Trinity Term
[2022] UKPC 31
Privy Council Appeal No 0034 of 2022

JUDGMENT

Attorney General of Trinidad and Tobago (Appellant) *v* Akili Charles (Respondent) (No 2) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Kitchin
Lord Hamblen
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
28 July 2022

Heard on 8 and 9 June 2022

Appellant (Attorney General of Trinidad and Tobago)
Peter Knox QC
Fyard Hosein SC
Daniel Goldblatt
(Instructed by Charles Russell Speechlys LLP (London))

Respondent (Akili Charles)
Anand Ramlogan SC
Peter Carter QC
Pippa Woodrow
Adam Riley
(Instructed by Ganesh Saroop (Trinidad))

Interested Party (Law Association of Trinidad and Tobago)
Douglas L Mendes SC
Kiel Taklalsingh
Aaron Mahabir
(Instructed by Kavita Roop Boodoo of Law Association of Trinidad and Tobago)

LORD HAMBLEN:

1. Introduction

1. This appeal concerns the constitutionality of a law passed by the Parliament of the Republic of Trinidad and Tobago which provides that bail may not be granted to any person charged with the offence of murder.

2. The relevant statutory provision ("the Bail provision") is section 5(1) and Part 1 of the First Schedule of the Bail Act 1994 ("the Bail Act").

3. The appellant, the Attorney General, accepts that the Bail provision derogates from the fundamental rights and freedoms enshrined in sections 4 and 5 of the Constitution of Trinidad and Tobago adopted in 1976 ("the Constitution") but contends that it was nevertheless constitutional on two grounds. First, it was an "existing law" immediately before the commencement of the Constitution and therefore, pursuant to section 6 of the Constitution, it was not invalidated by anything in sections 4 and 5 ("the existing law issue"). Secondly, it was passed with a special majority under section 13 of the Constitution ("the section 13 issue"). Section 13 allows for Acts of Parliament to be passed even though they are inconsistent with sections 4 and 5, provided that they are declared to have that effect and that they are passed with a three-fifths majority of both Houses of Parliament, as the Bail Act was. An Act will have the declared effect unless it is "shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual".

4. The Court of Appeal rejected the Attorney General's case, holding that the Bail provision was not an existing law and that it was not reasonably justifiable so as to be validated by section 13 of the Constitution. The Attorney General appeals with leave to the Privy Council.

2. The factual background

5. The respondent, Akili Charles was charged, jointly with five others, for the murder of Russell Antoine on 5 December 2010. He was thereafter kept on remand in custody at the Royal Jail in Port of Spain pending trial.

6. The respondent's preliminary inquiry began on 16 January 2012 before the-then Chief Magistrate, Her Worship Marcia Ayers-Caesar. The preliminary inquiry continued

for five years before it halted, part-heard, on 3 April 2017 when the Chief Magistrate was elevated to the High Court bench as a puisne judge. The then Acting Chief Magistrate, Her Worship Maria Busby Earle, decided that the respondent's preliminary inquiry should be heard de novo.

7. On 17 October 2017, the respondent challenged this decision by way of a claim for judicial review and constitutional relief. The claim was ultimately dismissed by Gobin J on 4 January 2019. The second preliminary inquiry began shortly thereafter before Her Worship Maria Busby Earle but was discharged on 21 May 2019, the magistrate having determined that the evidence relied on by the State did not give rise to a case to answer. The respondent was accordingly released, having been on remand in custody for nearly 8 ½ years.

3. Procedural history

8. On 6 February 2020 the respondent brought a constitutional motion seeking declarations of unconstitutionality and damages.

9. On 9 March 2021 Charles J dismissed the respondent's claim. The main ground of her decision was that the Bail provision was existing law. She did not rule on the section 13 issue.

10. On 17 February 2022 the Court of Appeal (Archie CJ, Dean-Armorer and Holdip JJA) allowed the respondent's appeal. The Court held that the Bail provision was not existing law and that the earlier majority Court of Appeal decision in *Krishendath Sinanan v The State* [1992] 44 WIR 359 was wrong in holding that the High Court did not have jurisdiction to grant bail to a person who had been committed for trial for murder. The Court further held that the Bail provision was not validated under section 13 as it had been shown that it was not reasonably justifiable.

11. The Court of Appeal made declarations that section 5 and Part 1 of the First Schedule to the Bail Act 1994 (i) "are not reasonably justifiable in a society that has proper respects for the rights and freedoms of the individual" and (ii) "are unconstitutional insofar as their effect is to remove the jurisdiction of High Court Judges to grant bail for persons charged with the offence of murder".

12. The Law Association of Trinidad and Tobago was permitted to intervene and to make written and oral submissions before the courts below and in the appeal before the Board.

4. The Constitution

13. On 31 August 1962, the first independence Constitution came into effect. On 1 August 1976 it was superseded by the Constitution. Section 1 provides that the Republic of Trinidad and Tobago "shall be a sovereign democratic state". Section 2 provides that the Constitution is the supreme law and that any law inconsistent with the Constitution is void to the extent of the inconsistency.

14. Chapter 1 of the Constitution (sections 4 to 14) provides for "the recognition and protection of fundamental human rights and freedoms".

15. So far as material, section 4 provides:

> "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> ……"

16. So far as material, section 5 provides:

> "5. (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or

infringement of any of the rights and freedoms hereinbefore recognised and declared.

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

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

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

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

…

(iv) of the remedy by way of *habeas corpus* for the determination

of the validity of his detention and for his release if the detention is not lawful;

…

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

(i) to be presumed innocent until proved guilty according to law …

(ii) to a fair and public hearing by an independent and impartial tribunal; or

(iii) to reasonable bail without just cause; …

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

17. Section 6, the 'savings clause', states that nothing in sections 4 and 5 "shall invalidate" an "existing law". It provides:

"6(1) Nothing in sections 4 and 5 shall invalidate -

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(3) In this section –

'alters' in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

'existing law' means a law that had effect as part of the law of Trinidad and Tobago immediately before the

commencement of this Constitution, and includes any enactment referred to in subsection (1);

'right' includes freedom."

18. Section 13 provides that subject to special procedural requirements legislation which is inconsistent with sections 4 and 5 may be passed by Parliament. It provides:

> "13(1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.
>
> (2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.
>
> …"

19. The other exception provided for under section 5 is set out in section 54 in Chapter 4 which provides for the repeal of Chapter 1 by an Act passed with a two thirds majority in each House.

5. The Bail Act

20. The preamble to the Bail Act contains the declaration required by section 13 of the Constitution. It provides:

> "An Act to amend the law relating to release from custody of accused persons in criminal proceedings and to make provision for legal aid for persons kept in custody and for connected purposes.

WHEREAS it is enacted by section 13(1) of the Constitution that an Act of Parliament to which that section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 of the Constitution and, if any Act does so declare, it shall have effect accordingly:

And whereas it is provided in section 13(2) of the Constitution that an Act of Parliament to which that section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House:

And whereas it is necessary and expedient that the provisions of this Act shall have effect notwithstanding sections 4 and 5 of the Constitution:"

21. Section 5 provides:

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

(2) A Court shall not grant bail to a person who is charged with an offence listed in Part II of the First Schedule and has been convicted on three occasions arising out of separate transactions –

(a) of any offence; or

(b) of any combination of offences, listed in that Part, unless on application to a Judge he can show sufficient cause why his remand in custody is not justified."

22. The First Schedule provides:

"EXCEPTIONS TO PERSONS ENTITLED TO BAIL

PART 1

CIRCUMSTANCES IN WHICH PERSONS ARE NOT ENTITLED TO BAIL

Where a person is charged with any of the following offences:

(a) murder;

(b) treason;

(c) piracy or hijacking;

(d) any offence for which death is the penalty fixed by law.

PART II

[A list of offences is set out - drug trafficking, possession of firearms, certain sexual offences, shooting, larceny of a motor car, robbery, burglary, perverting the course of justice, arson and receiving stolen goods]."

23. Other provisions in the Bail Act concern the identification of the matters which a court is to take into account in deciding whether to deny bail. Where a person is charged with an offence punishable by imprisonment, for example, a court may deny bail where it is satisfied that there are reasonable grounds for believing that the defendant, if released on bail, would fail to surrender to custody, commit an offence while on bail, interfere with witnesses or otherwise obstruct the course of justice - section 6(2)(a). In considering whether to deny bail on any of these grounds, a court may consider the nature and seriousness of the offence, the character, antecedents, associations and social ties of the defendant, the defendant's record with respect to the fulfilment of his obligations under previous grants of bail in criminal proceedings, the strength of the evidence of his having committed the offence or having failed to surrender to custody, and any other factor which appears to be relevant- section 6(3). Section 12 of the Act deals with the conditions which may be imposed on the grant of bail.

6. The Issues

24. The principal issues which arise on the appeal are:

(i) (1) Whether the Bail provision is an existing law under section 6 of the Constitution. This is what has been referred to in para 3 above as "the existing law issue".

(ii) (2) Whether the Bail provision is a valid law because it was passed under section 13 of the Constitution. This is what has been referred to in para 3 above as "the section 13 issue".

25. If the Attorney General succeeds in the appeal on either of these issues the respondent raises a further ground of challenge to the constitutionality of the Bail provision, namely that it usurps a core judicial function and is not consistent with the separation of powers guaranteed by section 1 of the Constitution under which the Republic of Trinidad and Tobago "shall be a sovereign democratic state". The Interested Party also seeks permission to cross appeal on the grounds that the declaration of unconstitutionality should be extended to the prohibition on the grant of bail by a magistrate.

7. The existing law issue

(i) The position at common law

26. At all material times the common law of Trinidad and Tobago would have been the same as the common law of England and Wales. Mr Peter Knox QC for the Attorney General accepted that at common law a High Court judge had jurisdiction to grant bail pre-committal in murder cases, although it was very rarely exercised. He submitted, however, that the case law shows that the position was different post-committal after a prima facie case had been established. In such cases bail was never granted and it would have been wrong in law for the court to do so.

27. In 1898 Lord Russell of Killowen CJ summarised the position at common law in *R v Spilsbury* [1898] 2 QB 615 at 620 in the following terms:

> "This court has, independently of statute, by the common law, jurisdiction to admit to bail. Therefore the case ought to

be looked at in this way: does the Act of Parliament, either by expressly or by necessary implication, deprive the court of that power? The law relating to this subject is well stated in 1Chitty's Criminal Law 2nd ed, p 97, as follows:

'The Court of King's Bench, or any judge thereof in vacation, not being restrained or affected by the statute 3 Edw 1, c 15 in the plenitude of that power which they enjoy at common law, may in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for a contempt, or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rapes, horse-stealing, libels and for all felonies and offences whatever'.

28. At the time of the first Constitution in 1962, the leading practitioner text, *Archbold, Pleading, Evidence & Practice in Criminal Cases* (35th edition), summarised the applicable common law principles at para 203 as follows:

"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. *Re Robinson*, 23 L.J.Q.B. 286; *R. v Scaife*, 10 L.J.M.C. 144.

The test should be applied by reference to the following considerations:

(1) The nature of the accusation. *R. v. Barronet and Alain* 1 E. & B. 1;

(2) The nature of the evidence in support of the accusation. *Re Robinson* (ante);

(3) The severity of the punishment which conviction will entail. *Re Robinson,* 23 L.J.Q.B. 286.

> (4) Whether the sureties are independent or indemnified by the accused person…
>
> ….
>
> It is not usual to grant bail on charges of murder: *Re Barthelemy* 1 E. & B. 8…"

29. The applicable principles were stated in materially the same terms at para 292 in the edition of *Archbold* current at the time of the Constitution in 1976 (the 39th edition).

30. Despite the general and unqualified terms in which these principles are stated, Mr Knox submitted that the case law shows that in murder cases the position was different post-committal. Mr Knox relied in particular on the cases of *R v Chapman* (1838) 8 C & P 558, *R v Barronet & Allain* (1852) 1 El & Bl 1, 169 ER 633 and *Re Barthelemy* (1852) 1 El & Bl 8, 118 ER 340.

31. In *R v Chapman*, after the grand jury had returned a true bill for murder, the trial was postponed due to the illness of an important witness and an application was made that the defendant be admitted for bail. This was refused by Lord Abinger CB as set out in the following exchange with counsel at p560:

> "Lord Abinger, C. B.—In a case of murder I cannot do it after a bill for murder has been returned by the Grand Jury. If a motion to put off the trial had been made before any bill was found, it might have been different; but after the bill has been found for murder, I know of no case in which it was ever done.
>
> Talfourd, Serjt.—It is entirely in your Lordship's discretion.
>
> Lord Abinger, C. B.—But it is a discretion that never has been exercised."

32. It is to be noted that Lord Abinger did not dispute that it was a matter for the court's discretion, albeit a discretion which he had never known to be exercised.

33. In *R v Barronet & Allain* the defendants were committed for trial for murder. They had on their own confession acted as seconds in a duel in which a man had been killed. They sought bail on the grounds that, as foreigners, they were ignorant of the fact that under English law killing a person in a fair duel was murder. The application was refused. In his judgment Erle J stated as follows at p60:

> "Wherever the crime is of great magnitude, the punishment of a high nature, and the evidence of crime clear, then an application of this sort ought, in my judgment, to be refused; but if any one of these requisites be wanting, the Court will exercise its discretion in the matter."

34. Again, it is to be noted that Erle J was recognising that the court had a discretion and was identifying principles upon which such discretion should be exercised. Coleridge J also stated in his judgment at p58 that: "This Court has, indeed, an unlimited right in all cases to bail the accused". The headnote for the case stated as follows:

> ".. although the Court of Queen's Bench, as the sovereign Court of criminal jurisdiction *has in all cases the power to admit to bail***,** yet that *in its discretion* where the crime is of high nature, the evidence clear, and the punishment heavy, it will not admit persons committed for such an offence to bail." (emphasis added)

35. *Re Barthelemy* was another case involving defendants committed for trial for murder following a duel in which a man had been killed. They sought bail on the grounds that, unlike in the *Barronet* case, they had made no admission of their guilt. In support of the application examples were given of duelling cases in which bail had been granted, in response to which Lord Campbell CJ observed at p9:

> "I do not think it has ever been doubted that the Court may bail in the case of murder."

He then considered the evidence and concluded that there was evidence that the defendants were party to murder and that the application should be refused. He refrained from commenting on what would have been done if the evidence had been considered insufficient.

36. The Board does not consider that these cases cast any doubt on the general position at common law as summarised in *R v Spilsbury* and *Archbold*. The cases confirm that the court retained a discretion to grant bail in murder cases and set out principles guiding the exercise of that discretion. Those principles meant that in post-committal murder cases bail would hardly ever be granted, but there remained a power to do so. As the Court of Appeal accepted, "although the grant of bail in murder cases by judges in the United Kingdom was 'unusual', the jurisdiction was very much alive and was given deliberate consideration by the Courts" (para 35).

37. The Board therefore agrees with the Court of Appeal that at common law there was no existing law prohibiting the grant of bail in murder cases either pre or post-committal.

(ii) The legislative position

38. The parties are agreed that the relevant provisions of existing law are as set out in the Indictable Offences (Preliminary Enquiry) Ordinance 1917 ("the 1917 Ordinance"), as originally passed and subsequently amended.

39. The 1917 Ordinance dealt with the procedure for preliminary enquiries (summonses) (sections 3 to 4); search warrants (section 5); how a magistrate was to deal with complaints and to summon an accused and to deal with him on his appearance (sections 6 to 11); witnesses and medical inspections (sections 12 to 13); how the enquiry itself was to be conducted (sections 14 to 22); how an accused was to be discharged or committed for trial (section 23); the transmission and custody of documents relating to the case (section 24); bail (sections 25 to 34); the place of commitment (section 35) and the use at later trial of depositions (section 36).

40. Under the 1917 Ordinance magistrates had the power to grant bail in all cases other than treason, murder or piracy. As set out in section 25:

> "s.25 (1) With respect to bail, the following provisions shall have effect:
>
> (a) Where the offence with which an accused person is charged is a misdemeanour, he shall be admitted to bail, as is hereinafter mentioned;

> (b) Where the offence with which an accused person is charged is a felony, not being treason, murder or piracy, the Magistrate may in his discretion, admit him to bail as is hereinafter mentioned; and
>
> (c) A Magistrate shall not admit to bail any person charged with treason, murder or piracy, or who has been twice previously convicted of felony, whether summarily or on indictment.
>
> (2) Every accused person, whether he has been committed to prison or not, shall or may, as the case may be, be admitted to bail, upon providing a surety or sureties sufficient, in the opinion of the Magistrate, to secure his appearance, or, except in a case of felony, upon his own recognizance, if the Magistrate thinks fit. Where bail may be allowed or refused in the discretion of the Magistrate, such discretion may be exercised at any stage of the proceedings."

41. The Supreme Court of Trinidad and Tobago had power to grant bail in all cases, "at any time" and whether the accused "has been committed for trial or not". As set out in section 31:

> "31. The Court or a Judge may at any time, on the petition of any accused person, order such person, whether he has been committed for trial or not, to be admitted to bail, and the recognizance of bail may, if the order so directs, be taken before any Magistrate".

42. "Court" is defined in section 2 to mean "the Supreme Court or any Judge thereof", making clear that the broad discretion under section 31 to grant bail was vested in judges of the superior courts (rather than magistrates).

43. As the Court of Appeal observed at para 42 of their judgment:

> "…the section is permissive and drafted in the widest possible terms. In that regard, the 1917 Ordinance merely preserves the distinction that existed at common law between Judges and Magistrates as adverted to in Spilsbury."

44. Section 25 was amended and replaced by section 4 of the Criminal Law (Amendment) Ordinance 1961 ("the 1961 Ordinance") as follows:

> **"**s.27 (1) With respect to bail, the following provisions shall have effect:
>
> (a) the Magistrate shall not admit to bail any person charged with treason, murder or piracy or with any offence for which death is the penalty fixed by law;
>
> (b) a Magistrate may, in his discretion, admit to bail any person charged with an offence that is not specified or referred to in paragraph (a) of this subsection;
>
> (c) the discretion of the Magistrate under paragraph (b) of this subsection, or of the court or a judge under section 32 of this Ordinance, shall be exercised in accordance with the principles for the time being in force in England with respect to the discretion of the High Court of Justice when dealing with applications for bail: Provided that where a person who has been committed for trial is in custody awaiting such trial in respect of an offence not specified or referred to in paragraph (a) of this subsection and is not brought to trial within six months after his commitment it shall be lawful for the court or judge on the application of such person, to admit such person to bail with a surety or sureties or upon his own recognisance to secure his appearance at his trial;
>
> (d) where a Magistrate when committing a person for trial of an offence other than treason or murder or piracy or any other offence for which death is the penalty fixed by law, does not admit such person to bail, he shall inform such person of his right to apply for bail to a Judge of the Supreme Court."

Subsection (2) remained in the same terms as before.

45. Section 31 was re-enacted in the same terms as section 32 of the 1961 Ordinance.

46. The 1961 Ordinance applied at the time that both the 1962 and 1976 Constitutions came into effect.

47. Mr Knox submitted that the effect of the amendments made in sections 27(1)(c) and (d) was to remove the power of the Supreme Court to grant bail post-committal for treason, murder or piracy or for any offence for which death is the penalty fixed by law. He submitted that these subsections have to be read in the light of the common law which, he contended, prohibited the grant of bail in murder cases post-committal and therefore bears out and supports this statutory scheme. Since the Board rejects the Attorney General's case on the common law, this foundation of Mr Knox's argument falls away. Indeed, given that the High Court could grant bail post-committal in murder cases both at common law and under the 1917 Ordinance, Mr Knox has to establish that sections 27(c) and (d) have taken away that power. They do not do so expressly and so it has to be shown that they do so by necessary implication, as Lord Russell CJ stated in *R v Spilsbury* in the passage cited above.

48. In relation to section 27(1)(c) Mr Knox's argument was that the first part of subsection (c) applies to both magistrates and Supreme Court judges ("the court or a judge") and the proviso in the subsection equally applies to both. That proviso limits the power to grant bail, where an accused had not been brought to trial within six months after his committal, to cases which do not involve treason, murder, or piracy etc. That limitation means by necessary implication that the Supreme Court judge's general power under section 32 was subject to this limit and was not intended to apply post-committal.

49. In relation to section 27(1)(d) Mr Knox's argument was that since this subsection required a magistrate committing an accused for trial of an offence other than treason, murder or piracy etc, to "inform such person of his right to apply for bail to a Judge of the Supreme Court", it follows that he was under no duty so to inform a person who had been committed for treason, murder or piracy etc. He submitted that this is evidently because such a person had no right to apply for bail to a judge of the Supreme Court, and such a judge had no jurisdiction to grant it. Were it otherwise, the subsection would have provided that whatever the charge, the magistrate had to tell the accused of his right to apply for bail to a judge of the Supreme Court.

50. The Board rejects these arguments. The proviso to section 27(1)(c) is an extension rather than a limitation of the power to grant bail. When making decisions about bail, courts, judges and magistrates should do so in accordance with principles applied by a judge of the High Court in England. So, for example, bail should be refused in cases where there are substantial grounds to believe the accused would abscond or commit further offences if released on bail. Under the proviso, those principles may be

departed from and bail granted where a person has been subject to significant pre-trial, post-committal delays. Bail may be granted in light of those delays notwithstanding that it would not otherwise be granted according to ordinarily applicable principles. The most serious cases, treason, murder, piracy (and other cases attracting a mandatory death sentence) are, however, excluded from the proviso. In this way a balance is struck between the risks which would ordinarily justify refusal of bail and the injustice of lengthy pre-trial detention, save in the most serious cases.

51. Section 27(1)(d) is concerned with the magistrate's powers only, as indeed is the whole of section 27 other than 27(1)(c). In cases where a magistrate refuses a person bail the magistrate is to inform that person of their right to apply for bail to a judge of the Supreme Court. This does not apply in those cases (treason, murder or piracy etc) in which the magistrate has no power to grant bail, as this subsection makes clear. In such cases bail can only be granted by a Supreme Court judge and no question of informing a person of their right to apply for bail following refusal by the magistrate can arise.

52. Neither section 27(1)(c) or (d) derogates from the broad discretion of the Supreme Court to grant bail as set out in section 32, which may be exercised whether the accused person "has been committed for trial or not". They do not do so expressly, nor do they do so by necessary implication. The only reference made to section 32 is that in section 27(1)(c). That reference is to the principles to be applied in exercising the discretion under section 32. It does not address or qualify the existence of the discretion. That is solely addressed in section 32.

53. It is true that Mr Knox's argument derives support from the decision of the majority of the Court of Appeal in *Sinanan* in which it was held in relation to a later version of the 1961 Ordinance (in materially the same terms but under which section 27 became section 29 and section 32 became section 34), that the combined effect of sections 29 and 34 was to fetter the jurisdiction of the Supreme Court judge to grant bail to a person who had been committed for trial for murder, treason, piracy etc. For the reasons set out above, and those given in the dissenting judgment of Sharma JA in *Sinanan* and the Court of Appeal in the present case, the Board agrees with the Court of Appeal that *Sinanan* was wrongly decided on this issue.

54. As the Court of Appeal stated at paras 53 to 54:

> "…consonant with the cited authorities, the severity of the offence may be a reason for caution and for consistently exercising the Court's jurisdiction in a particular way but it

> can hardly be a justification for removing that jurisdiction entirely…part of the statutory context was missing from the learned Chief Justice's analysis [in *Sinanan*]. Sections 29 and 34 should not only have been read together but also in the light of the 1962 and 1976 Constitutions, both of which entrenched the right not to be deprived of reasonable bail without just cause….It seems that the majority in *Sinanan* may have settled on an interpretation of the statute that aligned with their perception of the customary practice instead of evaluating the status of the 'custom' in the light of unambiguous words of statute and the case law which suggested that, in refusing to grant bail, judges had always been exercising a conscious and deliberate discretion."

55. The Board agrees with the Court of Appeal that there was no prohibition on the grant of bail in murder cases pre or post-committal either under the common law or under the applicable legislation. The Attorney General's appeal on the existing law issue accordingly fails.

8. The section 13 issue

56. In its recent decision in *Suraj and others v Attorney General of Trinidad and Tobago* [2022] UKPC 26 the Board addressed the nature of the test to be applied under the proviso in section 13 of whether a law passed thereunder is "reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual". For the reasons there stated it concluded that the test to be applied is a proportionality test, but one framed in a way which gives especially strong weight to the judgment of Parliament regarding the imperative nature of the public interest (para 94). In particular:

> (1) The onus is on the complainant to show that the measure is not "reasonably justifiable". This places a "heavy burden" on the complainant and a court will be slow to conclude that this has been shown (para 93).
>
> (2) The test of proportionality appropriate under section 13(1) involves a lesser intensity of review by the courts and a wider margin of appreciation or discretion for the state, acting by legislation passed by a super-majority in both Houses of Parliament (para 90).

(3) In relation to such legislation, Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken (para 91).

(4) Although the court has to make the ultimate judgment whether the proviso in section 13(1) has been satisfied or not, it is obliged in doing so to give especially great weight to the judgment of Parliament regarding the importance of the public interest which is sought to be promoted by the measure in question (para 92).

(5) Where legislation has been passed by a super-majority, that is capable of affecting each of the four stages in the proportionality test (para 94).

(6) Whether the legislation is inconsistent with sections 4 and 5 of the Constitution and the extent of any inconsistency is likely to be a relevant consideration (para 95).

57. With these considerations in mind, the proportionality test to be applied in the context of section 13 is that which reflects the modern conventional approach to issues of proportionality, which involves asking in relation to a measure: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community (para 51). This is an adaptable test which is to be applied with due allowance for the particular context in which it falls to be applied (para 94).

(i) Whether the objective of the Bail provision is sufficiently important to justify the limitation of a fundamental right

58. The broad aim of the Bail Act in general and the Bail provision in particular is the prevention of crime and disorder. More specifically the Board accepts the Attorney General's submission that the main public policy concerns behind the Bail Act were the reduction of the incidence of violent crime, the minimisation of the risk to public safety posed by repeat offenders, and a concern about the courts being too willing to grant

bail to people who then committed further crimes. In relation to the Bail provision there was also the need to ensure that persons charged with murder do not abscond and that they do not interfere with witnesses or otherwise obstruct the course of justice. The Board accepts that these objectives are sufficiently important to justify the limitation of a fundamental right and in particular the right to liberty.

59. The Attorney General drew attention to the fact that the rate of murder and violent crime at the time of the Bail Act was very high. As the Court of Appeal observed in their 1992 decision in *Sinanan* at p364: "It is a well-known fact that serious crimes of violence, including murders, have been an almost everyday occurrence over the past seven years". In the same passage the Court referred to the "spate of crimes, including murders, in the country over the last decade".

60. In putting forward the Bill that led to the Bail Act the Attorney General justified it on the basis that the percentage of accused who sought bail in 1990 who had committed offences while on bail was very high. This was said to be the driver behind the provisions which were eventually passed to the effect that suspects who had already committed more than three offences would not be granted bail "unless on application to a Judge he can show sufficient cause why his remand in custody is not justified" (section 5(2)).

61. Although there had been a public outcry against earlier proposals to remove the court's discretion to grant bail in relation to a wide range of serious offences, it appears that no particular objection was raised to murder, treason and piracy being non-bailable offences. It had been the long-established practice of the courts not to grant bail in cases of murder. Indeed, it is apparent from his comments on introducing the Bill that the Attorney General considered that this practice reflected the law. He stated in terms that: "our existing law recognizes that there are circumstances under which the judicial discretion will be removed. I refer specifically to the instances of murder and treason where a person only has to be charged—does not have to be convicted—with those two offences, and the existing law says that he would not be granted bail". This understanding would have been supported at the time by the Court of Appeal decision in *Sinanan.* For reasons already given that was, however, a wrong understanding of the law.

(ii) Whether the Bail provision is rationally connected to the objective

62. The Board accepts that remand in custody pending trial is rationally connected to the identified objectives. A person in custody is incapable of violent offending,

repeat offending or absconding. Being in custody will also make it more difficult to interfere with witnesses or otherwise obstruct the course of justice.

(iii) Whether a less intrusive measure could have been used

63. It is the Attorney General's own case that in Trinidad and Tobago "it had never been the practice to grant bail in cases of murder whether before or after committal". Given that practice it is difficult to see why there was a need to remove any discretion to grant bail and to impose a legal prohibition. In relation to cases of murder, the legislative objectives were already being met by the practice of the courts.

64. Since it was (wrongly) assumed that the law already prohibited bail in cases of murder, there was no consideration of whether it was necessary or appropriate to introduce such a prohibition. No concern was expressed about the courts' existing approach to the grant of bail in murder cases.

65. Even if there had been such a concern, this could have been addressed by imposing conditions on the exercise of the court's discretion rather than by removing it altogether. This was the general approach adopted in the Bail Act in section 6. Even where it was considered that a stricter approach was required, as in the case of those with three relevant prior convictions, there remained a discretion in the court to grant bail where "sufficient cause" could be shown (section 5(2)).

66. The Board therefore concludes that less intrusive measures could have been used.

(iv) Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community

67. Under this heading it is relevant to consider the extent of the inconsistency with sections 4 and 5. A blanket prohibition of bail infringes a number of the rights and freedoms recognised in sections 4 and 5.

68. The Attorney General accepts that it infringes the right not to be deprived of liberty except by due process of law (section 4(a)); the right not to be deprived of reasonable bail without just cause (section 5(2)(f)(iii)), and the right not to be deprived

of procedural protections necessary for giving effect and protection to section 5 rights and freedoms (section 5(2)(h)).

69. The Board considers, for reasons addressed below, that it also infringes the right not to be subject to arbitrary detention (section 5(2)(a)).

70. Other rights which the respondent contends are infringed include the right to the protection of the law (section 4(b)); the right to be presumed innocent (section 5(2)(f)(i)), and the right to a fair and public hearing (section 5(2)(f)(ii)). It is not necessary to determine whether these rights are also infringed. On any view, the rights and freedoms infringed are significant both in number and in substance.

71. It is also relevant to have regard to the nature and significance of the infringement of these rights.

72. A fundamental objection to a blanket prohibition of bail is that it treats all persons charged with murder indiscriminately and denies the possibility of bail whatever the circumstances and however compelling the case for bail may be. As such it operates in an arbitrary and potentially unfair and unjust way.

73. It is obvious that the circumstances in which a murder charge may be made are many and various. As recently stated by the Board in *Boodram v Attorney General of Trinidad and Tobago* [2022] UKPC 20 at para 30:

> "The crime of murder is, of course, always very serious; but some murders are even more serious than others. The circumstances of murder cases vary across a wide range, from the terrorist who aims to overthrow a state by killing as many of its citizens as possible to the devoted partner who commits a 'mercy killing' in order to end the unbearable pain suffered by a loved one who is terminally ill…"

74. The variety of circumstances in which a murder charge can arise means that there may well be cases where none of the objectives of a prohibition of bail will be served. There is no risk of absconding; there is no risk of further offending; there is no risk of interfering with witnesses or of obstructing the course of justice. In such cases there is likely to be a very compelling case for bail, but the blanket prohibition means that bail will not be possible. Preventing differential treatment in cases with different

circumstances involves what has been described as a "standardless sweep". As pointed out by the Court of Appeal of Trinidad and Tobago in *Attorney General v St Omer* Civil Appeal No. P351 of 2016 at para 62, a "standardless sweep" has the potential to produce unfairness and arbitrariness and is contrary to principles of fundamental justice.

75. Under the Bail provision the prohibition of bail occurs as a result of being charged and applies pre-committal, as in this case. It may well therefore include people in respect of whom there is insubstantial evidence of guilt. That is vividly illustrated by the facts of the present case in which it was ultimately found that the respondent had no case to answer - in the meanwhile he had spent nearly 8 ½ years in custody. A person who is eventually acquitted or discharged at a preliminary enquiry may therefore have been deprived of liberty for a substantial period of time, causing serious harm to their life chances, without there ever having been a consideration by a judicial officer whether the denial of bail is suitable in the particular circumstances of their case.

76. The Board was told that there were other examples of much longer pre-trial custody periods than that endured by the respondent and that lengthy pre-trial detention is common. This exacerbates the potential unfairness of a blanket prohibition.

77. As further pointed out at para 62 of the *St Omer* case, in pre-committal cases such unfairness is compounded by the fact that bail would be denied solely on the "say so" of the police or prosecutor. The police or prosecutor is given the power to determine that a person will be deprived of his or her liberty for a potentially prolonged period of time by the choice of offence with which to charge a suspect and by his or her determination that there is sufficient evidence to justify the charge.

78. The consequences of a prohibition on the grant of bail were considered by the Board in *State of Mauritius v Khoyratty* [2006] UKPC 13; [2007]1 AC 80. In that case it was held that such a prohibition infringed the separation of powers contained in section 1 of the Constitution of Mauritius. In his judgment Lord Mance explained that it would also contradict the principle of the rule of law, stating as follows at para 36:

> "…To remove the court's role - and in the process to prescribe automatic detention in custody pending trial whenever prosecuting authorities have reasonable grounds to arrest for a prescribed …offence …would be to introduce an entirely different scheme. …[which] would contradict the

> basic democratic principles of the rule of law and the separation of judicial and executive powers which serve as a primary protection of individual liberty".

79. The importance of the right to liberty was vividly explained by Bereaux JA in his judgment in *Francis v State of Trinidad and Tobago* (2014) 86 WIR 418 at para 276 (with which the Chief Justice and three other Justices of Appeal agreed):

> "…The liberty of the subject is one of the fundamental rights which is very jealously guarded in most democracies. It is especially precious to us as a society with a colonial past and a history of slavery and indentureship, in which liberty had to be fought for or bought and for which so many of our ancestors paid with their lives. As our national anthem puts it we, as a nation are 'forged from the love of liberty'. As judges sworn to uphold the Constitution, we will guard it with every breath of our constitutional power."

80. Moreover, in cases such as the present the infringement of the right to liberty undermines a right specifically recognised in section 5 of the Constitution, namely the right not to be denied bail without "just cause". As explained in relation to the equivalent provision in the Canadian Constitution in *R v Pearson* [1992] 3 RCS 665 at p689:

> 'Just cause' refers to the right to obtain bail. Thus bail must not be denied unless there is 'just cause' to do so. The 'just cause' aspect … imposes constitutional standards on the grounds under which bail is granted or denied."

81. The prohibition operates by reference to a single circumstance – the offence of which a person stands accused. That is assumed to be sufficient in itself to constitute "just cause" regardless of other circumstances and regardless of how unjust they may show the deprivation of liberty to be.

82. The fundamental importance of the protection by law of the right of liberty was emphasised in the Board's recent decision in *Duncan and Jokhan v Attorney General of Trinidad and Tobago* [2021] UKPC 17 at para 23:

> "The protection of liberty and the security of the person by law is, by long tradition, recognised as a fundamental value in the common law and this is reflected in the Constitution. It is also recognised as a fundamental value in international human rights instruments including the European Convention on Human Rights and the International Covenant on Civil and Political Rights ('the ICCPR') with which Chapter 1 of the Constitution has a close affinity: *Minister of Home Affairs v Fisher [1980] AC 319, 328-330*. Lord Bingham summarised the position in *A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68 (the so-called Belmarsh case)* at para 36:
>
> 'In urging the fundamental importance of the right to personal freedom … the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day…'

83. For all these reasons the Board accepts that very severe consequences flow from the infringement of the fundamental rights and freedoms by the Bail provision, including the undermining of the rule of law.

84. Against that must be set the strong public interest in the objectives of the Bail provision as recognised in the section 13 special majority procedure. As made clear in *Suraj* the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and must give great weight to the judgment of Parliament regarding the importance of the public interest which is sought to be promoted.

85. The Board has given careful consideration to the strong public interest in the objectives of the Bail provision and the great weight to be given to the judgment of Parliament. Bearing in mind that less intrusive measures could have been used, the Board nevertheless considers that in all the circumstances of the present case the interests of the community as expressed through the will of Parliament is outweighed by the very severe consequences of the imposition of a blanket prohibition of bail and that a fair balance has not been struck. The Board accordingly concludes that the Bail provision was disproportionate and, notwithstanding the heavy burden involved, has

been shown not to be reasonably justifiable "in a society that has a proper respect for the rights and freedoms of the individual". Although the Court of Appeal did not apply a proportionality test, this is consistent with the reasons given for the conclusion which they reached. As stated at para 89:

> "Turning now to answer the specific question posed by this appeal, there are several considerations that influence my eventual conclusion. Firstly, judges of the Supreme Court have always possessed the power to grant bail in cases of murder. Secondly, section 5 of the Bail Act clearly derogates from fundamental rights and freedoms. Thirdly, it removes what, under the doctrine or principle of separation of powers, must be regarded as a core judicial power and discretion from the remit of the judiciary. Fourthly, while there may be legitimate public policy concerns with respect to a rise in the incidence of violent crime, and the risk to public safety posed by repeat offenders, that must be juxtaposed against the presumption of innocence enjoyed before trial and protected by section 5(f)(1) of the Constitution. Finally, there is nothing to suggest that, having regard to the way in which Courts have historically exercised the power to grant or refuse bail in cases of murder, any statutory restrictions are necessary. The courts are perfectly capable of protecting the Public Interest."

86. For all these reasons the Board dismisses the appeal on the section 13 issue.

87. For completeness, the Board notes that the respondent also sought to rely on evidence of international practice which it was submitted showed that the overwhelming majority of democratic states and, in particular, members of the Commonwealth do not institute laws automatically denying bail to persons charged with murder. Given the adaptability of the proportionality test and the context of section 13 the Board accepts that this is potentially relevant evidence, but it is not necessary to address such evidence on this appeal.

88. The respondent also sought to rely on the oppressive effect of a prohibition on bail having regard to the inhumane conditions in which prisoners on remand are kept in Trinidad and Tobago – see the findings of Gobin J in *Edgehill v McHoney* No. 3178 of 2004 at para 38 and in *Omer v The Attorney General* No CV 3475 of 2015 at para 42. The Board accepts that this is potentially relevant to the severity of the consequences

of the infringement of the respondent's rights but again it is not necessary to address that evidence on this appeal.

9. Other issues

89. In the light of the Board's conclusion that the appeal should be dismissed it is not necessary to address the respondent's further argument that the Bail provision usurps a core judicial function and is not consistent with the separation of powers guaranteed by section 1 of the Constitution. The Board would, however, reiterate what was stated in relation to the Constitution in *Chandler v The State of Trinidad and Tobago* (No 2) [2022] UKPC 19 at para 81:

> "The separation of powers is not a free-standing, legally enforceable principle that exists independently of and above a Constitution. It is a principle that has informed the drafting of a Constitution and operates through the terms of a Constitution. In other words, it is a principle which is relevant to the interpretation of the 1976 Constitution but provides no basis independent of the Constitution for invalidating legislation".

90. The Board does not grant permission to the Interested Party to cross appeal. In circumstances where the Board's decision recognises that the Supreme Court judges have a discretion to grant bail in murder cases, for magistrates not to have a similar discretion involves no unconstitutionality. Moreover, they had no such discretion under the existing law saved under section 6.

10. Relief

91. Mr Knox made submissions as to the relief which may be appropriate if the Attorney General's appeal succeeded. Save in relation to the Interested Party's proposed cross-appeal, it has not been suggested that there is any reason to alter the terms of the relief granted by the Court of Appeal.

11. Conclusion

92. For all the reasons set out above the Board dismisses the appeal.