that the Acts 20/2010 and 22/2010 were passed to safeguard the public interest. In fact the section reads "subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

[36] The Memorandum of Objects and Reasons with regards to each of the Amending Acts indicates that "this Bill seeks to give effect…and is a companion to other proposed legislation **aimed at reducing crime.** (Emphasis mine) This, Mr Cochrane argued, shows that the Acts were passed in the public's interest so are therefore not in violation of the Constitution.

[37] Moollan CJ of the Supreme Court of Mauritius in the case ***Noordally v. Attorney general et al*** (1981) LRC 599, when dealing with a submission resembling Mr. Cochrane's, viz. that when one is determining whether or not the legislature has exceeded its prerogatives one should have regard to the magnitude of the evil sought to be caused by the impugned law, expressed himself in the following words

> "If a law undoubtedly passes the test of constitutionality, then it would be none of our business even to think of questioning the reasonableness, or wisdom of the measure. Within the framework of the Constitution Parliament's right to pass laws, however unpalatable, stringent or to our minds unfair, remains unfettered. But this Court's power to control the Executive, in accordance with its Constitutional role, must remain, and be seen to remain unimpaired."

[38] Lord Diplock was equally blunt, when in ***Hinds and others v. R.*** (1975) 13 JLR 262 at page 270 paragraphs A-B, he stated-

> "…So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board and concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been

> amended by the method laid down by it for altering that entrenched provision."

[39] I cannot therefore agree with Mr Cochrane's submission that as the Bail Act was amended with a view to assist in curtailing escalating crime and violence in the society, that this was quite in order because of section 48(1) of the Constitution, already quoted above.

[40] In ***R. v. Stephens*** (*supra*), Sykes J opined -

> "...the liberty of the subject is such a fundamental right that the framers of the Constitution thought that it should not be left to implication but rather should be expressly protected. The provision is located in Chapter III which is headed "Fundamental Rights and Freedoms….The fact that the right has received the highest level of protection possible in a legal system, which is located in a constitutional democracy with a written constitution, then any derogation from such a high ranking right must be justified by very, very cogent reasons…."

The amending Acts were passed into law by a mere majority in each case – short of the required 2/3 which was required to alter or repeal any of the Chapter III provisions Chapter III. None of the provisions are therefore affected by either of the two Amending Acts.

[41] It was submitted, on behalf of claimant Adrian Nation that section 33 of the Principal Act affected the right granted him in section 15(3) of the Constitution, to be brought "without delay" where the case against him is not tried within a reasonable time, that "he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings

preliminary to trial." The term "without delay" has not been statutorily defined, but it may be argued that the delay contemplated by the "seven days minimum is not the delay" contemplated by the framers of the Constitution.

[42] I am therefore obliged to conclude that by extending the constitutional provision "without delay" to mean, for certain named offences, "not more than seven days after the person is first charged with the offences concerned, section 15(3) is breached. The extension is offensive to and contrary to the presumption of innocence as provided by section 20(5) of the Constitution.

[43] In a distinct shift of policy, for certain specified offences, the accused was no longer "entitled to bail". Formerly, it was the custodians who had the onus of justifying keeping the accused in custody. The burden of proving that bail should be granted to him, is now placed on the accused. This was complained of by the claimants.

[44] For the first respondent, Mr Taylor, submitted concerning this complaint, that the passage of the Amendment Acts served only to shift the burden to an accused person, to show why he should "need to be set free." He relied for this view on the provisions of section 20(5) of the Constitution and cited the *proviso* thereto:

> "provided that nothing contained in or done under the authority of any law shall be held inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts." (Emphasis mine)

Mr Taylor pointed to certain statutes which properly placed a burden on the accused to prove particular facts.

[45] With every respect to learned counsel the shift of the burden to the accused to show why he should be granted bail, is not the same as being asked to prove a fact which is in his knowledge and not ordinarily available to the prosecution. I am therefore not in agreement with Mr Taylor's submission on this point. This shift of the burden of proof is in contravention of the right to liberty guaranteed in sections 13 and 15 of the Constitution and is also in contravention of the presumption of innocence provided for in section 20(5) of the Constitution.

[46] On behalf of claimant Kerreen Wright, Mr Godfrey had submitted that section 3B has breached the right which section 17(1) of the Constitution has given to the citizen of Jamaica. It served as a "restriction on the judiciary in the exercise of its historic power as regards bail". This, he expounded, resulted in a trespass on the exclusive purview of the judiciary and consequently was a breach of the fundamental principle of the separation of powers, an essential plinth to the Westminster model of democracy as operated in Jamaica. A consequence of this trespass on the role of the judiciary meant that an accused may well be unable for the entire 60 days period as indicated on section 3B to access bail and the uncertainty as to his or her liberty, amounted to inhuman and degrading. This is particularly the position as there is a presumption of innocence with regards to the accused.

[47] Mr Godfrey relied for these submissions on the judgment of the Board in ***Lambert Watson v. R.*** (2004) UKPC 34 (delivered 7 July, 2004). At paragraph 33 of the judgment, Lord Hope of Craighead delivering the judgment of the Board stated, among other things-

> "…to condemn a man to die without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate is to treat him in a way that no human being should be treated."

[48] Mr Taylor however countered Mr Godfrey's submissions. He was quick to dismiss the claimants' mere alleging that such treatment was received by them as providing no evidence to prove their assertions. He relied on the following judgments ***Fuller vs. Attorney General (****supra****).*** ***Higgs and Mitchell v. The Ministry of National Security and Others*** (1999) UKPC 45 of 1999 (delivered 14 December 1999).

[49] The situation in the instant cases of either Adrian Nation or Kerreen Wight is completely different from those in the ***Fuller*** case or the ***Lambert Watson*** case. Mr Godfrey's submission that there has been a breach of section 17(1) of the Constitution is wholly without basis and therefore unacceptable.

[50] Besides the novelty of shifting the onus of proof to the accused, Act 20 is also responsible for providing the prosecution with the right to appeal to a single judge of the Court of Appeal in Chambers. This novelty, Mr Godfrey complained, was also unconstitutional as the grant of the right of appeal is to the prosecution only.

[51] But is this really the position that the prosecution has been afforded in Act 20, a right to appeal against an order granting bail, which right has not been granted to the defendant to appeal from a refusal of bail? Section 3(1) of the Principal Act states:

> "Subject to the provisions of this Act, every person who is charged with an offence shall be entitled to be granted bail by a Court, a Justice of the Peace or a police officer, as the case may require."

Section 2 defines "court" as including "a Judge or a Resident Magistrate". Judge here is "… a Judge of the Supreme Court or the Court of Appeal." Section 13 (1) of the Principal Act provides that -

> "A person who was granted bail prior to conviction and who appeals that conviction may apply to the Judge or the Resident Magistrate before whom he was convicted or a Judge of the Court of Appeal, as the case may be for bail pending the determination of this appeal."

[52] Part 58 of the Civil Procedure Rules 2002, governs bail applications, as the rule itself is captioned. This is secondary legislation, but seeks to indicate that bail applications may be considered to be an exercise of the Court's civil jurisdiction. Section 11 of the Judicature (Appellate Jurisdiction) Act, setting out restrictions on appeal, at 11 (1) (f) (1) makes an exception "where the liberty of the subject…is concerned." A refusal of an application for bail does not prevent a further or further applications should fresh arguments be available, being urged on the applicant's behalf.

[53] I am not convinced that the conferring on the prosecution by the Amending Acts the right to appeal the grant of bail to an applicant, without more, is unconstitutional, as Mr. Godfrey has posited.

[54] The constitutions which have been exported from Westminster, based on the Westminster model (and which are written Constitutions) imposed limits upon the legislature and provide for judicial review of legislation, based on the principle of the separation of powers. This principle was dealt with, *in extenso*, in a line of Jamaican cases, by the Privy Council, ***Hinds et al v. DPP*** 13 JLR 262, and ***Director of Public Prosecutions v. Mollison (2)*** [2003] 2 AC 411; [2003] UKPC 6 (delivered 22nd January, 2003); .

[55] These cases were mentioned in the decision of the Privy Council in the case of ***State v. Abdool Rashid Khoyratty*** PCA 39 of 2004 (delivered 22 March, 2006). This case is from the jurisdiction of Mauritius (like Jamaica a recipient of a written constitution from Westminster). It concerned the question of bail, and legislation concerning the granting or withholding of bail.

[56] These cases establish that legislation which is in contravention of the doctrine of separation of powers, especially where it trespasses on the Court's authority to grant bail and administer sentences, were held to be void, unless passed in accordance with that majority which the constitution lays down as the required majority in that section or sections which deal with Parliament's powers and procedures (to make laws).

[57] Lord Steyn delivering the Board's Judgment in the ***State v. Khoyratty,*** quoted with approval, Lord Bingham's observation in ***Mollison*** (*supra*, at paragraph 13):

> "…whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation based on the rule of law was recently described by Lord Steyn as 'a characteristic feature of democracies': ***(R v. Anderson v. Secretary of State for the Home Department [***2003] AC 837 890-1 para. 50)."

[58] That section of the Mauritian Constitution, which is similar to section 15(3) of the Constitution of Jamaica, was amended by legislation passed in Mauritius. It was passed with a sufficient majority as provided by that Constitution. Their Lordships also were of the opinion that this legislation was void, not only because it had precluded the right to bail for certain offences but also because it was offensive to the Court's power to grant bail, a power granted by the Constitution.

[59] Their Lordships however were of the view and decided that the Court's power was "deeply entrenched" in that country's Constitution and as the amendment sought to "introduce a provision which was inconsistent with the concept of a democratic society as guaranteed by section 1 of the Constitution, section 2 was accordingly void."

[60] Lord Steyn was also approving of Lord Bingham's view in ***R v. Secretary of State for Home Department*** (mentioned above) that

> "…Parliament the executive and the Courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself…"

[61] Lord Roger of Earlsferry, though agreeing with Board's judgment, referring to the amendment, as "absolute in form and effect" was also of the opinion that, 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."

[62] It is readily admitted that the Amending Acts being challenged in the instant case cannot be accurately described as being "absolute in form and effect" as the legislation challenged in Mauritius where bail was denied to anyone charged with certain offences under the Dangerous Drugs Act, until the determination of the case. However, in the local situation the Judge's power to grant bail, can be ousted for a period of seven days, if a defendant can be "lawfully held" and brought to Court at intervals, specified in section 3B 2(a) of Act 22.

[63] These amending acts were not passed in conformity with the Constitution of Jamaica, unlike the situation as existing in the passage of the impugned amendment in ***Khoyratty***. They could not therefore properly amend the sections of the Constitution which they were intended to. The situation is not ameliorated by the fact that the provision is interim and set to last for a year only. It still has

the effect, while it is in existence, of trespassing on what is the "domain of the judiciary."

[64] Lord Steyn repeated, again approvingly, an observation of the Mauritian Supreme Court ***"***that decisions on bail are intrinsically within the domain of the Judiciary." Only the Constitution can limit the Court's authority, for even a short time.

[65] The introduction of the second schedule has ushered into the consideration of bail, the seriousness of the offence as being a determining factor in the refusal of the grant of bail, rather than one of the considered factors. The case of ***Hurnam*** (*supra*) is authority that seriousness of the offence is not the issue which should determine whether bail should be granted. It should be only one of the factors to be taken into consideration.

[66] There is legal authority that where sections of legislation offensive to the Constitution (or the principle concerning the separation of powers), may be excised from the body of the legislation, if what remains still represented, after a review of the whole matter, that which it could be "assumed that legislature would have enacted what survives without enacting that part that was *ultra vires*" it may b retained. See ***Hinds et al v. The Queen*** (supra). See also ***Attorney General for Alberta v. Attorney General for Canada*** (1947) 1 AC 518.

[67] Section 2 of Act 20 is the section of the Amending Act which places a burden of proof on the defendant/applicant for bail. Section 3(4) of Act 20

(limited to the subsection which demands that the Court remand the defendant pending an appeal by the prosecution) and all of Act 22 which is built on the foundation of section 2 of Act 20 – these are all provisions offensive to the Constitution of Jamaica. Their connection to the second schedule established by Act 20 are so inextricably intertwined, none may be saved.

[68] Section 3 of Act 20 may stand as it is possible to remove from it the repugnant subsection which required the Court to remand the Defendant pending appeal. The remainder of this section may stand on its own and may independently survive.

[69] The effect of the impugned Acts 20 and 22, resulted in a removal from the defendant the entitlement to bail and was an infringement on his right to liberty guaranteed by the Constitution as provided for in section 15(3) of the Constitution of Jamaica.

[70] The placing of the burden of proof on the defendant by amending section 3 of the Principal Act, by section 2 of Act 20, was also an affront to provisions in section 20 of the Constitution; the presumption of innocence. Together the provisions of the amending Acts, all contravened the principle of the separation of powers, the cornerstone of the Jamaican Constitution, based on the Westminster model.

[71] As Saunders J (as he then was) put it in the case ***Benjamin et al v. Ministry of Information et al*** Suit No. 56 of [1997], delivered 7th January 1998 (High Court Anguilla)

> "….our democracy rests on three fundamental pillars, the Legislative, the Executive and Judicial. All must keep within the bounds of the Constitution. The Judiciary has the task of seeing to it that legislative and executive action does not stray outside those boundaries into forbidden territory. If that occurs and a citizen with standing complains, the Court declares the trespass and grants appropriate remedies…The court is subject to and must enforce laws passed by Parliament that are *intra vires* the Constitution…."

The sole aspect of the impugned amendments which should be allowed to exist is that subsection of section 3 of Act 20 which provided the prosecution with the right to appeal.

[72] For the reasons above expressed, the challenges to the Amendment Acts succeed, and the Acts (except for Section 3 of Act 20) all should be declared in breach of the Constitution of Jamaica and consequently I would declare them void and award costs to be the claimants, to be taxed if not agreed.

BROOKS J

[73] The Bail Act was brought into force on 29 December 2000. It was hailed by many as being a positive step by Parliament to finally recognise people's constitutional right to liberty being retained, despite their being charged with a criminal offence. It was, however, not a universal acclamation. In certain quarters, the exercise of the judicial discretion, to grant bail to certain individuals and for certain types of offences, was criticised. Granting bail was said to be

undoing the good work of the police, in apprehending persons suspected of committing serious crimes in the society. In the context of a rapidly escalating murder-rate, the criticism garnered much support.

[74] In June 2010 Parliament acted in an attempt to stem the advancing tide of criminal conduct in the country. It passed six Acts which, together, were, in common parlance, called "the Anti-Crime Bills". In these consolidated claims, it is with two of those Acts, that this court is concerned.

[75] Both Acts amended the Bail Act (the principal Act). The first is Act 20/2010 entitled "The Bail (Amendment) Act, 2010" (hereinafter called "Act 20") and the second is Act 22/2010 entitled "The Bail (Interim Provisions for Specified Offences) Act, 2010" (hereinafter called "Act 22"). Both were brought into law on 22 July 2010. I shall refer to them together hereafter as "the amendment Acts". Their cumulative effect was to:

a. remove the entitlement to bail for certain specified offences,
b. reverse the burden of proving whether or not a person accused of such offences should be granted bail,
c. provide for a system of periodical review of persons held in custody, as a result of the new regime, and,
d. grant a right of appeal to the prosecution, in the event that a court granted bail to a defendant.

[76] The claims before the court have been respectively instituted by Mr Adrian Nation and Ms Kerreen Wright. They both assert that Act 20 the amendment

Acts caused a Resident Magistrate to refuse to consider their respective applications for bail. They assert that the refusal constituted a breach of their constitutional right to liberty and amounted to cruel and inhuman punishment. They challenge the validity of the amendment Acts and ask this court to make declarations that both are inconsistent with the provisions of the Constitution and should, therefore, be struck down as being void.

[77] The respondents, the Director of Public Prosecutions and the Attorney General, both refute these assertions.

[78] This court is therefore charged with the task of assessing these challenges. It should be noted that the reference to the Constitution in this judgment is in respect of its provisions which were in force before the passing of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011. That Act, which replaced Chapter III (sections 13-26) of the Constitution, was brought into force on 8 April 2011. The new Chapter III, especially at section 14 (3) thereof, makes somewhat different provisions affecting the question of bail and may, therefore, not be conveniently discussed here.

The factual background

[79] There is no dispute as to the events occurring after the arrest of each of these claimants. They were each charged with the offence of murder arising out of separate incidents. Mr Nation was arrested on 29 June 2010 while Ms Wright

was arrested on 31 July 2010. Each was brought to the Resident Magistrate's court for the parish of Manchester on dates subsequent to the passage of the amendment Acts; Mr Nation for the second time. In each case the learned Resident Magistrate declined jurisdiction to adjudicate on the question of bail. He cited the provisions of the Bail Act, as amended by Acts 20 and 22, as depriving him of the jurisdiction to consider an application for bail.

[80] Not long after those refusals, it became generally known that a judge of this court had granted bail to a person accused of murder, despite the passage of the amendment Acts. Thereafter, both Mr Nation and Ms Wright were afforded leave by the learned Resident Magistrate to apply for bail. Despite the fact that Ms Wright was granted bail on that occasion, she and Mr Nation have, nonetheless, filed these applications. They assert that the issues raised, are of significant importance to the public, as they affect the issue of the liberty of the subject.

The question of standing

[81] Mr Taylor, appearing for the Director of Public Prosecutions (the DPP), argued that these claimants were not entitled to claim constitutional redress. On his submission, section 25 of the Constitution is the provision which allows any person to seek redress for any alleged breach of the provisions of Constitution, which outlaw the deprivation of the several fundamental rights and freedoms granted to persons in Jamaica. This court should not, however, exercise any power granted to it by section 25 if it is satisfied that adequate alternate means of

redress are available to the claimant. Learned counsel submitted that these claimants had, and still have, adequate alternate means of redress. He submitted that they were entitled to appeal against the decision of the learned Resident Magistrate by virtue of the provisions of sections 8 to 11 of the principal Act. In support of his submissions, learned counsel relied on a number of authorities, including *Fuller v Attorney-General* (1998) 56 WIR 337.

[82] In *Fuller,* our Court of Appeal accepted that Mr Agana Barrett had been subjected to cruel and inhuman punishment when he was locked away in a small, hot, cramped, damp, almost airless cell, with eighteen other persons. Mr Barrett died in those circumstances. Patterson JA, having stated that acceptance, considered whether an application pursuant to section 25 of the Constitution was appropriate. He said, in part, at page 399 c-h:

> "…The clear principle that is established by [the relevant decided] cases is, in my judgment, that in every case that an application pursuant to s 25 of the Constitution is made to the Supreme Court alleging a contravention of the protective provisions of ss 14 to 24 of the Constitution the court may only exercise its powers of enforcement of the provision if it is satisfied that no other law provides adequate means of redress for such contravention….The meaning to be attached to the words 'adequate means of redress' is quite clear from the opinion of their lordships' Board in [*Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago* (No 2) (1978) 30 WIR 310]. **There must be a remedy available at law which will be sufficient for the purpose of enforcing or securing the enforcement of [redress for] the alleged contravention.** 'Adequate means' is referable to the remedy at law that can be invoked to bring about like protection to those stated in s 25(2) of the Constitution; **it has nothing to do with the quantum of damages recoverable at law or the amount of compensation that may be payable as redress**." (Emphasis supplied)

[83] Although recognizing that damages would be the only remedy available in those circumstances, the court concluded that an award of damages, even aggravated or exemplary damages, would not be adequate. It found that Mr Barrett's estate was entitled to constitutional redress for the treatment meted out to him before his death.

Section 25(2), referred to above, states:

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person [for redress] in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> **Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law**." (Emphasis supplied)

[84] A part of the rationale for the inclusion of the *provisio* to section 25(2) was explained by Lord Diplock in considering the importance of a similar provision in the Constitution of the Republic of Trinidad and Tobago. In *Harrikisson v Attorney-General* (1979) 31 WIR 348 at page 349 e-j, he said:

> "The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by…the Constitution is fallacious. The right to apply to the High Court under…the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under [the relevant subsection], the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court

under the subsection **if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy** for unlawful administrative action which involves no contravention of any human right or fundamental freedom." (Emphasis supplied)

[85] Whereas I unreservedly and with full respect, accept the validity of those statements in law, I respectfully disagree with Mr Taylor's submissions, as they apply to the instant case. In my view, the claimants had good ground on which to opine that an appeal against the decision of the learned Resident Magistrate would not be an adequate remedy. The submissions on behalf of the DPP implicitly recognized that fact. The written submission tendered by Mr Taylor, included the following statement:

> "9. **The learned Magistrate, in refusing to admit the Claimants to bail, would have, after July 23, 2010, been acting in accordance with the law in force at the time the issue of bail came before him for consideration**. Further, it would not be, and does not seem to be in dispute that the question of bail is always a matter for the discretion of the tribunal before whom the question is raised. Accordingly, it does not seem to be in dispute that the learned Magistrate acted properly in the exercise of his discretion to refuse to admit the Claimants to bail." (Emphasis supplied)

[86] On that submission, an appeal would, in the opinion of counsel for the DPP, be doomed to failure. It follows therefrom that it is the "law in force" which must be subjected to scrutiny. That scrutiny, in my view, may only be achieved by a challenge, such as that raised by the present claims.

[87] The Constitution lists the fundamental right of the liberty of the subject immediately after it recognizes the right to life. Based on that importance, I find

that the issue of the validity of the amendment Acts takes this matter outside the realm of a mere allegation that a fundamental constitutional right has been contravened. I find that the application of the provisions of these two Acts goes beyond administrative action as it applies to these particular claimants; it affects the citizenry as a whole. The issues raised by their passage into law are of great general public importance and the claimants are entitled to approach this court by virtue of the provisions of section 25 of the Constitution, to have them resolved.

[88] I rely for support for this stance on the following quote from the judgment of Rawlins JA in the case of *Attorney General of Saint Lucia v Theophilus* Civil Appeal No 13 of 2005 (delivered 20 March 2006). In addressing the issue of legislation affecting the right to apply for bail, the learned judge of appeal said:

> "9. The charge against Mr Theophilus was subsequently withdrawn. In relation to him, therefore, this appeal is merely academic. **However, the issue, which arises, remains one of great public importance. It is still necessary for the citizenry, as well as for the organs of the State to know, with certainty, whether the impugned provisions are consistent with the Constitution** or whether they are unconstitutional and therefore of no effect." (Emphasis supplied)

I find that the highlighted portion of that quotation may be applied to the instant claims.

[89] Having determined that the claimants have standing in which to make these applications, I shall outline the context existing prior to the passing of the amendment Acts; the common law background, the constitutional framework and then the relevant provisions of the principal Act.

The common law background

[90] The common law tradition which forms part of the underpinnings of the legal system of this country has established that "the proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial, and that **bail is not to be withheld merely as a punishment**" (see *Noordally v Attorney-General and another* [1987] LRC (Const.) 599 at page 601 d). In *Noordally*, the court also cited, with approval, the principle that refusal or delay by a judge or magistrate to bail any person is, at common law, an offence against the liberty of the subject. It held that such a refusal is also a violation of the Habeas Corpus Act 1679 and of the Bill of Rights 1689. Although that decision was handed down by a court in the Republic of Mauritius, the relevant legal history and law of that country, in its anglicised dimension, is very similar to Jamaica's. In *R v Badger* and another (1843) 7 J.P. 128 at page 130, Denman, CJ, in a case where sureties for bail were refused by magistrates, stated:

> "The law is clear, and is as old as the statute of Westminster, 13 Edward 1, c. 15. Lord *Coke*, in his commentary upon that statute…says, that "to deny a man plevin who is plevisable, and thereby to detain him in prison, is a great offence, and grievously to be punished;"…Blackstone, referring to the ancient statute…the *habeas corpus* and the bill of rights, calls it an offence against the liberty of the subject."

[91] Thus, the law cited above, represents the state of the relevant law in Jamaica immediately prior to the Constitution being brought into effect.

[92] By section 4 of the Jamaica (Constitution) Order in Council, 1962, all laws which were in force in Jamaica immediately before 6 August 1962 continued to be in force after that date, subject to amendment or repeal by the appropriate authority. This was reinforced by the Constitution itself (in section 26(9)), which came into force on that date.

The constitutional framework

[93] In assessing the constitutional framework, it is perhaps convenient to begin with the relevant sections of Chapter III thereof as it stood at the time of the passage of the amendment Acts. That chapter dealt with fundamental rights and freedoms of "every person in Jamaica" and, as mentioned above, it spanned sections 13 through 26 of the supreme law of this country. The Privy Council *in Director of Public Prosecutions v Nasralla* (1967) 10 JLR 1; [1967] 2 AC 238 stated that Chapter III "proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law" (page 5E; 247-8). That opinion was cited, with approval, by their Lordships in the more recent case of *Watson v R* PCA 36 of 2003 (delivered 7 July 2004).

[94] Section 13 is the first section in Chapter III. It specifies the fundamental rights and freedoms of the individual and declares that every person in Jamaica is entitled to, among other things, life and liberty.

[95] Section 15 is the next relevant section. It establishes the right of every person to personal liberty. This right is only subject to detention pursuant to law.

Section 15 (3) prescribes the method by which persons who are detained or arrested are to be dealt. It states in essence that they are to be brought **without delay** before a court and if not tried within a reasonable time, are to be released either conditionally or unconditionally to ensure their attendance at a later trial. The subsection reads:

> "(3) Any person who is arrested or detained-
>
> (a) for the purpose of bringing him before a court in execution of the order of a court; or
>
> (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence,
>
> and who is not released, **shall be brought without delay before a court**; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence **is not tried within a reasonable time**, then, without prejudice to any further proceedings which may be brought against him**, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial**." (Emphasis supplied)

The portion latterly emphasised has been said to include a right to bail. Whether that interpretation is justified will be examined below.

[96] Section 20 is the next relevant section. It codifies what we know and conveniently refer to, as the "presumption of innocence". Section 20(5) states, in part:

> "Every person who is charged with a criminal offence **shall be presumed to be innocent** until he is proved or has pleaded guilty:" (Emphasis supplied)

[97] The personal liberty of the subject and the individual's right to freedom of movement (section 16 (1) of the Constitution) are therefore the norm to be presumed and enforced. In *Hurnam v The State* PCA 53 of 2004 (delivered 15 December 2005), the Privy Council, while considering the equivalent of section 15 in the Mauritian constitution, quoted, without demur, from the decision of *Noordally* in these terms:

> "…that the suspect's remaining at large is the rule: his detention on the ground of suspicion is the exception and, even then, if he is not put on his trial within a reasonable time he has to be released:" (see paragraph 4) (Emphasis supplied)

[98] The Privy Counsel also stated, again without criticism, at paragraph 5 of the opinion of the Board, in connection with a reference to the equivalent of section 15:

> "The court in *Noordally* rejected a submission that section 5 did not grant an accused party a right to be at large:"

[99] The derogation of these fundamental rights should only be allowed for cogent reasons. Reasons which have been recognised as acceptable by the Constitution include the "interests of defence, public safety, public order, public morality or public health" (see section 16(3) (a)).

[100] The relevant Constitutional framework, in my view, does establish that an individual deprived of his liberty by an agent of the state is entitled to be brought without delay before a court and is entitled to have the question of his release, either conditionally or unconditionally, considered by the court.

[101] It is also necessary, before moving on to consider the relevant legislation, to note that section 2 of the Constitution, establishes the Constitution as the supreme law. It states that if any other law is inconsistent with its provisions, that other law is, to the extent of the inconsistency, void. Sections 49 and 50 provide for the means by which the Constitution may be altered, including the majority required in the legislature, to pass such alterations.

[102] Thus stood the relevant law, just prior to the passing of the principal Act, in the year 2000.

The principal Act

[103] Section 3 of the Bail Act builds on this constitutional foundation, and reinforces the right to liberty. It states:

> "(1) Subject to the provisions of this Act, every person who is charged with an offence **shall be entitled to be granted bail** by a Court, a Justice of the Peace or a police officer, as the case may require.
>
> (2) **A person who is charged with an offence shall not be held in custody for longer than twenty-four hours without the question of bail being considered**.
>
> (3) Subject to section 4 (4), bail shall be granted to a defendant who is charged with an offence which is not punishable with imprisonment.
>
> (4) A person charged with murder, treason or treason felony may be granted bail only by a Resident Magistrate or a Judge.
>
> (5) Nothing in this Act shall preclude an application for bail on each occasion that a defendant appears before a Court in relation to the relevant offence." (Emphasis supplied)

[104] The important words for this aspect of the discussion are "**shall be entitled to be granted bail".** Again, the norm is that the individual is entitled to his freedom. The expression of "entitlement" to bail was not previously included in legislation. As mentioned above, it will, therefore, be necessary for these purposes, to determine whether it is Parliament or the Constitution which created the "entitlement" to be granted bail.

[105] Section 4 of the Act is also very important. It stipulates the circumstances in which bail may be denied an individual who is charged with an offence which is punishable with imprisonment. It makes it very clear that the onus is on those who wish to deprive the defendant of his liberty, to show why bail should be denied. The section commences:

> "4. – (1) Where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with which imprisonment, bail may be denied to that defendant in the following circumstances-
>
> (b) the Court, a Justice of the Peace or police officer is satisfied that there are substantial grounds for believing that the defendant, if released on bail would-
>
> (i) fail to surrender to custody;
>
> (ii) commit an offence while on bail; or
>
> (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;…"

The rest of the section speaks to other circumstances in which bail may be denied and what should be taken into account in deciding whether to deny the defendant bail.

[106] Those provisions speak to a person who is charged with an offence. Section 22 provided for a person who had not yet been charged:

> "Where a person who is arrested or detained is not charged within twenty-four hours after such arrest or detention, he shall be brought forthwith before a Resident Magistrate or a Justice of the Peace who shall order that the person be released or make such other order as the Resident Magistrate or the Justice of the Peace thinks fit, having regard to the circumstances:
>
> Provided that where an identification parade is required in relation to that person, the person shall not be brought before a Resident Magistrate or a Justice of the Peace but the matter shall be referred to a Resident Magistrate or a Justice of the Peace who shall make any such order in the absence of that person.

[107] Sections 3(2) and 22 together define, or perhaps more accurately, refine, "without delay", as used in section 15(3) of the Constitution, to mean "within twenty-four hours".

[108] Jamaican jurisprudence in this area has benefitted greatly from the assessment of the impact of the principal Act by Sykes J in *Stephens v The Director of Public Prosecutions* 2006 HCV 0520 (delivered 23 January 2007). In that case the learned judge considered the reasoning of the Privy Council in *Hurnam* and noted the close connection between the relevant provisions of the European Convention on Human Rights and the provisions of section 15(3) and 20(5) of the Constitution. The issue was put in context by Sykes J, who said at paragraph 16 of *Stephens*:

> "The European Court of Justice formulated the criteria against the backdrop that the liberty [of the subject] is the normative position, and his detention has to be justified by those who would deny him this human right. **It is not for him to justify why he should be set free**. A criminal charge does not change this normative position. **Subject to**

> **any legislation to the contrary, a person is entitled to his liberty unless the state can show relevant and sufficient reasons to justify the continued detention of the person**." (Emphasis supplied)

Indeed, that connection with the Jamaican Constitution was recognized, by the Privy Council, in *Director of Public Prosecutions v Mollison (No. 2)* [2003] 2 AC 411 at page 420, paragraph 8. I respectfully accept that those statements accurately reflect the law regarding bail, up to the time of the passing of the amendment Acts.

The amendment Acts

[109] There is no doubt that, in the context of the crime situation which faced the country in 2010, this principle of an "entitlement to be granted bail", severely tested the mettle of judicial officers and the legislature, as the public clamoured for a reduction in crime and the incarceration of offenders. Parliament, faced with this scenario, decided to remove the entitlement to bail in certain circumstances. It did so first, by Act 20. Section 2 of that Act stated:

> "Section 3 of the principal Act is amended by inserting next after subsection (4) the following as subsection (4A)-
>
> > "(4A) Bail shall be granted to a defendant in relation to an offence specified in the Second Schedule, **only if the defendant satisfies the Court that bail should be granted**." (Emphasis supplied)

In addition to that provision, Act 20 also gave a right of appeal to the prosecution in the event that bail was granted to the defendant. The offences set out in the second schedule, which Act 20 also created, included murder, treason, illegal possession of firearms and dealing in illegal drugs.

[110] Act 22 built on the foundation laid by Act 20. Its provisions are, however, stipulated to continue in force for one year from July 22 2010. That limited period of application has resulted in Act 22 being termed, "sunset legislation". The limit does not, however, preclude this court assessing its impact; especially as it is subject to have its period of duration extended by Parliament. Section 3 of the Act inserts sections 3A and 3B into the principal Act. Section 3A (1) provided, in part, that where a person is charged with certain offences set out in the second schedule (which schedule was created by Act 20), that person:

> "**shall be entitled to be granted bail only if** a period of sixty days, commencing on the date on which the person is first charged with that offence, has elapsed **and the person satisfies the Court that bail should be granted**." (Emphasis supplied)

A person charged with certain other offences, listed in the second schedule, was permitted by subsection (2) before the expiry of 60 days, to apply for bail, but again, was "entitled to be granted bail **only** if that person satisfies the Court that bail should be granted". (Emphasis supplied)

Section 3A(3) provided for what should occur after the expiry of 60 days:

> "In any case falling within subsection (1), upon the expiration of the sixty day period mentioned in that subsection, the procedure set out in section 22 shall apply in respect of that person."

[111] These provisions provided a radical shift from the jurisprudential attitude of the principal Act. Yet, section 3B provided a somewhat different approach to that used in section 3A. The difference is such that it appeared as if, to use the words of the Privy Council in *Hurnam*, it were "contributed by a different hand". Section 3B states:

"(1) A person who is held in custody without bail under section 3A shall be brought before the Court at the intervals specified in subsection (2), for the Court to review the question of whether the person should continue to be held in custody or the grant of bail should be considered, in relation to the offence by virtue of which the person has been held in custody under that section.

(2) The intervals at which a person referred to in subsection (1) is to be brought before the Court for the purposes of that subsection are-

(a) not more than seven days after the person is first charged with the offence concerned;

(c) thereafter, subject to the determination of any review under subsection (1), at intervals not exceeding fourteen days, until the sixty day period referred to in section 3A(1) expires.." (Emphasis supplied)

[112] The difference in approach was addressed in the Memorandum of Objects and Reasons which accompanied the, then, Bill. It stated, in part:

"However, the sixty day period in custody is subject to **the right of the person so held to be brought before the Court** at intervals not exceeding 14 days for the Court to review the question of whether the person should continue to be held in custody **or the grant of bail be considered**." (Emphasis supplied)

Instead of a right to bail, the person held, only has a right to be brought before the court. It is then for the court to decide whether he should or should not be granted bail. Undoubtedly, the person held would then have the opportunity to show why bail should be granted.

[113] In order to reconcile the provisions of sections 3A and 3B, so as to prevent any inconsistency, it would seem that they have to be interpreted to mean that although a person charged with, for example, murder, is not **entitled to be granted bail** before the expiry of 60 days (section 3A), that person may yet be

granted bail after a period of seven days of being first charged, if he can convince the court that **he should be granted bail** (section 3B).

[114] The term “entitle”, is defined by the Collins English Dictionary to mean “to give (a person) the right to do or have something; qualify; allow”. Using these definitions in the context of section 3, and section 3A the term “entitle”, would seem to mean, “to give (a person) the right to…have [bail]” rather than “to qualify [for bail]” or “to allow” or grant that person bail. The term has been, apparently, used to mean one or other of the above definitions. In the case of a person charged for murder, his **right** to bail, granted or recognised by section 3, is removed by section 3A and replaced by a **qualification** for bail. He may be **allowed** bail pursuant to section 3B.

[115] Whether it was permissible for Parliament to seek to remove the right will now be assessed.

Analysis

[116] Counsel for claimants argued the matter along three broad lines:

a) The amendments to the Bail Act are in breach of the Constitution of Jamaica;

b) The constitutional rights of the claimants have been breached by the said amendments to the Bail Act;

c) The claimants' right to liberty were contravened when the Learned Resident Magistrate declined jurisdiction to hear the application for bail, basing his decision on the amendments to the Bail Act.

[117] I find it more convenient to analyse the issues a little differently. I shall first examine whether the provisions of the amendment Acts are, objectively, in breach of the Constitution. Secondly, I shall determine whether any of those provisions impinge on the principle of separation of powers, as it is embodied in our democracy and finally, I shall examine whether, if there is in fact a breach, whether the offending aspect may be severed leaving the rest of the amendment Acts to have their intended effect.

[118] Before embarking on that analysis however, I shall, at this stage, deal with a submission made by Mr Cochrane, on behalf of the Attorney General, as he sought to demonstrate a constitutional basis for these amendment acts. Learned counsel argued that the amendment Acts were passed in compliance with the authority given to Parliament to pass laws to safeguard the public interest, such as the interests of defence, public safety, public order, public morality, or public health. He cited section 48(1) of the Constitution in support of this stance. That subsection states:

> "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica.

[119] Learned counsel referred to the Memorandum of Objects and Reasons which accompanied each of the, then, Bills. In each memorandum, after stating

the decision to amend the Bail Act, in the manner set out in the proposed legislation, the relevant portion stated:

> "This Bill seeks to give effect to that decision and is a companion to other proposed legislation **aimed at reducing crime**." (Emphasis supplied)

Mr Cochrane submitted that the words emphasised above demonstrate that the amendment Acts were passed in the interests of the public and are therefore in compliance with the Constitution.

[120] I hope that I have not misunderstood Mr Cochrane's submissions on the point but I reject those submissions as taking too simplistic an approach to the matter. Parliament may not, deliberately or unintentionally, avoid the impact of the provisions of the Constitution, especially the entrenched provisions guaranteeing fundamental rights and freedoms to persons in Jamaica, by simply stating that the purpose of a particular Act (passed by a bare majority in the lower house) is to protect the interests of the public. In a decision of the Privy Council, concerning an act of Parliament passed almost 40 years ago, in an attempt to tackle this country's, then, crime problem, their Lordships said:

> "So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, **however reasonable and expedient**, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision." (Emphasis supplied)

Their Lordships expressed those views in *Hinds and others v R* (1975) 13 JLR 262 at page 270A-B. Those views are no less relevant today.

[121] I accept, however, that there may be some support for Mr Cochrane's position in *Hinds.* At page 277G-288A of the judgment, their Lordships held that, in that case, there was no evidence to rebut the presumption that Parliament had information concerning circumstances in Jamaica which required legislation, in the interests of public safety, in terms of that which it passed into law. In my view, the right to liberty is far too fundamental to be removed by the application of such a presumption. I find support for this position in paragraph 9 of *Stephens*. There, Sykes J explained the consequences of having this important right. He said:

> "…The liberty of the subject is not an implied right that has to be gleaned from a number of provisions. The liberty of the subject is such a fundamental right that the framers of the Constitution thought that it should not be left to implication but rather should be expressly protected….the fact that this right has received the highest level of protection possible in a legal system which is located in a constitutional democracy with a written constitution, then **any derogation from such a high ranking right must be justified by very, very cogent reasons**." (Emphasis supplied)

Whether the amendment Acts are in breach of the Constitution of Jamaica

[122] It is necessary to repeat, at this stage, that the amendment Acts were passed in Parliament by a bare majority. The vote was well shy of the two-thirds majority, of the entire membership, which was required to alter or repeal any of the provisions in Chapter III; being 28 rather than the, then required, 39. The result is that none of the provisions of Chapter III may be affected by the passage of either, or both, of these amendment Acts.

[123] The first complaint raised by Mr Greenwood, on behalf of Mr Nation, was that section 3B (2) (a) directly affected the right granted in section 15 (3) of the Constitution, in that it "gives the state [the] luxury not to bring the person [charged] to court before seven days had passed". Learned counsel submitted that "we had the right before [Act 22 was passed] to be brought before the court without delay".

[124] Whereas I accept that the term "without delay" has an inherent quality of elasticity, I find that a period of seven days would stretch that concept to the point of rupture. The appropriate period of time must necessarily, depend on the circumstances of each case but it would seem to me that a Resident Magistrate would be available to the agents effecting detention, before six days had elapsed, in order for them to comply with the requirement of section 15(3) of the Constitution. Based on this analysis, I find that the extension of the Constitutional provision of "without delay", to mean, for certain offences, "not more than seven days" results in a breach of section 15(3) and offends against the presumption of innocence provided for by section 20(5) of the Constitution.

[125] The next complaint concerned the policy shift, whereby, for the specified offences, the defendant was no longer entitled to bail, so that it was his detainers who had to justify keeping him in custody, but that it was now the defendant who had to demonstrate that he was worthy of the grant of bail. In respect of this complaint, Mr Taylor submitted that the effect of the passage of the amendment Acts is only to shift the burden to a defendant to show "why they need to be set

free". He argued that that effect was in accordance with the provisions of section 20(5) of the Constitution. In support of that submission, learned counsel cited the *provisio* to section 20(5):

> "Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid **the burden of proving particular facts**." (Emphasis supplied)

Mr Taylor pointed out that there were statutes which properly required the person accused to prove certain facts.

[126] In my view, the shift of the onus to the defendant to show that he should be granted bail, is distinct from an onus to prove particular facts, for example, that he holds a driver's licence; which would be a fact within his knowledge that would not ordinarily be available to the prosecution. I do not agree with Mr Taylor's submission. I also find that the shift of the onus does contravene the right to liberty established by sections 13 and 15 of the Constitution and also offends against the presumption of innocence provided for by section 20(5) of the Constitution

[127] There are two further points which I find necessary to address on the question of the constitutionality of the amendment Acts. The first concerns the question of whether the amendment Acts result in cruel and inhuman treatment and as such constitute a breach of section 17(1) of the Constitution. The second is whether it is unconstitutional to grant a right of appeal to the prosecution where bail is granted, when no such right of appeal exists for the defendant when bail is refused.

Do the amendment Acts result in cruel and inhuman treatment?

[128] Section 17(1) of the Constitution prescribes that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment". Mr Godfrey, on behalf of Ms Wright, submitted that the provisions of section 3B breach the right given to the citizen by section 17(1). Inherent in the amendment, submitted Mr Godfrey, is a "restriction on the judiciary in the exercise of its historic power as regards bail". It resulted, on learned counsel's submission, in a trespass on the purview of the judiciary and therefore was a breach of the fundamental principle of the separation of powers which is essential to the Westminster style of democracy on which this country operates.

[129] Learned counsel sought to show that this trespass on the authority of the judiciary meant that a defendant would be unable, for the entire 60 day period allowed by section 3B, to predict whether he will be heard by a judicial officer when he is eventually brought before the court. That unpredictability, says Mr Godfrey, leads to a state of uncertainty which amounts to cruel and inhuman treatment. This is especially so as the defendant is presumed to be innocent. Learned counsel supported these submissions by citing from the case of *Lambert Watson v R* [2004] 3 WLR 841. In *Watson*, their Lordships said at paragraph 33 of their judgment:

> "To condemn a man to die without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate is to treat him in a way that no human being should be treated."

[130] Mr Taylor countered those submissions by stating that merely alleging such treatment, by the agents of the state, is not enough; evidence has to be provided in respect of the allegation. On his submission, neither of these claimants has come close to proving these assertions. Learned counsel relied on the judgments in the decisions of *Fuller v Attorney General*, mentioned above and *Higgs and Mitchell v The Minister of National Security and others* [1999] UKPC 45 of 1999 (delivered 14 December 1999), in support of his submissions.

[131] In *Fuller,* the Court of Appeal, at pages 421 j – 422 d dealt with the issue of cruel and inhuman treatment. The judgement stated:

> "There is no doubt that in the instant case, the deceased was subjected to inhuman and degrading treatment, due to the 'oppressive, arbitrary and unconstitutional action' of the police officers [in ignoring the pleas of the persons in that frightful cell].
>
> The Constitutional Court of South Africa in *The State v Williams* (1995) (unreported) in categorizing juvenile whipping as inhuman and degrading and acknowledged:
>
> > 'According to the [United Nations Rights Commission], the assessment of what constitutes inhuman or degrading treatment depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.'
>
> The court noted that:
>
> > 'The European Commission of Human Rights…described inhumane treatment as that which "causes severe suffering, mental [or] physical which in the particular situation is unjustifiable…" The European Court of Human Rights …categorised degrading conduct as that which aroused in its victims feelings of fear, anguish and inferiority leading to humiliation and debasement and possible breaking of their physical and moral resistance.'

> The Concise Oxford Dictionary (9th Ed) defines 'inhuman treatment' as '…manner of behaving towards or dealing with a person…[in a way which is]…brutal unfeeling [or] barbarous' and degrading treatment, as 'humiliating causing a loss of self respect'. I adopt these descriptions of inhuman and degrading treatment."

The State v Williams referred to in the quote is in fact reported. The citation is (1995) CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995)

[132] I cannot place the circumstances of the instant claims, in the same category as those of Agana Barrett in *Fuller*, those in *Watson*, or as the situation in *Pratt and Morgan v Attorney General and another* (1993) 30 JLR 473. The situation where a defendant is able to attend before a court, albeit after a delay of a maximum of seven days, and attempt to convince the judicial officer presiding, that he or she should grant bail to the defendant, is wholly different from a convicted person being sentenced to die without being afforded an opportunity to say why that penalty is inappropriate to his particular situation. I cannot accept Mr Godfrey's submission that there has been a breach of section 17(1) of the Constitution.

The prosecution's right to appeal

[133] In addition to seeking to shift the burden of proof to the defendant, Act 20 also granted the prosecution the right to appeal to a single judge of the Court of Appeal sitting in chambers. Apart from the logistic conundrum, created by the amendment, where a decision of a judge of Appeal in chambers (who constitutes a "Court" in the principal Act), may be appealed to another judge of Appeal in

chambers, Mr Godfrey complains that the grant of the right to appeal to the prosecution only, is unconstitutional.

[134] It does seem, from an examination of section 103 of the Constitution, Parts IV, IVA, V and VI of the Judicature (Appellate Jurisdiction) Act, section 42 of the Judicature (Supreme Court) Act and the principal Act generally, that no appeal lies to the Court of Appeal, from a refusal of bail by a judge of this court who is exercising jurisdiction in the Circuit Court division of this court or the High Court division of the Gun Court. Undoubtedly, it is in those courts that the vast majority of applications for bail, at this level, are heard.

[135] There is, however, nothing to preclude a person from appealing from a refusal of a Resident Magistrate to a judge of the Court of Appeal who is sitting in chambers. There is yet, another option open to a person who wishes to make an application for bail. That person may apply directly to a judge, either of this court or of the Court of Appal, who is sitting in chambers. Section 3(1) of the principal Act states:

> "Subject to the provisions of this Act, every person who is charged with an offence shall be entitled to be granted bail by a **Court**, a Justice of the Peace or a police officer, as the case may require." (Emphasis supplied)

The term "Court" is defined in section 2 of the principal Act to include a judge, while the term "judge", is therein defined to mean "a Judge of the Supreme Court or the Court of Appeal".

[136] If the applicant chooses to apply to a judge of this court who is sitting in chambers, that application would be governed by the provisions of Part 58 of the

Civil Procedure Rules. That would seem to indicate an exercise of the civil jurisdiction of this court. Appeals from an exercise of the civil jurisdiction seem to be allowed where the liberty of the subject is in issue.

[137] Section 11 of the Judicature (Appellate Jurisdiction) Act impliedly allows an individual who is in custody to have access to the Appeal Court in respect of the question of bail. It states:

> "11. – (1) No appeal shall lie-
>
> …
>
> *(f)* without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except-
>
> (i) **where the liberty of the subject or the custody of infants is concerned**;
>
> (2) In this section "Judge" means Judge of the Supreme Court." (Emphasis supplied)

Whereas the Court of Appeal may only exercise the jurisdiction afforded it by statute, it is my view that section 10 of the Judicature (Appellate Jurisdiction) Act does give that court the jurisdiction to hear appeals from a decision of a judge of this court, exercising the court's civil jurisdiction, on the question of bail.

[138] In addition to all the above avenues, a person who is remanded in custody is entitled to renew his application, provided there is some fresh argument available to be advanced (*R v Nottingham Justices ex parte Davies* [1981] QB 38; Bail Act section 3(5)).

[139] Based on all the above, I find that there has been no facility given to the prosecution which is not available to the person charged. In the circumstances it would be wrong to say that this aspect of the amendment to the principal Act would be, by itself, unconstitutional.

Whether the amendment Acts impinge on the principle of separation of powers

[140] The principle of the separation of powers in constitutions based on the Westminster model was extensively dealt with in the decision of the Privy Council in *The State v Abdool Rachid Khoyratty* [2006] 2 WLR 1330. Reference was made in *Khoyratty* to the Jamaican cases of *Hinds*, cited above, and *Director of Public Prosecutions v Mollison*, which has also been cited above.

[141] The principle established by those cases is that legislation which contravenes the principle of separation of powers, especially impinging on the authority of the court to grant bail and administer sentences, will be held to be void, unless passed by the majority required to amend the relevant section in the Constitution. In *Mollison,* Lord Bingham, in a unanimous judgement of the Board said, in part, at paragraph 13:

> "It does indeed appear that the sentencing provisions under challenge in *Hinds* were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded....Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, **the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so**. Such separation, based on the rule of law, was recently described by Lord Steyn as "**a**

> **characteristic feature of democracies**": *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800, at 1821-1822, paragraph 50." (Emphasis supplied)

[142] In *Khoyratty*, the Board considered a situation where legislation was passed, with a sufficient majority to amend the section of the Mauritian constitution, which is the equivalent to section 15(3) of the Constitution of Jamaica. Their Lordships found that the legislation was nonetheless void because, in precluding the right to bail for certain offences, it also abridged the court's constitutional power to grant bail. They found that that power was deeply entrenched in the constitution of that country, by virtue of the commitment of that democracy to the principle of separation of powers, and that, to abridge it, a referendum was required (see paragraphs 15-16).

[143] There was somewhat of a qualification mentioned in that case, that should be set out here. In his judgment, though not dissenting from the judgment of the Board, Lord Rodger of Earlsferry left the door open for the legitimacy of legislation which did not absolutely bar the right to bail. He said at paragraphs 29-30.

> 29. …In particular, it is a hallmark of the modern idea of a democratic state that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary, on the other.
>
> 30. I have come to the view that section 2 of the 1994 Act [seeking to amend the Constitution] did indeed purport to make a fundamental, albeit limited, change to this component of the democratic state envisaged by section 1 of the Constitution**. The crucial problem lies in the absolute nature of section 5(3A). Where applicable, it would completely remove any power of the judges to consider the question of bail, however compelling the circumstances of any particular case might be. By contrast, a provision, for example, that persons of the type**

> **envisaged in the subsection should not be admitted to bail unless in exceptional circumstances would not create the same problems because the judges would still have a significant, even if more restricted, role in deciding questions of bail and of the freedom of the individual.** Unfortunately, however, as Mr Guthrie QC stressed on behalf of the respondent, precisely because it is absolute in form and effect, subsection 5(3A) is liable to operate arbitrarily and so, it may well be, to create potential difficulties in relation to section 3(a) of the Constitution. Moreover, there is a risk that, **by choosing to charge an offence which falls within section 32 of the Dangerous Drugs Act, the relevant agent of the executive, rather than a judge, would really be deciding that a suspect should be deprived of his liberty pending the final determination of the proceedings**. In these respects, the executive would be trespassing upon the province of the judiciary: *Ahnee v DPP* [1999] 2 AC 294, 303. **In my view a state whose constitution permitted accused persons to be locked up until the termination of the proceedings against them without any right to apply to the court for bail would be, in this essential respect, different 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. (Emphasis supplied)

[144] The amendment Acts, in the instant case, cannot be said to be absolute in removing the power of a judicial officer to consider the question of bail. In my view, however, the restriction on bail in the amendment Acts, has not been so qualified as to redeem it from being unconstitutional. Firstly, unlike the situation in Khoyratty, this was not legislation passed with a majority sufficient to amend any of the relevant sections of the Constitution. Secondly, the removal of the court's authority, even if it be for a maximum of seven days, has been achieved by implication rather than specifically. "It is a common-law presumption of legislative intent that access to the Queen's courts in respect of justiciable issues is not to be denied save by clear words in a statute" (*Judicial Review of Administrative Action* by DeSmith, Woolf and Jowell, 5th Ed. paragraph 5-17).

[145] Act 22 creates the situation created whereby, adapting the words of Lord Rodger of Earlsferry, in the quote immediately above, to the instant case:

> "…by choosing to charge an offence which falls within [the list of scheduled offences], the relevant agent of the executive, rather than a judge, would really be deciding that a suspect should be deprived of his liberty [for a maximum period of seven days]."

[146] The fact that the provision is stipulated to last for only a year, in the first instance, does not redeem the encroachment. The court's authority cannot be put "on hold", even temporarily, except as provided for in the Constitution.

[147] Another encroachment on the jurisdiction of the court is the imposition by the legislature of a principle that the seriousness of the offence charged, is determinative of whether the person charged is entitled to bail. The principal Act (at section 4(2) and the common law before it, regarded the seriousness of the offence as only one of a number of factors to be considered. The issue of seriousness was held in *Hurnam* not to be determinative of the question of whether bail should be granted.

[148] Finally, on this issue, there is a difficulty with the provision, inserted into section 10 of the principal Act, by section 3 of Act 20, which requires the court to remand the defendant in custody until an appeal by the prosecution is determined. The provision states:

> "(4) Subject to subsection (5) upon the receipt of the oral notice referred to in subsection (3)(a), the Court shall remand the defendant in custody until the appeal is determined."

[149] I find that this provision also offends the principle of separation of powers. It is the court which should decide, if the prosecution indicates an intention to appeal, whether it will order the defendant to remain in custody pending the appeal. That authority may not be removed by ordinary legislation.

Going forward

Can the offending aspect be severed leaving the rest of the amendment Acts to have their intended effect?

[150] In *Hinds,* their Lordships made it clear that where it is possible, the sections of legislation which offend the Constitution, or the principles governing the separation of powers, may be severed from the body of the legislation, leaving those parts which may remain, standing on their own. The majority judgment referred to the principle laid down in *Attorney-General for Alberta v Attorney-General for Canada* [1947] AC 503 at page 518:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

[151] Based on the above analysis, section 2 (which shifted the onus of proof), and section 3(b) (limited to the subsection requiring the court to remand the defendant pending an appeal), of Act 20, and the entire Act 22 which rests on the foundation of section 2 of Act 20, would be the offending provisions. They, along with the second schedule established by Act 20, are so inextricably bound up in the repugnance, that no part of any of them may be salvaged.

[152] Section 3 of Act 20, which allows the right of appeal, may, however, stand. It is possible to remove the subsection which requires the court to remand the defendant pending appeal, and allow the rest of the section to stand on its own.

[153] I do not intend, by this judgment, to say that every defendant should be granted bail. Judicial officers should carefully heed the admonition given by Sykes J at paragraph 20 of his judgment in *Stephens,* cited above:

> "What is clear is that the Privy Council is indicating that bail applications must be anxiously and carefully considered. If the state wishes to oppose bail it must have good reasons which can, on an objective assessment, stand up to serious scrutiny."

[154] That admonition by the learned judge, requires police officers to attend court when applications for bail are to be made and to be in a position to advise the prosecutor of any factors which would justify the remand of the accused. It also requires the representatives of the Director of Public Prosecutions, when attending in chambers in response to a notice of application for court orders, to secure instructions and to file affidavits in response to the application, if it is that they are advised to oppose the application; the duty rests on the prosecution to show why bail should not be granted.

Conclusion

[155] The provisions of Acts 20 and 22, which result in the removal of a defendant's entitlement to bail, infringe on the constitutional right to liberty as set out in section 15(3) of the Constitution, bearing in mind the background of the

presumption of innocence provided for in section 20 thereof. Those provisions of those amendment Acts also amount to an assault on the principle of the separation of powers, which is an established part of our Westminster-style Constitution.

[156] As a result, when the learned Resident Magistrate declined to consider an application for bail, it was a breach of the constitutional rights of Mr Nation and Ms Wright. I would not, however, fault the magistrate for interpreting the Bail Act, as amended, in the way that he did.

[157] The only provision from the amendment Acts which may stand, after the severance of the offending sections, is section 3 of Act 20 granting the right of appeal to the prosecutor, and in respect of that section I would remove the provision therein which seeks to limit the court's jurisdiction in respect of the grant of bail pending appeal.

[158] For these reasons I agree that sections 3(4A), 3A, 3B, 10(4), and the Second Schedule of the Bail Act, as amended by The Bail (Amendment) Act, 2010 and The Bail (Interim Provisions for Specified Offences) Act, 2010, should be declared as being in breach of the Constitution and therefore void. Section 17 should be re-adjusted to restore it to its original wording by deleting the word "First" from subsection (2)(b). I would also order costs to be granted in favour of the claimants.

PUSEY J

The Applicants

[159] Adrian Nation and Kereen Wright were each charged for murder in unrelated incidents in the parish of Manchester in July 2010. On several days in July and August 2010 applications were made for bail for these accused persons in the Manchester Resident Magistrates' Court. In Ms. Wright's case, despite the prosecution indicating that there was no basis to oppose bail, the Resident Magistrate declined to assume jurisdiction in the matter. The magistrate indicated that the recent amendments to the Bail Act deprived him of jurisdiction. Mr Nation was also denied bail and the provisions of the Bail Act were cited. Both of them have been subsequently offered bail.

[160] These applicants have contended that rights guaranteed to them under the Constitution of Jamaica have been breached. Their challenge to the amendments to the Bail Act can be summarized as follows.

1. The amendments infringe the applicants' constitutional rights to liberty as guaranteed by section 15, 16 and 20(5) of the Constitution.

2. The said amendments infringe the applicants' right not to be subjected to cruel and inhuman treatment as guaranteed by section 17 of the Constitution.

3. The said amendments having not been passed as special acts of Parliament as required by section 49 & 50 of the Constitution as is necessary for constitutional amendments.

4. The said amendments have abrogated the constitutional principle of separation of powers.

For these reasons the applicants ask for the amendments to be declared void by virtue of being inconsistent with the Constitution.

Alternative remedies

[161] Before dealing with the substantive issues I must deal with the question of whether there were appropriate remedies, alternative to constitutional relief open to the applicants. Mr Taylor, who appeared for the Director of Public Prosecutions (the DPP), argued that the applicants cannot claim redress as they have not demonstrated that other remedies provided by law were inadequate to redress the damage done to them. This argument is based on section 25 of the Constitution that provides that the Supreme Court shall not exercise its powers to provide constitutional redress where adequate means of redress was available to the person concerned under any other law. He points out that the applicants had a right to appeal the order of the magistrate under the Bail Act.

[162] The principles Mr Taylor relied on, as set out by the Privy Council in the case of *Harrikissoon v AG of Trinidad and Tobago* (1979) 31 WIR 348, are indeed correct. Their Lordships said at page 349 e:

> "The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the …the Constitution is fallacious."

[163] This authority was cited with approval by the Jamaican Court of Appeal in *Doris Fuller v Attorney General* (1998) 56 WIR 337**.** The Court of Appeal went on to say at page 339:

> "The meaning to be attached to the words "adequate means of redress" is clear from the opinion of their Lordships in the Maharaj (no. 2) case. There must be a remedy available at law which will be sufficient for the purpose of enforcing or securing the enforcement of the alleged contravention."

[164] It is without doubt that a constitutional remedy is a remedy of last resort and should only be granted where other laws do not provide an adequate remedy. However, when it is alleged that the state has, by legislative enactment, infringed on a citizen's fundamental rights, there can be no other adequate remedy than the determination that that law is unconstitutional and void. To do otherwise would tantamount to the court aiding and abetting the legislature in its violation of the citizen's constitutional right.

[165] Additionally, it must be noted that *Harrikissoon* and *Fuller* both dealt with administrative acts which were directed at individuals. Legislative acts which may affect all citizens are looked at differently.

The legislation

[166] The Bail Act (the principal Act) which was enacted in 2000 sets out the principles and conditions which govern the granting of bail to accused persons in Jamaica. The two amendments which are challenged were enacted in July 23 2010. They are the Bail (Interim Provisions for Specified Offences) Act 2010

which was Act 22 of 2010 and the Bail (Amendment) Act 2010 which was Act 20 of 2010. For ease of reference we have called the amendments Act 22 and Act 20 respectively. The legislation has been set out in detail by the judgments of Marsh J and Brooks J.

[167] The salient features of the principal act are that section 3 outlines that bail is an entitlement and sets out when and by whom bail should be considered. Section 4 defines the circumstances in which bail may be denied and section 5 restricts the conditions to be imposed on the accused that has been granted bail. Sections 8 – 11 deal with the provisions for an appeal from the refusal of bail.

[168] Act 22 is termed "sunset" legislation. It continues for 1 year only unless extended by resolution of both houses of Parliament. It inserts section 3A and 3B of the principal Act. Section 3A addresses two classes of persons. Those charged with offences specified in paragraphs 1 to 6 of the second schedule shall not be entitled to bail unless sixty days have passed and they satisfy the court that bail should be granted. Those persons charged with offences in paragraphs 7 to 11 of the second schedule and who have been previously convicted of a second schedule offence shall not be entitled to bail until sixty days have passed and they satisfy the court that they should be granted bail. If they have not been convicted of a second schedule offence they shall be entitled to bail only if they satisfy the court that bail should be granted.

[169] Section 3B allows a person held in custody as a result of section 3A to be brought before the court for the court to "review " the question of whether the

person should be held in custody or the grant of bail should be continued. The intervals for review for persons to be brought are not less than 7 days in the first instance and not less than 14 days thereafter.

[170] There is some lack of clarity in relation to section 3B. It appears that it gives the court a discretion to determine whether a person accused of a second schedule offence shall be granted bail even during the sixty day period. It is unclear whether the 7 days mentioned in section 3B (2) is meant to oust the period of 24 hours in section 3 (2) of the principal Act. Mr Godfrey, for the applicant Ms Wright, argued that that these two sections cannot exist in harmony. He submitted that if Parliament intended section 3B (2) to amend section 3 (2) it ought to state this specifically. Having failed to clarify this issue the citizen is left in the position where he does not know if he should be first before the court in 1 or 7 days.

[171] Act 20 creates the second schedule. It states that a defendant charged with a second schedule offence shall only be granted bail if the defendant satisfies the court that bail should be granted. It also grants the prosecution a right to appeal a grant of bail made under this act. Mr Godfrey mentioned in passing that no such right of appeal exists for the defence in the Circuit Court. I adopt the comments made by my brother Brooks J in relation to the issue of the right to appeal.

The Constitutional Right to Bail

[172] The Constitution provides a right to liberty (s. 13). It then goes on to indicate that a person's liberty can only be taken away in specified cases as authorized by law. It is important to note that in relation to the criminal defendant almost all of those exceptions relate to an order of the court. (See s. 15 (1) a –e).

[173] The person who is arrested and detained shall be informed of the reasons as soon as practicable (s. 15 (2)) and shall be taken before the court without delay and shall be released if not tried within a reasonable time (s. 15 (3)).

[174] Section 15 goes on to provide compensation for persons unlawfully detained and sets out the parameters of arrest and detention in times of public emergency. Even in times of public emergency there is a review process for persons detained as a result of such emergency. Section 16 deals with the right to freedom of movement and allows exceptions in case of lawful detention and the reasonable requirements of defence, public safety, public order public morality and public health.

[175] These rights are, for the criminal defendant, underscored by the presumption of innocence as set out in section 20 (5).

[176] The effect of all these provisions is that the liberty of the person is paramount. It is for the state to indicate why the individual's liberty should be taken away. Consequently the Constitution safeguards against arbitrary arrest and detention. In respect of the criminal defendant the fact that his detention is

referable to the court, that is, he must be taken to court as soon as possible and must be released if not tried within a reasonable time, demonstrates the paramountcy of the right to personal liberty.

[177] The court in Mauritius has dealt with the issue of bail and in particular, the effect of legislative intervention into the circumstances for the grant of bail. In the cases of *The State v Khoyratty* [2006] 2 WLR 1330, and *Hurnam v The State* PCA 53 of 2004 (delivered 15 December 2005), the Privy Council had opportunities to consider the constitutional effect of these interventions. The principles distilled from these cases are helpful in that they attempt to construe constitutional provisions which are similar to those in the Jamaican Constitution. One of these principles is set out by Lord Bingham in *Hurnam* where he cites with approval the decision of the Supreme Court of Mauritius in *Noordally v Attorney General* [1987] LRC (Const.) 599. In *Noordally* the court in construing section 5 of the Mauritius Constitution which is similar to section 15 of the Jamaican Constitution (see Para 3 of *Hurnam*) concluded that

> "… that the suspect's remaining at large is the rule: his detention on ground of suspicion is the exception and, even then, if he is not put on trial within a reasonable time he has to be released."

[178] These conclusions are appropriate to Jamaica as the courts trace the fundamental rights provisions to have their roots in the European Convention on Human Rights and before that, the Universal Declaration of Human Rights. This was stated in *Minister of Home Affairs v Fisher* (1979) 44 WIR 107; [1980] AC 319. The Jamaican Constitution has these same roots. This perspective is

enhanced by the fact that it is now accepted that, as first stated in *Fisher* (and confirmed in *Hinds and others v R* (1975) 13 JLR 262 and *Lambert Watson v R* [2004] 3 WLR 841), the Constitution and in particular "those provisions which provide for the protection of fundamental rights and freedoms, are to be interpreted with greater generosity than other types of legislation" (*Attorney General of Saint Lucia v Theophilus* Civil Appeal No 13 of 2005 (delivered 20 March 2006) at para 30)

[179] These rights have to be balanced with the interests of preserving the public interests. Rawlins JA (as he then was) of the Eastern Caribbean Court of Appeal summarized it best, when referring to *Hurnam* in *Theophilus*

> "Their Lordships found, on the basis of these guiding principles, that a detained person's entitlement to be released on bail arises from the general right to liberty, which is declared in sections 3 (a) and detailed in section 5 of the Constitution of Mauritius, and the presumption of innocence provided in section 10(2)(a). They stated that these provisions promote the right and interest of a detained person to remain at liberty unless and until convicted of a crime that is sufficiently serous to justify depriving the person of his or her liberty. They noted, however, that on the other hand, the community has a countervailing interest in ensuring that the course of justice is not thwarted or perverted by the flight of the person or by his interference with witnesses or committing other crimes while on bail awaiting trial. The result of competing interests in any particular case can only be determined upon the exercise of the discretion by a court." (See para. 33)

[180] My conclusion is that a proper interpretation of the Jamaican Constitution discloses the following principles:

1. An arrested or detained person has a right to be released on bail as a result of the right of liberty and the presumption of innocence.

2. This right must be balanced against the interest of the state that the person does not frustrate the course of justice by flight, interfering with witnesses or committing other crimes.

3. The balancing of these rights must be done by the court, as each situation may have unique factors.

Separation of Powers

[181] The principle of separation of powers was set out rather concisely by the Privy Council in *Khoyratty*, at paragraph 12 of that judgment. In that case Lord Steyn said:

> "The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an independent judiciary. Thirdly, in order to achieve reconciliation between these ideas, a separation of powers between the legislature, the executive and the judiciary is necessary."

[182] The responsibility of safeguarding the fundamental rights granted under the Jamaican Constitution resides in the independent judiciary. This has been set out in a line of Privy Council cases on appeal from Jamaica, such as *Hinds, DPP v Mollison (No. 2)* [2003] 2 AC 411 and *Independent Jamaica Council For Human Rights (1998) Ltd. and others v Marshall- Burnett and another* [2005] UKPC 3 (delivered 3rd February 2005)**.**

[183] In *Hinds* the Privy Council looked at the Gun Court Act and declared held among other things that it was contrary to the Constitution for Parliament to endow anybody, apart from the judiciary, the power to determine the punishment to be inflicted on individual offenders. Lord Diplock said at page 279 F:

> "Thus Parliament, in exercise of its legislative power, may make a law imposing limits upon the discretion of judges who preside over courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders…."

[184] In *Mollison (No. 2)*, the Privy Council held that section 29 of the Juveniles Act which prescribed that juvenile offenders convicted of murder could be detained at the Governor General's pleasure was contrary to the Constitution as it gave to the executive, powers reserved to the judiciary. Their Lordships opined, at paragraph 13, that

> "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total and effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800, at 1821-1822, paragraph 50."

The Board went on to find that the particular section was incompatible "with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive."

[185] In *IJCHR (1998) Ltd. v Marshall-Burnett,* cited above, the Board considered an Act to replace appeals to the Privy Council with appeals to the

Caribbean Court of Justice. Their Lordships held that while Parliament could repeal section 110 of the Constitution by a simple majority, as that section was not entrenched, it is, however, objectionable to establish a court which consists of judges who do not have the requisite constitutional protection. It was concluded that the effect of establishing such a court weakened the constitutional protection granted to the people of Jamaica, as a court was created which had a judiciary whose independence and jurisdiction and powers were not safeguarded from interference by the executive and the legislature.

[186] It is my view that the principles distilled from these cases are that:

1. an independent judiciary free from interference by the legislature and the executive is an essential characteristic of democracy and an underlying aspect of the Jamaican Constitution

2. the fundamental rights of individuals under the Jamaican Constitution are protected not only by the fact that they are entrenched in the Constitution but also by those rights being safeguarded by the judiciary

3. the legislature ought not to attempt to determine the way the judiciary should deal with individual offenders

4. any legislative action that diminishes the independence of the judiciary or impedes the judiciary in its function of safeguarding the constitutional right of the individual will be struck down unless such legislation is enacted in accordance with the rules for constitutional amendments

Inhuman Treatment

[187] The law in relation to inhuman treatment has changed somewhat in the years since independence. In *Riley v Attorney General for Jamaica* (1982) 35 WIR 279 the Privy Council ruled that the injunction against cruel and inhuman punishment dealt with the type of punishment and not the time that it was

inflicted. In the case of *Pratt and Morgan v Attorney General and another* (1993) 30 JLR 473 the Board ruled that the time taken to inflict the death penalty could be considered cruel and inhuman.

[188] Their Lordships disagreed with the decision in *Riley* and held that the circumstances in which the executive intended to carry out the sentence of death was inhuman and degrading. They rationalized that there was an instinctive revulsion against hanging a man after years on death row.

[189] In *Lambert Watson v R* where the same Board came to construe the mandatory death penalty for some classes of murder, the Board went further. Here, the argument was no longer the question of an instinctive revulsion but that no human being was to be treated in a way that denied his basic humanity. Lord Hope of Craighead in the majority judgment explained it, at paragraph 33 of his judgment, this way:

> "To condemn a man to die without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate is to treat him in a way that no human being should be treated. There are no limits to the variety of circumstances which may lead a man to commit homicide…."

[190] If this is the definition of inhuman treatment then it would seem that any legislation that attempts to deal with persons by defining them according to the offences that they have been charged with and not granting them the right to persuade the court that their case is different, would violate the right not to be subjected to inhuman or degrading treatment.

Act 22

[191] Act 22 violates several of the principles identified. Section 3A, in restricting the entitlement to bail to sixty days after the date of being charged with an offence, infringes the constitutional right to bail. In requiring the defendant to satisfy the court that bail should be granted, the amendment violates the presumption of innocence guaranteed by section 20 (5) of the Constitution. It is offensive to the Constitution in that it deprives the individual of the protection of having an independent judiciary assessing that person's right to bail based on the individual circumstances of his case.

[192] Although section 3B allows the court to review the detention of arrested persons with the possibility of bail being offered, the onus is still on the defendant and the entitlement has still been taken away.

Act 20

[193] The aspect of Act 20 adding to section 3, subsection 4A, which identifies the specified offences of the second schedule and requires a defendant to satisfy the court that bail should be granted, encroaches upon the constitutional rights of individuals by categorizing them according to particular offences.

Conclusion

[194] I would therefore grant the declarations sought. Consequently the sections designated as 3A, and 3B of the Bail Act are void as being unconstitutional.

Additionally, section 3 (4A) and the second schedule of the principal Act would be also void.

[195] The Bail Act, as it remains, can still be a viable tool in relation to dealing with the scourge of crime. Although the court when considering the constitutionality of an Act is not concerned with the motives, however laudable, of Parliament, it is clear that judges will still have the ability to refuse bail to offenders who constitute a risk to witnesses or who are likely to re-offend. The Bail Act in section 4 indicates that bail can be refused in particular circumstances.

MARSH J

1. It is hereby declared that sections 3(4A), 3A, 3B, 10(4), and the Second Schedule, of the Bail Act, as amended by The Bail (Amendment) Act, 2010 and The Bail (Interim Provisions for Specified Offences) Act, 2010, are in breach of the Constitution and therefore, void.
2. Section 17 of the Bail Act should have the word “First” as it appears in subsection (2)(b) deleted.
3. Costs to the claimants to be taxed if not agreed.