BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(CIVIL DIVISION)

Civil Suit No: 859 of 2020

BETWEEN:

LAMAR ANTONIO STEPHON JONES **CLAIMANT**

AND

THE ATTORNEY-GENERAL OF BARBADOS **DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Dates of Hearing **2021: 15th April**

Date of Decision: **2021: 17th May (Oral)**
28th May (Written)

Appearances:

Mr. Larry A. C. Smith QC in association with Mr. Jamar O. Bourne, Ms. Jamila C. A. Smith and Mr. Akeem D. Rowe for the Claimant;

Mr. Jared K. Richards, Senior Crown Counsel for the Defendant.

Constitutional law – Bail (Amendment) Act, No. 13 of 2019, sections 5A(1) & (2) – Restriction on bail for certain serious offences – Whether restrictions constitutional – Presumption of constitutionality - Separation of Powers – Proportionality – Portion only of section unconstitutional - Effect on entire section.

DECISION

INTRODUCTION

[1] By Fixed Date Claim filed in August, 2020 the Claimant Lamar Antonio Jones moved the Supreme Court of Barbados for Constitutional relief for the infringement of several of his fundamental rights and freedoms. The Claimant alleges breaches to sections 11(a) and (c); sections 18(1) and 18(2)(a); and section 13(3) of the Constitution. These sections translate to alleged breaches of the Claimant's right to liberty; security of the person; protection of the law; to a fair hearing within a reasonable time; and to the presumption of innocence. The breaches are alleged to be occasioned by virtue of an amendment to the Bail Act, Cap. 122A, in the form of the Bail (Amendment) Act, No. 13 of 2019. Specifically, by the insertion therein of section 5A, insofar as it restricts the grant of bail for offences charged under the Firearms Act, Cap. 179, which are punishable by imprisonment for 10 years or more (section 5A(1d)).

[2] The restriction complained of is that section 5A(1) prohibits the grant of bail for relevant firearm offences before the expiry of a period of 24 months, subject to three (3) prescribed exceptions, of which only one is applicable to firearm offences.

That exception is met where the court is of the view that the strength of the evidence suggests that the accused person did not commit the offence charged. In plain language, the Claimant's case is that save for a pre-trial assessment by a judge that the case against him is not a strong one, he is condemned to a mandatory period of 24 months on remand, before he is eligible to apply for, much less be granted bail. The denial of the opportunity to obtain bail save for the single circumstance which rests upon the strength or not of the case against him, and the consequent detention whilst awaiting trial for at least 24 months, forms the basis of the Claimant's Constitutional challenge to section 5A(1)(d) of the Bail Act, as amended.

[3] The Defendant relies upon the presumption of constitutionality in respect of the amendment and refutes that the Claimant has succeeded in discharging the heavy burden in favour of such a presumption. More particularly, the Defendant's position is that the issue of the Claimant's entitlement to bail engages only his right to liberty enshrined under section 13(3) of the Constitution; and as permitted by section 49 of the Constitution itself, the Bail (Amendment) Act lawfully alters the said right to liberty. This position is evidenced by the provisions of the Amendment itself, which speak to the fact that the Act was passed with the required two thirds majority of Parliament, as prescribed under section 49(2) of the Constitution.

Aside from complying with the stipulated manner in which the Constitution may be altered, the Defendant's position is that the Bail Amendment was necessary in furtherance of Parliament's mandate to make laws for the peace, order and good government of Barbados.

[4] The matter was heard by way of written and oral submissions on the 15th April, 2021. Evidence comprised of a single affidavit of the Claimant which was filed in support of his Claim, and an affidavit in answer filed on behalf of the Defendant by a Sergeant of the Criminal Investigations Division of the Oistin's Police Station, where the Claimant was interviewed leading up to his charges. There was no cross-examination by either side on the affidavit evidence which therefore stood uncontested before the Court. On conclusion of the submissions in the matter, the Court reserved its judgment on the matter, which comprises two issues broadly defined as follows:-

(i) Whether section 5A of the of the Bail (Amendment) Act, No. 13 of 2019 is unconstitutional;

(ii) If so, what remedies should be afforded the Claimant who seeks damages for breach of his Constitutional rights, in addition declaratory remedies pronouncing against the impugned legislative provisions.

[5] In this Judgment, the Court renders its decision (in favour of the Claimant) on the issue of constitutionality only, and further reserves its decision on the issue

of remedies to be afforded to the Claimant. The Court's approach to its determination on the issue of constitutionality is as follows:-

A. Extraction of Relevant Legislative Provisions – pages [5 - 15]

B. General Principles of Constitutional Interpretation – pages [16 - 23]

C. The Ambit of the Claim – pages [23 - 44]

D. Discussion and Analysis – pages [44 - 98]

E. The Fate of Section 5A of Cap. 122A – pages [98 - 101]

F. Conclusion and Disposal – pages [101 - 107]

A. Relevant Legal Provisions

[6] This Claim engages legislative provisions from the Constitution of Barbados; the Bail Act, Cap. 122A; and the impugned section 5A of the Bail (Amendment) Act, No. 13 of 2019. For ease of reference, the applicable provisions are extracted in full or in relevant part in this section, with emphasis where appropriate. First to be extracted are the relevant Constitutional provisions upon which the Claimant advances his Claim:-

(i) Sections 11(a) & (c) – Protection of liberty and security of the person; protection of the law

> "**11.** *Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions,*

colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

a. ***life, liberty and security of the person****;*

b. protection for the privacy of his home and other property and from deprivation of property without compensation;

c. the protection of the law; and

d. freedom of conscience, of expression and of assembly and association,

the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

(ii) Section 13(3) – Provisions for the protection of the right to liberty

"**13.***(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 before a court as soon as is reasonably practicable; 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."

(iii) Sections 18(1) and 18(2)(a) – Protection of the law by means of a right to a fair hearing within a reasonable time and presumption of innocence

"**18.***(1)* ***If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law****.*

(2) ***Every person who is charged with a criminal offence-***

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;"

(iv) Section 48 – Power to make laws

"**48.***(1)* ***Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Barbados****.*

(2) Without prejudice to the generality of subsection (1) and subject to the provisions of subsection (3), Parliament may by law determine the privileges, immunities and powers of the Senate and the House of Assembly and the members thereof.

(3) No process issued by any court in the exercise of its civil jurisdiction shall be served or executed within the precincts of the Senate or the House of Assembly while it is sitting, or through the President or the Speaker, the Clerk or any other officer of either House."

(v) Section 49 – Alteration of this Constitution

"**49.***(1)* ***Subject to the provisions of this section, Parliament may, by an Act of Parliament passed by both Houses, alter this Constitution.***

(2) ***Subject to the provisions of subsection (3), a Bill for an Act of Parliament under this section that alters any of the following provisions, that is to say***

a. this section and section 1;

b. Chapter II;

c. Chapter III;

d. sections 28, 32, 35 to 39, 41, 41A to 41E, 42, 48, 60(2), 61, 62, 63 and 76 to 79 (other than subsection (7) of section 79);

e. Chapter VII (other than section 83);

f. Chapter VIII;

g. Chapter IX

h. any provision of Chapter X in its application to any of the provisions specified in paragraphs (a) to (g),

shall not be passed in either House unless at the final voting thereon in the House it is supported by the votes of not less than two-thirds of all the members of the House.

(3) Subsection (2) shall not apply to a Bill in so far as it alters any of the provisions specified in that subsection for the purpose of giving effect to arrangements for the federation or union of Barbados with any other part of the Commonwealth or for the establishment of some other form of constitutional association between Barbados and any other part of the Commonwealth.

(4) A Bill for an Act of Parliament under this section to which subsection (2) does not apply shall not be passed in either House unless at the final voting thereon in the House it is supported by the votes of a majority of all the members of the House.

(5) ***In this section***

(a) references to this Constitution or to any particular provision thereof include references to any other law in so far as that law alters the Constitution or, as the case may be, that provision; and

(b) references to altering this Constitution or any particular provision thereof include references –

i. to repealing it, with or without re-enactment thereof or the making of different provision in lieu thereof;

ii. ***to modifying it (whether by omitting, amending or overriding any of its provisions*** *or inserting additional provisions in it or otherwise); and*

iii. to suspending its operation for any period or terminating any such suspension.

(6) ***No Act of Parliament shall be construed as altering this Constitution unless it is stated in the Act that it is an Act for that purpose.***

(7) Nothing in subsection (2) shall be construed as including any of the provisions of the First Schedule or the Second Schedule among the provisions specified in that subsection."

(vi) Bail Act, Cap. 122A, Section 5

"**5.***(1) Where a defendant is accused or convicted of an offence that is punishable with imprisonment, the court may refuse an application for bail if*

(a) the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail, whether subject to conditions or not would

(i) fail to surrender to custody,

(ii) commit an offence, or

(iii) interfere with witnesses;

(b) the court is satisfied that the defendant should be kept in custody

(a) for his own protection;

(b) for the protection of the community; or

(c) if he is a child or young person, for his own welfare;

(c) the defendant is in custody in pursuance of the sentence of a court or of any authority acting under the Defence Act;

(d) the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this section for want of time since the institution of the proceedings against the defendant;

(e) having been released on bail in or in connection with the proceedings for the offence, the defendant has been arrested in pursuance of section 17;

(f) the defendant's case is adjourned for inquiries or a report and it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody; or

(g) the defendant is charged with an offence alleged to have been committed while he was released on bail.

(2) In the exercise of its discretion under subsection (1), the court shall have regard to any relevant factor including the following:

(a) the nature and seriousness of the offence or default, and the probable method of dealing with the defendant for it;

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

(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail;

(d) the strength of the evidence of his having committed the offence or having defaulted, except where the

defendant's case is adjourned for inquiries or a report; and

(e) the length of time the defendant would spend in custody if the court were to exercise the power conferred on it by section 218A of the Magistrate's Courts Act.

(3) Where the defendant is accused or convicted of an offence that is not punishable with imprisonment, the court may refuse an application for bail if

(a) the defendant has absconded under section 17 and the court believes that, in view of that failure, the defendant, if released on bail, would fail to surrender to custody;

(b) the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare;

(c) the defendant is in custody in pursuance of a sentence of a court or of any authority acting under the Defence Act; or

(d) the defendant, having been released on bail in or in connection with the proceedings for the offence, has been arrested in pursuance of section 17.

(4) A person charged with

(a) murder;

(b) treason;

(c) high treason; or

(d) an indictable offence under the Firearms Act,

shall not be granted bail except by order of a Judge of the High Court.

(5) For the purposes of this section

(a) the question whether an offence is one punishable with imprisonment shall be determined without regard to any enactment prohibiting or restricting the imprisonment of young offenders or first offenders;

(b) references to previous grants of bail include references to bail granted before the coming into force of this Act;

(c) references to a defendant being kept in custody or being in custody include, where the defendant is a child or young person, references to his being kept in custody at a Reformatory and Industrial School in pursuance of a warrant of commitment under section 6 of the Juvenile Offenders Act;

(d) "court", in the expression "sentence of a court", includes a service court as defined in section 2 of the Visiting Forces Act;

(e) "default", in relation to the defendant, means the default for which he is to be dealt with in breach of a probation order."

(vii) The Bail Amendment Act, No. 13 of 2019, Section 5A

"Bail in the case of persons charged with serious offences

5A.*(1) Subject to subsection (2), a person charged with*

(a) murder;

(b) treason;

(c) high treason; or

(d) an offence under the Firearms Act, Cap. 179, which is punishable with imprisonment for 10 years or more shall not be granted bail unless a period of 24 months has expired after that person was charged*.*

(2) ***Notwithstanding subsection (1), bail may be granted by the High Court where***

(a) any person is charged with murder in circumstances connected with the discharge of that person's official duties;

(b) ***the court is of the view that the strength of the evidence suggests that the accused did not commit the offence with which he is charged****; or*

(c) the court is satisfied on the evidence presented that the accused would be able to rely on the defence of self defence."

(3) An application for bail by a person who is charged with an offence mentioned in subsection (1) shall be heard by the Chief Justice or a Judge of the High Court assigned by the Chief Justice.

(4) No application for bail by a person who is charged with an offence mentioned in subsection (1) shall be heard by the High Court unless

(a) a period of 72 hours has expired after the application for bail is made to the Court; and

(b) the Court is satisfied that notice of the application was served on the prosecution.

(5) Where

(a) bail is granted by the High Court to a person in the circumstances mentioned in subsection (2); or

(b) bail is granted by the High Court to a defendant after bail is withheld for the period mentioned in subsection (1),

the Chief Justice or Judge, as the case may be, shall at the time of making the decision,

(i) give reasons in writing for his decision; and

(ii) give a copy of the reasons for the decision to the defendant and the prosecution.

(6) Where bail is granted by the High Court to a defendant in the circumstances mentioned in subsection (5)(a) or (b), there shall be a right of appeal by the prosecution to the Court of Appeal against the decision of the Court.

(7) An appeal to the Court of Appeal under subsection (6) shall be heard by the Chief Justice or by a Justice of Appeal assigned by the Chief Justice as is appropriate in the particular circumstances."

B. General Principles

[7] As a Commonwealth Caribbean state, Barbados' written Constitution is *inter alia*, a symbol of its acceptance of, and commitment to democracy as its system of governance. It (the Constitution) is a repository for the core values, principles and mechanisms which define and govern that democracy. It (the Constitution) is also the guardian of the fundamental rights and freedoms which are guaranteed to all persons who dwell within the State. The Constitution, as the average citizen or resident knows (even without fully appreciating why), is the Supreme Law of the land, and as any legally trained person learns upon their first introduction to Constitutional law, any other law that is inconsistent with it, is void to the extent of its inconsistency.[1] As a consequence of its deservedly revered status, there are several well established principles which restrict resort to the Constitution for legal redress; and equally well established principles which address the manner in which the Constitution is to be interpreted and applied.

[8] As a general rule, one who invokes the Constitution to protect a right or to seek redress for an alleged breach of a constitutional right, must demonstrate the existence of a justiciable right, sufficient standing to bring the action, and the absence of any recognized or permissible bar to advancing such a right.

[1] The Constitution of Barbados, Section 1.

The Court has been excellently assisted by the length and breadth of the research and submissions of Counsel on both sides and gratefully adopts the authority of **Banton et al v Alcoa Minerals of Jamaica Incorparated et al**[2], cited by Queens Counsel for the Claimant, which was referenced in support of the above statement of general principle. In addition to the grounding necessary to bring an action, it is also a general principle that a person seeking Constitutional redress must have no alternative or no viable alternative remedy available particularly in private law, which can be accessed to remedy the underlying complaint.

[9] This principle that 'parallel' or 'alternative' remedies must be exhausted before recourse is had to the Constitution, is expressly grounded in the proviso to section 24(2) of Barbados' Constitution. It is stipulated therein that the court may decline to exercise its powers (to give redress) under that section, if satisfied that adequate means of redress were or had been otherwise available to the applicant. Judicial pronouncement in the Region, on the rationale for this provision, is commonly attributed to **Kemrajh Harrikisson v Attorney-General of Trinidad & Tobago**,[3] also cited by Queen's Counsel for the Claimant.

[2] (1971) 17 WIR 275 @ 305
[3] (1979) 31 WIR 348

> Lord Diplock explains the rationale in terms that not every failure to comply with the law by a public authority or public officer necessarily gives rise to a breach of a fundamental right or freedom. The right to apply for redress in respect of any such breach is an important safeguard of such rights and freedoms, but that right (of redress) would be diminished in value were it allowed to be misused as a general substitute for [in that case] judicial control of administrative action.[4]

[10] This position applies in relation to alternative rights such as appeal[5] and more broadly speaking, where a parallel remedy does exist, the complaint should comprise some feature which makes resort to the Constitution, the appropriate course.[6] As submitted by Queen's Counsel on behalf of the Claimant and not disputed by Counsel for the Crown, the Claimant, Mr. Lamar Jones, as a person charged with criminal offences and currently detained, is without question a person with requisite interest and standing to bring a claim which alleges the unconstitutionality of section 5A of the Bail (Amendment) Act. Having been denied bail upon application of sections 5A(1) & (2) of the Act, the Claimant as of August, 2020 when the Claim for redress was filed, also

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[4] Ibid @ 349
[5] **Hinds v Attorney-General et al (Barbados)** [2001] UKPC 56
[6] **Attorney-General of Trinidad & Tobago v Ramanoop** [2005] UKPC 15 @ paras 22-25.

satisfies the criteria of having no other (effective) remedy available to challenge his detention, as an appeal would likely be futile.

[11] As a matter of formality as there was no dispute in this regard, it is found that the Claimant's application for redress pursuant to section 24(1) of the Constitution of Barbados, for breach of the several rights as listed above,[7] is properly grounded. In addition to the above general principles which underpin the institution of a claim for constitutional redress, Queen's Counsel for the Claimant also highlighted the established approach of courts when called upon to interpret and apply the Constitution. Reference was made to **Minister of Home Affairs v Fisher**[8], in which the Privy Council (the judgment delivered by Lord Wilberforce) strongly rejected interpreting the Constitution with the same rigidity as an ordinary Act of Parliament. Instead, the approach preferred was regarded as a '*radical one*' which recognizes the character and origin of the instrument and treats it as

> *"…sui generis, calling for principles of interpretation of its own, suitable to its character…, without necessary acceptance of all the presumptions that are relevant to legislation of private law"*

[7] The Claimant alleges breaches of his rights to liberty and security of the person – sections 11(a) & 11(c); right to a fair trial within a reasonable time and presumption of innocence – sections 18(1) & 18(2)(a); deprivation of liberty – section 13(3).
[8] [1980] AC 319

[12] Aside from ascribing unto it an interpretation wider than that of an ordinary Act of Parliament, Queen's Counsel for the Claimant points the Court to the further recognition that the Constitution is to be construed as a '*living instrument*.' Meaning, that the interpretation of the Constitution ought to reflect prevailing times, notwithstanding that the precise interpretation of the right being invoked, would not have been within the contemplation of the framers of the Constitution at the time of its implementation. Queen's Counsel for the Claimant referred to **Boyce et anor v R**[9] as illustration for the principle that the Constitution should where necessary (and appropriate), adapt to the prevailing conditions of the relevant time at which it falls to be interpreted.

[13] In illustration of this approach, the dictum of Lord Hoffman regarding the interpretation of the mandatory death penalty relative to its newly adjudged inconsistency with the right of protection against cruel and inhuman punishment, was extracted in part, thus:-

> *"…changes in society and attitudes are capable of bringing about changes in the practical content of fundamental rights like the protection against cruel and unusual punishments in both international and domestic law."*

[9] (2004) 64 WIR 37 (not to be confused with Attorney-General et al v Boyce et anor [2006] CCJ 1)

Further affirmation of the connection between interpretation of the Constitution keeping abreast with '*ever-changing social realities*', was made by Queen's Counsel for the Claimant, with reference to **R v Lewis**[10] per Pollard JCCJ.

[14] Finally (for the moment), in relation to the established approach to be undertaken by the Court in respect of interpretating the Constitution, Queen's Counsel for the Claimant, highlighted the contrasting position of a narrow approach that ought to be taken by the court, when called upon not to give effect to, but to derogate from a protected right. Reference was made to **Nervais v The Queen; Severin v The Queen**[11] (*Nervais and Severin*) per Byron PCCJ who acknowledged as a general principle of constitutional interpretation that "*derogations from the fundamental rights and freedoms must be narrowly construed and there should be applied an interpretation which gives voice to the aspirations of the people who have agreed to make this document their supreme law…*"

[15] With specific reference to the Constitution of Barbados, Byron PCCJ, went on to observe:-

> *"In the preambular context, the point was made that the people of Barbados have, over centuries, resisted attempts to derogate*

[10] (2007) 70 WIR 75 @ paras 73-74
[11] [2018] CCJ 18

> *from those fundamental rights which they have entrenched in their written Constitution. This Court should give effect to the interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms"*

The employment of that conversely narrow approach to derogation as opposed to wider approach for enforcement or protection of a fundamental right, was referred to by Queen's Counsel for the Claimant, on the basis that the amendment to the Bail Act, under consideration amounts to such a derogation from the Claimant's constitutional rights as identified above.

[16] The Court pauses at this juncture to put in context the commencement of its consideration of this matter with reference to the general and overarching principles of constitutional interpretation stated above. Albeit a formality in the sense that the Claimant's interest and standing to challenge the section 5A amendment to the Bail Act is indisputable and clear, it is considered necessary to affirm that standing and interest, given the weight appended to a challenge to the constitutionality of a law of the land, as well as the far reaching implications and impact, such a challenge is bound to have on the administration of justice and the public interest. The task before the Court is therefore a serious one, but the matter has been appropriately brought for ventilation and ultimate resolution.

Further in this regard, it was also considered necessary by the Court, to affirm that the Claimant in the face of his continuing detention for the offences charged, had no other recourse (in the circumstances of this case), than to seek to avail himself of his Constitutional rights.

[17] Before commencing its substantive deliberation of the matter at hand, the Court acknowledges that there are additional principles of constitutional interpretation which were commended for the Court's attention. These additional principles are (i) the separation of powers; (ii) the presumption of constitutionality; (iii) the proportionality principle; and (iv) further consideration of the derogation versus alteration of fundamental rights. These principles are relevant to and will form part of the Court's substantive determination of the claim, as opposed to serving only as context and foundation as with the first few principles identified.

C. The Ambit of the Claim

(i) The Constitution and the Right to Bail

[18] In this Part, the Court brings into focus the precise complaint of unconstitutionality, both according to the legal submissions of how the unconstitutionality arises, as well as the unconstitutionality highlighted by the practical effect of the legislation on the Claimant.

Once more, the Court acknowledges as of great assistance, the extensive and well researched submissions of Counsel, particularly on behalf of the Claimant. Drawing from the body of authorities referred on behalf of the Claimant, the Court commences by giving context to the subject matter of the Claim - namely, bail. What is bail? What is the purpose of bail? What is its connection to the Constitution? These questions need not be answered individually or sequentially, they are effectively answered as one.

[19] The Constitution bestows upon its subjects a right to liberty as may be seen from sections 11(a) and 13(1). That right to liberty is of course subject to the protection of rights of others, as further stated in section 11, as well as subject to the specified limitations prescribed in section 13(1). With relevance to the case at bar, the Claimant was of course, lawfully detained pursuant to section 13(1)(e), which permits the deprivation of liberty in respect of a person reasonably suspected of having committed a criminal offence under the law of Barbados. The permitted deprivation of liberty, or the permitted detention of a person charged with a criminal offence (in the words of the Constitution – upon reasonable suspicion of having committed a criminal offence), is limited by the further provisions of section 13(3)(b).

[20] This section addresses two stages of the progression of criminal proceedings, subsequent to institution of charge.

The first, is that the person arrested or detained who is not released – is to be brought before a court as soon as is reasonably practicable – this provision provides the foundation for the grant of bail. The second, is that the person charged with a criminal offence who is not released, is entitled, if not tried within a reasonable time, to be released unconditionally, or with reasonable conditions. The reasonable conditions include such conditions as may be necessary to assure the person's attendance at his trial or any proceedings preliminary to trial. Queen's Counsel for the Claimant, ties this right to liberty (as delimited in relation to criminal charge and proceedings), with the further fundamental right of a person charged with a criminal offence, to be afforded a fair trial within a reasonable time (section 18(1)); as well as the presumption of innocence (section 18(2)(a)).

[21] According to Queen's Counsel for the Claimant, the conjoint effect of all these rights, namely, to the right to liberty as supported by the rights to a presumption of innocence and entitlement to a fair trial within a reasonable time, is to underscore that the right to bail as generally known, must first be understood with reference to the underlying fundamental rights from which it is derived. The statutory acknowledgment of the right to bail in section 4 of the Bail Act, Cap. 122A, is therefore to be understood within the wider context of the Constitutional rights to liberty, as supported by the presumption of

innocence and right to a fair trial within a reasonable time. Queen's Counsel refers to the Jamaican authority of **Stephens v Director of Public Prosecutions**[12] in which Sykes J, as he then was, in strong terms, expressed the right to bail as grounded in the Constitution of Jamaica[13], as opposed to the Bail Act. As a consequence of the enshrinement of the right to liberty within the Chapter of Fundamental Rights and Freedoms (as it is here in Barbados), Sykes J. opined that '*any derogation from such a high ranking right must be justified by very, very cogent reasons*.'[14]

[22] Bearing in mind that statement regarding any attempt to derogate from the lofty protection afforded the fundamental right to liberty, Sykes J. contextualized the narrow construction and application he would give to the provisions of Jamaica's Bail Act; but moreover, added to that context, the influence on the Jamaican Constitution of the European Convention on Human Rights', insofar as the latter had its origins in the aftermath of the atrocities of the Second World War. The purpose of such context, as understood by this Court, was to further underscore the seriousness of the right to liberty against any corresponding limitations to be imposed on that right.

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[12] [2007] JJC 2301

[13] The now learned Chief Justice Sykes referenced the rights to liberty, fair trial within a reasonable time, and presumption of innocence, Jamaica's counterpart to sections 13(3), 18(1) and 18(2)(a) of Barbados' Constitution, as the bases for the right to bail in Jamaica.

[14] Ibid, @ para 9 per Sykes J.

Still framing the complaint of the unconstitutionality of section 5A of the Bail Act, Queen's Counsel further commended to the Court, several commonwealth authorities on the issue of bail and its corresponding engagement of the constitutional right to liberty – namely, **Noordally v Attorney-General et anor**[15] and **Hurnam v The State.**[16]

[23] ***Noordally*** in particular, adverted to the position of the common law of England, referred to therein as having been '*established for centuries*'[17], to the effect that the relevant test for grant of bail was whether or not an accused person would appear to take his trial and as such was not to be withheld merely as a punishment[18]. In this regard, particular reference is drawn to the fact that the conditions of release provided in section 13(3)(b), include those which are reasonably necessary to ensure that the person charged appears at their trial or proceedings preliminary to trial. From ***Hurnam,*** Queen's Counsel for the Claimant extracts the illustration of the competing rights on the one hand, of the individual's right to liberty; and on the other hand, the wider identified public interest that is served by the appearance at and trial of the accused person[19].

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[15] (1987) LRC 599
[16] [2005] UKPC 49
[17] Nordally, supra @ 601
[18] Ibid.
[19] ***Hurnam***, supra @ paras 1 & 4

[24] Both of these cases recognized and articulated the factors and assumptions which are properly considered within the overall discourse on the grant of bail as an incident of the right to liberty and the permissible curtailment of that right as enabled by the Constitution. The factors and assumptions include a base assumption that the more serious the charge and penalty, the more incentive there is for a person charged not to attend their trial. There may also exist the possibility that a person charged might interfere with witnesses or otherwise tamper with the case to be brought against them. The factors which influence a denial of bail therefore correspond to the underlying purpose of bail, the latter being to ensure attendance at trial. Extracted from the dicta in ***Hurnam*** in particular, (borne out in Barbados by the statutory provisions for refusing bail in section 5 of the Bail Act), the denial of bail centers around the possibility that the accused person may not appear for trial; is likely to commit further offences whilst on bail; or may interfere with further investigations pertaining to his (or her) charge.[20]

[25] The argument that is commended to the Court, is therefore understood, that the refusal of bail with reference to an accused person, is based upon narrowly themed objectives, related to ensuring the accused's appearance at trial, and preventing any attempts to tamper with investigations or otherwise pervert the

[20] Bail Act, section 5(1)(a);

course of justice. These decisions will be examined in greater detail, but at this stage, the Court understands the claim as to unconstitutionality, to be premised as follows:-

(i) the existence of the right to liberty as a fundamental right under the Constitution, as supported by the additional fundamental rights to a fair trial within a reasonable time and presumption of innocence;

(ii) that the weight and importance of that right to liberty correspondingly affects any attempts to derogate from that right beyond the limitations already contained within sections 11 and 13 of the Constitution itself;

(iii) consistent with the status of the right to liberty and the corresponding prescribed limitations thereon, any attempt to derogate from that right must be justified and based on cogent reasons;

(iv) also consistent with the status and protections afforded the right to liberty, is the existence of bail in itself, and the limited bases upon which it is properly refused; and

(v) the limited bases for refusal are constrained to the main purpose of ensuring the attendance of the accused person at trial or preventing interference with the due prosecution of the accused person.

(ii) The Constitution and Section 5A of Act, No. 13 of 2019

[26] The Court now moves to the substantive complaints against the constitutionality of section 5A in its intended purpose to restrict the grant of bail. Section 5A has been extracted in paragraph 6 above. Queen's Counsel firstly submits in relation to this section that its practical effects are as follows:-

(i) Save for the Claimant being able to demonstrate that the case against him is weak, he is automatically disqualified from being able to apply for bail, until the period of 24 months, as prescribed by the statute, has expired. This effect, it is submitted is arbitrary and capricious as there has been no reason put forward to justify this measure;

(ii) Contrary to the presumption of innocence to which he is entitled under section 18(2)(a) of the Constitution, the Claimant is put in the position of having to convince a judge as to the lack of merits of the prosecution's case against him, in order to obtain bail;

(iii) Short of being able to demonstrate the weakness of the Prosecution's case, the Claimant has been condemned to spending 24 months in prison without the possibility of reapplying for bail on a change of circumstances.

There is no possibility of reapplying for bail as the only condition applicable to his circumstance is the strength of the case against him;

(iv) Instead of operating as an onus on the Prosecution to expedite the Claimant's case, the 24 month restriction on bail would have the opposite effect of legitimizing delay in bringing the Claimant to trial, as the Prosecution is given a statutory 'grace period' before being held to account in respect of the proceedings.

(v) As stated in ***Hurnam***[21], the pretrial detention of the Claimant particularly if acquitted or never tried will inevitably have an effect of prejudicing him, and in many cases, his livelihood and well-being and that of his family.[22]

[27] As a matter of law, Queens Counsel for the Claimant submits that section 5A amounts to an encroachment by Parliament and the Executive, on the Judiciary's power to grant bail, and as such is an infringement of the separation of powers principle. Queen's Counsel relied on **The State (Mauritius) v Khoyratty**[23] in which the dictum of the lower court to the effect that the grant or refusal of bail is under judicial control[24] was approved.

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[21] [2005] UKOC 49
[22] Ibid @ para 1
[23] [2007] 1 AC 80
[24] Ibid @ para 8, citing with approval the Constitutional Court of South Africa in *Dlamini v The State [2000] 2 LRC* 239 @ para 74.

It is worthwhile to expressly note the statement affirmed as follows:-

> *"Again the exercise of granting bail is a judicial one which is duly recognized by section 5(3) of the Constitution. It is a judicial act in the same way as passing sentence and must be left to the judiciary to adjudicate when and in what circumstances it must be granted or refused."*[25]

In the instant case it is contended that section 5A fetters the discretion of the judge by removing all factors relevant to the grant or refusal of bail except the single one applicable to the Claimant in this case. This effect is submitted to breach the principle of separation of powers and as a result renders section 5A void, notwithstanding that the Act was passed with the requisite majority pursuant to section 49(6) (sic)[26] of the Constitution. The authority of ***Khoyratty*** is submitted as particularly relevant given that the impugned amendment to the Dangerous Drugs Act which therein restricted the grant of bail, had also been passed with a requisite majority required in order to amend the Constitution.

[25] Khoyratty, supra @ para 8 per Lord Steyn, referring to the judgment of the Supreme Court, below.
[26] The correct reference is section 49(2).

[28] In addition to the separation of powers argument, Queen's Counsel for the Claimant submits that section 5A does not effectively achieve the alteration to the Constitution which it purports to do. Instead, section 5A is in fact a derogation from the fundamental rights (aforementioned) by an ordinary Act of Parliament for which there is no authority in the Constitution. The Barbados position is contrasted with that in Trinidad and Tobago, which contains a specific provision[27] which authorizes the enactment of an ordinary Act of Parliament which is inconsistent with the constitutionally enshrined fundamental rights and freedoms, so long as the Act is enacted in strict compliance with its enabling procedure .[28] In the absence of such express provision by which an ordinary statute can alter the Constitution, Queen's Counsel submits that Act No. 13 of 2019 is ineffective in so doing and as such void. In particular, the argument is that because the text of the Constitution (specifically section 13(3)) has not been altered, the preamble to the amending Act is vague and uncertain, in that it cannot be determined what or how section 13(3) has been altered.

[27] (section 13 of the Trinidad & Tobago Constitution)
[28] Section 13(1) of the Trinidad & Tobago Constitution authorizes the enactment of an Act of Parliament which is inconsistent with the fundamental rights and freedoms contained in sections 4 and 5 of the Constitution, once the Act of Parliament is executed in accordance with the procedure laid out in section 13(2).

[29] Further, that the purported alteration in the manner carried out, also derogates from the fundamental rights contained in section 11 and 18 of the Constitution, and there is no provision made for such derogation in the amending Act. It is submitted that absent the 'special Acts' provision as per the Trinidad and Tobago Constitution, the proper approach is that illustrated by ***Khoyratty***, which is that the actual text of the Constitution must be altered, and so done in accordance with section 49 of the Constitution. By way of illustration to buttress this position, Queen's Counsel referred to the manner in which alterations to the Constitution itself have been carried out in Barbados - namely by Acts entitled the 'Constitutional (Amendment) Act, which then specifically alter the text of the Constitution as therein provided. It is submitted that only an alteration carried out in that manner could effectively and appropriately alter any fundamental right, much less the right to liberty as protected in section 13(3) of the Constitution.

[30] As a consequence of this ineffectual amendment, Queen's Counsel submits that the entire Act No. 13 of 2019 is void for being inconsistent with section 49 of the Constitution. The final submission regarding the unconstitutionality alleged in relation to section 5A of the amending Act, concerns the principle of the presumption of constitutionality, which rests upon the supremacy of the

Constitution and the express law-making powers of Parliament.[29] Expressed in at least one way, the presumption of Constitutionality, is such that the court is not concerned with the wisdom or policy considerations behind the enactment of laws by Parliament. Queen's Counsel for the Claimant acknowledges the presumption with reference to the following extract from **Noordally**[30]

> *"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."*

Counsel illustrates this position as being the same even where it pertains to an entrenched provision, by Lord reference to Lord Diplock **in Hinds et al v R**[31]

> *"…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.*

[29] The Constitution is the supreme law of Barbados – *section 1*; Parliament may make laws for the peace, order and good government of Barbados – *section 48*; Parliament may by an Act of Parliament passed by both Houses, alter the Constitution – *section 49* et seq.
[30] Supra
[31] [1977] AC 195

> *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."*

[31] Notwithstanding, this particular dispensation of the presumption of constitutionality, Queen's Counsel for the Claimant directs the Court's attention to the more current principle of 'proportionality' which assesses the relationship between the legislation passed and its intended purpose. This principle is illustrated by **De Freitas v Permanent Secretary**[32] in which a threefold test for determining the constitutionality of limitations sought to be imposed on fundamental rights, was accepted by the Privy Council. This test is in terms that:-[33]

> *"(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish that objective"*

[32] (1998) 53 WIR 131
[33] Ibid @ para 31

Queen's Counsel for the Claimant also referred to **Weel v Attorney-General of Barbados**[34] in which the Court of Appeal, citing with approval ***Rocket v Royal College of Dental Surgeons of Ontario***[35] approved what was ultimately the same test, therein articulated by McLachlin J, (also adopted by the Privy Council in *Surratt v Attorney-General of Trinidad and Tobago.)*[36] The difference in the approach adopted from ***Rocket*** and ***Surratt***, is that the reference to proportionality, appears by then to have become more crystallized.

[32] In carrying out the assessment of proportionality of the impugned amendment to the Bail Act in the instant case, Queen's Counsel for the Claimant commends the approach in **Huang v Secretary of State**[37] which requires the justification for the interference of the right to be convincingly established. As extracted from this case, the essence of the principle of proportionality, is that a fair balance has to be struck between the interests of society and with those of individuals and groups. The assessment to be carried out requires the Court to find that the limitation to bail in section 5A of the Amendment Act is in pursuit of a legitimate end; and that the limitation effected is proportionate to the that legitimate end.

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[34] (2011) 78 WIR 22
[35] [1990] 2 SCR 232
[36] *[2008] 1 AC 655*
[37] [2005] 3 All Er 435

Accepting, as provided in the preamble to the Amendment Act, that the purpose of the Act was for the maintenance of law and order, the Court would have to assess whether the limitation placed on the Claimant's right to bail was necessary to achieve that purpose.

[33] The argument on behalf of the Claimant is that based on the pre-existing provisions in the Bail Act, the amendment in terms of section 5A was excessive. Queen's Counsel for the Claimant's submission in that regard arises from an assessment of the pre-existing section 5, which already limits the right to bail in seven (7) prescribed circumstances. Further, a court is guided by a number of prescribed factors to take into account in deciding whether to grant or refuse bail. Queen's Counsel submits that the pre-existing provisions of section 5 of the Bail Act, provided a sufficiently wide basis to cater to restrictions to bail where appropriate. As a consequence, the additional restrictions imposed in relation to the named offences of section 5A were excessive and not capable of being justified.

[34] Further, the argument that section 5A lacks proportionality is also to be considered with reference to its apparent isolation of the offences therein as 'serious offences'. On the authority of ***Hurnam*** and ***Stephens***, the Court is at liberty to treat the seriousness of the offence charged as a relevant but not the determinative factor in deciding whether to grant or refuse bail.

Even further, Queen's Counsel for the Claimant asserts that the nature of the restriction in section 5A(2)(b) is such that the accused's right to the presumption of innocence is infringed. As stated in ***Stephens*** it is the prosecution's responsibility to establish that bail must be denied, and must never be the responsibility of an accused person to establish that he should be entitled to retain his liberty.

[35] The case for the Defendants rested primarily on the presumption of constitutionality, particularly in terms that the burden of establishing the unconstitutionality of an Act of Parliament rests upon a claimant. It was submitted that albeit admittedly containing an infringement on the right to liberty of a person charged with an offence, the section 5A amendment to the Bail Act was enacted in accordance with the express power of section 49 of the Constitution to alter a fundamental right.[38] Counsel for the Crown supported this argument by distinguishing the Jamaican authorities **Nation & Wright v Director of Public Prosecutions and Attorney-General (consolidated)**[39], in which two separate amendments to the Jamaican Bail Act were declared unconstitutional, on the basis that they were not passed in accordance with the required procedure to alter a fundamental right.

[38] Chapter III
[39] Jamaica High Court, Unreported Nos. 5201 and 5202 of 2010

[36] By contrast Counsel submitted, amendment No. 13 of 2019 was passed with the requisite two thirds votes of the members of the House as required by section 49(2) of the Constitution. Further, as evidenced by its preamble, the amendment also complied with section 49(6) of the Constitution, by stating as its intended purpose the alteration of section 13(3) of the Constitution. In response to the submission that the amendment was ineffectual as it amounted to a derogation from, as opposed to alteration to, the section 13(3) fundamental right to liberty; and accordingly ought to have been effected by a specific Constitutional amendment Act demonstrating the precise terms of the amendment to the right - Counsel for the Crown pointed to the plain terms of section 49(5)(b) of the Constitution which defines the meaning of references to *'alteration to this Constitution.'*

[37] In particular, Counsel referred to section 49(5)(b)(ii) which provides that '*alteration'* to the Constitution includes references to "*modifying it (whether by omitting, amending, or overriding any of its provisions or inserting additional provisions in it or otherwise*." As a consequence of this expansive definition therefore, Counsel submitted that there was no issue that could be taken in respect of any differentiation between *alteration versus derogation*, as the latter would in any event be included in '*modify*' or '*override*.' Counsel for the Crown also addressed the arguments in relation to the amendment

lacking proportionality and being in breach of the separation of powers principle.

[38] With respect to the latter, Counsel's position was minimalist insofar as he pointed out that the amendment merely imposes further conditions of which the Court must be cognizant, and the discretion whether to grant or refuse bail still remains with the judiciary. With respect to the issue of proportionality, Counsel for the Crown referred to the approach taken in **Weel v Attorney-General of Barbados.**[40] In particular, the two stage test referred to in the following terms:-

(i) Whether the infringement to the right had a legitimate aim; and

(ii) Whether the means used to achieve the aim were proportionate.

Again, the approach of Counsel for the Crown in addressing this issue was minimalist. Counsel invited the Court to take judicial notice of the prevailing social conditions regarding an increase in crimes involving the use of firearms; and that persons charged often commit further firearm offences whilst on bail.

[39] As a consequence, the legitimate aim of the amendment could be clearly justified in terms of protecting society and serving as a deterrent to offenders. Further, the fact of the increase in firearm and other serious crime should

[40] BB 2011 CA 16

signify to the Court that the Bail Act, as it stood prior to the amendment, was therefore not effective in the deterrence of the kinds of serious crime covered in section 5A, nor was it achieving the aim of protecting society. Additionally, given that the amendment does not totally restrict the liberty of the person charged but instead allows the Court at an early stage to consider the evidence, it is submitted that the amendment seeks to achieve its legitimate aims with the minimal infringement to the rights of the Claimant. The final response to be taken into account on behalf of the Defendant, pertains to the asserted breach of the Claimant's right to protection of the law.

[40] Also part of the complaint in this regard is a breach of the presumption of innocence to which the Claimant is entitled, occasioned by the requirement of the Claimant to convince the Court that he has a strong case in order to be granted bail. Counsel for the Crown's position was that the amended legislation does not require the Claimant to produce evidence to establish that the case against him is weak. Instead, the burden remains on the Prosecution to satisfy the judge that the case is a strong one, thereby disentitling the accused person to bail. Counsel likened the amendment to that in **Attorney-General of the Gambia v Jobe**[41] in which legislation containing a prohibition

[41] [1984] 1 AC 689

on the grant of bail save for a magistrate being satisfied of the existence of exceptional circumstances, was upheld as constitutional.

[41] Additionally, Counsel submits that ***Jobe*** goes even further, in that the Privy Council found that the Constitution (of Gambia) contained nothing that excluded a total prohibition on bail, provided that the person charged was brought to trial within a reasonable time. The parallel drawn to the legislation under review, is that the prohibition in relation to section 5A is similarly not absolute, as the judge still retains a discretion to grant bail if satisfied that the case is not a strong case. Also, that there is no assertion in the instant case that the Claimant has not been brought to trial within a reasonable time. As a consequence the Crown rejects the submission that the amendment in the form of section 5A, amounts to a breach of the Claimant's right to protection of the law.

(iii) The issues to be determined

[42] Following the arguments as extracted above, the precise scope of the Claim which requires determination by the Court is expressed in the following manner:-

(i) Did the mechanism of an ordinary Act of Parliament passed in accordance with section 49(2) of the Constitution, effectively alter section 13(3)(b) of the Constitution as intended?

(ii) If yes to (i) above, is the Court at liberty to determine whether the alteration to the Constitution, is itself unconstitutional?

(iii) If yes to (ii) above, what is the reason for such a finding – namely – (a) breach of separation of powers; (b) lack of proportionality; (c) breach of other constitutional rights?

(iv) If found unconstitutional, how is the unconstitutionality of section 5A to be resolved? Can it be severed, amended or otherwise modified to be brought within the Constitution?

D. Discussion and Analysis

(i) The mechanism adopted to alter section 13(3)(b)

[43] It is considered that this issue need only engage a technical legal interpretation of section 49 of the Constitution, which has been extracted at paragraph 6 above. The structural attack on Act No. 13 of 2019 as understood by the Court is firstly, that given that it fails to make any alteration to the actual text of the Constitution, no amendment of section 13(3) has taken effect.

As a result of this position, there is no certainty as to the manner in which, or the extent to which, section 13(3) has actually been amended. The effect of the vagueness and uncertainty surrounding the method of amendment attempted, is that the Act is incapable of affecting the fundamental right to

liberty in any way.[42] Further, that the manner in which alteration to the text of the Constitution ought to have been effected in order to constitute a valid amendment thereto, is as previously done by way of a Constitutional (Amendment) Act. Alteration by way of an ordinary Act of Parliament, albeit passed in the manner prescribed, could not be intended as a means to derogate from a Chapter III right.

[44] Queen's Counsel for the Claimant garnered support for this position by illustrating the inclusion of the express provision in section 13(1) of Trinidad and Tobago's Constitution which enables the alteration of fundamental rights by ordinary Act passed in accordance with that section. It is submitted that the absence of such a provision from Barbados' Constitution ought to be regarded as confirmation of the fact that alteration cannot be effected by means of an ordinary Act, such as attempted to be done by the Bail (Amendment) Act, No. 13 of 2019. The Court considers that on its face, the Constitution permits an alteration to its terms by means of an ordinary Act of Parliament passed in the manner prescribed by section 49. In particular:-

(a) **section 49(1)** prescribes the vehicle for alteration to the Constitution as an "Act of Parliament for that purpose passed by both Houses";

[42] Recalling Sykes J. in ***Stephens v DPP*** supra, that the right to liberty being such a high ranking right that any derogation therefore must be justified by very cogent reasons.

(b) **section 49(2)** which prescribes that the Act (in this case for alteration of Chapter III) must be supported by at least two thirds of members in each House;

(c) Further, as pointed out by Counsel for the Defendant, a reference to '*alteration*', as prescribed in **section 49(5)(b)(ii)** – includes a reference to *modifying* the Constitution, whether by *omitting, amending or overriding* any of its provisions. To place a limit on a right, even a fundamental right, falls within the definition of modify, specifically in terms of amending or overriding same. The imposition of a limitation on the section 13(3) right to liberty by means of section 5A of Act No. 13 of 2019 in the Court's view, falls within the ambit of section 49(5)(b)(ii) of the Constitution.

[45] Albeit the Court appreciates the illustration of the express provision in section 13(1) of the Trinidad and Tobago Constitution as being the means by which that Constitution can be altered by an ordinary Act of Parliament, the Court finds that the power to do so is likewise expressly authorised in the Barbados Constitution, except that it is so done by the cumulative effect of the provisions of section 49. With respect to the question of the effectiveness of the legislative vehicle applied, the Court acknowledges the clarity obtained by specific and express alteration to the text of the Constitution in the manner

carried out in the various Constitutional (Amendment) Acts. However, the power to modify in **section 49(5)(b)(ii)** goes beyond the scope of modification to the actual text of the Constitution. The permitted means of modification of the Constitution (in this case a Chapter III right) by 'amending' or 'overriding' a provision, in this Court's view, contemplates the mode of alteration carried out by Act. No. 13 of 2019.

[46] The effect of section 5A is modify the protections to the right to liberty contained section 13(3) by means of the restrictions imposed in respect of the grant of bail for the offences therein, and it is permissible within the terms of **section 49** of the Constitution. The wisdom of, or technical choice of drafting selected by Parliament as informed by the Executive, falls in the Court's view within the remit of the presumption of constitutionality, which still exists, albeit (as to be discussed further on), as limited by the principle of proportionality. Reference is made to the turn of phrase of Lord Diplock on the presumption of constitutionality as illustrated in the previously referenced **Hinds v R**[43]. The Court finds it apposite to apply that terse approach to the question of the methodology selected by Parliament, to effect an amendment to the Constitution, in this case section 13(3).

[43] Supra, per Lord Diplock @ 214

[47] The amendment in this case complied with the requirements for numerical votes needed to take effect as an alteration to the Constitution; as well as complied with the requirement to have specified in the Act itself, its intended purpose of altering the Constitution. Any question of validity of the Amendment Act, having regard to the wider question of conflicts with its subject matter vis-a-vis other principles of interpretation, or with other rights within the Constitution, fall to be separately determined. The first element of the challenge to the constitutionality of section 5A of the Bail Amendment Act, No. 13 of 2019 therefore fails.

(ii) Is the Court at liberty to determine whether the alteration to the Constitution is itself constitutional?

[48] The Court considers that not unlike the Crown's response, the average person might ponder how section 5A, enacted pursuant to a power granted by the Constitution and in accordance with the specific requirements prescribed by the Constitution for its enactment, could be questioned as to its constitutionality. The answer to that question would lie in the fact that in addition to the existence of the power to alter and the requirement to follow the specified mode of enactment, the constitutionality of the amendment also depends upon its legal effect relative to the Constitution itself. It is best to illustrate.

As discussed above, section 5A amounts to a restriction on the right to liberty as protected by section 13(3) of the Constitution. Queen's Counsel for the Claimant's argument was that the method of enactment of section 5A (by Act No. 13 of 2019) could only have been enabled by virtue of a like provision to Trinidad and Tobago's Constitution, section 13(1). That section says as follows:-

> *"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.*
> *(3)…"*

[49] As can be seen from this provision, subsection (1) permits inconsistency with sections 4 and 5 which are the sections which contain Trinidad and Tobago's fundamental rights provisions. Further, the method of enactment required is provided in subsection (2). Notwithstanding the express power granted by the Trinidad & Tobago Constitution to limit the fundamental rights contained in sections 4 and 5 by special enactment for that purpose, it is clear that such an

Act must nonetheless fall within the standard of being '*reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.*'[44] Should such an Act fail to conform to such a standard it would be unconstitutional notwithstanding having been validly enacted. It is therefore perhaps useful to state the position in terms that where alteration of the Constitution is concerned, the validity of such an alteration is both a matter of form and substance. A few judicial authorities should also assist the illustration of this position.

[50] In **Public Service Appeal Board v Maraj**[45] Lady Hale, delivering on behalf of the Board, noted that the reference to 'any law' being inconsistent with the Constitution includes the Constitution itself.

The case of ***Khoyratty*** provides a practical example and it is useful to examine the decision in some detail. ***Khoyratty*** has a history with **Noordally v Attorney General et anor**[46] in which latter case, a provision in the Dangerous Drugs Act (of Mauritius) denying bail to a person charged with committing certain drug offences, was struck down as unconstitutional. The basis of that finding was that the denial of bail, being an infringement on the constitutionally protected right to liberty, could not be effected by means of

[44] Section 13(1) of Trinidad & Tobago Constitution
[45] (2011) 3 LRC 616 @ para 26 - 29
[46] supra

an ordinary act of parliament. The Constitution of Mauritius was subsequently amended and a specific provision was inserted into it, (placed after what would be the equivalent to section 13(3) in Barbados). That insertion into the Constitution made provision for denial of bail in relation to certain drug and terrorism related offences. The denial of bail was absolute until the conclusion of the criminal proceedings. There was no discretion retained by the judiciary to grant bail in respect of offences caught by the amendment.

[51] In furtherance of that amendment, the Dangerous Drugs Act then made provision for the specific offences to which the Constitutional amendment applied. A magistrate in Mauritius declined to apply the provisions which denied bail and instead stated a question on the validity of the provisions, to the Supreme Court of Mauritius. The local courts struck down the constitutional amendment itself as unconstitutional, on the basis that it offended other provisions of the Constitution, primarily section 1, which provided for the separation of powers and required a referendum to be altered. This decision will be examined further below but it suffices at this point to demonstrate that an amendment to the Constitution can itself be struck down for inconsistency with other provisions in the Constitution.

Evidently the same will apply to an amendment to the Constitution effected by way of special Act of Parliament such as No. 13 of 2019. The Court will now examine the specific bases upon which it has been submitted that section 5A is unconstitutional.

(iii) Submissions on the unconstitutionality of section 5A

[52] Queen's Counsel for the Claimant presented the argument of unconstitutionality of section 5A on two limbs. The first, regarding the mechanism of enactment, has already been determined by the Court, in favour of constitutionality. The second limb alleges that section 5A is in any event unconstitutional on the following bases, which will be examined in turn:-

(i) breach of the separation of powers doctrine

(ii) lack of proportionality

(iii) breach of protection of the law

Separation of Powers

[53] It is not considered that the separation of powers principle needs much if any introduction. However, like many principles in constitutional law, even though widely spoken, it is not unfairly described as esoteric, somewhat abstract, or perhaps even abstruse. As a result, rather than extracting eloquent soundbites from the plethora of authorities which acknowledge and uphold

the status of the separation of powers as an entrenched norm of any democratic state, the Court will attempt to proffer a more relatable illustration. Literally, even we the legally trained, understand the concept of separation of powers in the general sense that in order to prevent abuse of power, maintain the rule of law, and preserve one's democracy – the powers and functions of Government should not be concentrated in or exercised by Government as a singular entity or authority. The powers and functions should be separate, with each branch of Government operating as a check and balance to the other. It suffices to point out that at no point in the Constitution of Barbados, is there any actual reference to 'the separation of powers.'

[54] Simplistically however, one can visibly point to the fact that within the Constitution, there is that deliberate scheme, whereby the powers of each arm of Government are separately and distinctly established.

The Legislature, in Chapter V; Executive Powers, in Chapter VI; and the Judiciary, in Chapter VII. Simplistically also, the Executive determines policy and is responsible for the general direction and control of the Government[47], whilst Parliament makes the laws for the order and good government of the people[48].

[47] Section 64(2) of the Constitution
[48] Section 48(1) of the Constitution

Given the electoral majority required to form the Government there is a recognized and acknowledged overlap between these two arms of Government. As pertains to the Judiciary's functions, given the importance of the exercise at hand, the Court will now revert to recognized authorities, from which to extract the relevant learning as to its powers and place within the Government. In delivering the lead judgment of the Privy Council in ***Khoyratty***, Lord Steyn, said of the judiciary's role in the midst of generally explaining the separation of powers[49] (emphasis mine):-

> *"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 and impartial judiciary..."*

[55] Lord Steyn also referred to the Board's unanimous decision in ***Director of Public Prosecutions of Jamaica v Mollinson***[50] citing Lord Bingham as follows:-

> *"Whatever overlap there may be under constitutions on the Westminister 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 hand is total or effectively so*.

[49] Khoyratty v Attorney-General of Mauritius supra, para 12 per Lord Steyn
[50] [2003] 2 AC 411 @ para 13

Still on the issue of the judiciary's role within the democratic system of government, Lord Steyn further referred to ***A v Secretary of State for Home Department***[51] at the instance of Lord Bingham once more:-

> *"…It is also of course true…that Parliament, the executive and the courts have different functions. <u>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</u>…"*

[56] Specifically with reference to the question of bail, Lord Steyn in ***Khoyratty***, continued his discussion on the issue of the constitutionality of the law withholding bail completely in relation to drug and terrorism related offences, as follows:-

> *"There is another aspect to take into account. The Supreme Court observed that decisions on bail are intrinsically within the domain of the judiciary. At the very least that means that historically decisions on bail were regarded as judicial…"*[52]

Lord Steyn would go on to uphold the Supreme Court of Mauritius' decision that the constitutional amendment which restricted the right to bail in relation to the specified category of offences was itself unconstitutional, as it offended

[51] [2005] 2 AC 68 @ para 42
[52] Khoyratty, supra @ para 14

the separation of powers entrenched by section 1 of Mauritius' Constitution. On the specific point of bail and the separation of powers however, the Court now moves on to the supporting judgment of Lord Rodger of Earlsferry, from ***Khoyratty,*** who expressed the desire to spell out the reasoning that led him to the same conclusion as Lord Steyn.

[57] After acknowledging the entrenchment of Mauritius as a sovereign democratic State by virtue of section 1 of the Constitution and as such the applicability of the separation of powers principle, Lord Rodgers said the following[53] of the amendment which removed the right to bail in relation to the specified offences[54]:-

> *"I have come to the view that section 2 of the 1994 Act did indeed purport to make a fundamental, albeit limited, change to this component of the democratic state envisaged by section 1 of the Constitution. The crucial problem lies in the absolute nature of section 5(3A). Where applicable, it would completely remove any power of the judges to consider any question of bail, however compelling the circumstances of any particular case might be…"*

[53] ***Khoyratty*** supra, para 30 per Lord Rodgers of Earlsferry.
[54] The Constitution of Mauritius was amended in 1994 by insertion of section 5(3A) after section 5 (which is the equivalent of Barbados' section 13(3)). This amendment provided for the denial of bail until the conclusion of criminal proceedings for persons charged with drug and terrorism related offences as were to be specified by separate Act. Such separate Act was subsequently enacted as the Dangerous Drugs Act 2000, which by section 32 prescribed those offences to which the constitutional amendment restricting bail, applied.

Also:-

> *"Unfortunately, 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 on 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] 2AC 294, 303."[55]

[58] The dicta above is intended to illustrate the grounding of the separation of powers argument in relation to bail - which is that the grant or refusal of bail is a matter of the exercise of judicial discretion. In the ***Khoyratty*** example, that discretion was removed from the judiciary and replaced by the preset legislative position in the constitutional amendment and Dangerous Drugs Act. More specifically, the removal of the Court's discretion to grant bail was viewed as a redistribution of judicial power into the hands of the Executive, as it is the Executive branch of government which institutes the criminal proceedings that give rise to issues of bail.

[55] Khoyratty, supra @ para 30 per Lord Earlsferry

Another example of a prohibition on bail struck down as unconstitutional on the basis of an infringement of the separation of powers principle, is the case of **Attorney-General of St. Lucia v Lorne Theophilus.**[56] Then Justice of Appeal Rawlins, established the constitutional grounding of the grant of bail as the right to liberty, expressed in the Constitution of St. Lucia, in similar terms to Barbados' section 13(3).

[59] The legislation under consideration[57] imposed a total restriction against bail in relation to persons charged with various kinds of serious offences, that in question being rape, punishable for life. Rawlins JA had no difficulty finding that the total restriction against the grant of bail in the legislation under consideration, was unconstitutional. On the way to that determination, Rawlins JA cited ***Hurnam*** with approval, particularly with respect to the grounding of the right to bail in the constitutional rights to liberty and the presumption of innocence. More so however, was Rawlins JA's acknowledgment of the competing interests arising from the constitutional rights, as on the one hand - the right and interest of the detained person to remain at liberty unless and until convicted of a crime deserving of a custodial sentence; against the countervailing interest of the community in ensuring that

[56] Eastern Caribbean Court of Appeal, No. 13 of 2005 per Rawlins JA @ paras 35-38.
[57] Sections 593(1) & (2) of the 2004 Criminal Code of St. Lucia

justice is served by the due prosecution of the accused without flight or other interference to the proceedings.[58]

[60] In relation to such competing interests, Rawlins JA stated that the resolution of such interests, is properly determined upon the exercise of a discretion by a court.[59] It was further highlighted, that by the terms of section 3(4) of the St. Lucia Constitution (similar but not identical to Barbados' section 13(3)(b)), the continued detention of a person to whom that section applied, was by its terms - 'save upon the order of a court'. In the absence of the discretion necessary to resolve the countervailing interests described above, and by removing the court's power to order continued detention by the total restriction on bail, Rawlins JA struck down that St. Lucia provision as unconstitutional.

[61] At this juncture the Court pauses to acknowledge what is quite clear in the instant case – the curtailment of bail in relation to firearms offences in section 5A is not absolute. There is no total prohibition on the grant of bail for firearms offences, and Queen's Counsel for the Claimant was quite aware of this difference as a distinguishing feature in the above cited authorities. The restriction in section 5A is not absolute, as a person charged becomes eligible

[58] AG v Theophilus, supra, per Rawlins JA @ paras 32-33.
[59] Ibid

for bail after the expiration of a period of 24 months (from the date of charge), or before the expiration of that period, where the judge is satisfied that the case against the accused person is not a strong one. On the basis of the availability of the grant of bail in these circumstances, Counsel for the Crown says that the case is more aptly regarded with reference to the authority **Attorney-General of the Gambia v Jobe.**[60] This case was referred to by counsel representing the state in ***AG St. Lucia v Theophilus***, but was rejected therein, because of the discretion retained by the judge in ***Jobe***, to grant of bail on the basis of 'exceptional circumstances.'

[62] For the very reason of the existence of the discretion retained by judges to grant bail in exceptional circumstances which was found in ***Jobe,*** Counsel for the Crown in the case at bar, says that the limitation on bail imposed by section 5A is not unconstitutional. Counsel says that the court retains the discretion to grant bail if satisfied that the case is not a strong one, and that contrary to the submission of Queen's Counsel for the Claimant, that process places no burden on the accused person to establish a weak case against him. Conversely Counsel says, the burden remains on the prosecution at all times, to satisfy the judge as to the strength of their case. Queen's Counsel for the Claimant

[60] [1985] LRC (Const) 556

however, says that it is misconceived to equate the discretion available in ***Jobe***, with the fetter placed on the court's discretion by section 5A.

There was no definition or limitation placed on what would amount to 'special circumstances in ***Jobe***, which meant that any number of relevant factors capable of amounting as 'exceptional', could be relied on by the Court to grant bail.

[63] In the case of section 5A, Queen's Counsel for the Claimant posits, that the effect of the discretion retained by section 5A, is that it condemns a person charged with the qualifying firearm offence, to 24 months in detention, unless that person is able to demonstrate that the prosecution's case is a weak one. It is submitted that this factor, as the only factor available to a person charged with a firearm offence to be granted bail, amounts to such an encroachment on the powers of the judiciary, as to offend against the separation of powers.

Queen's Counsel commends the Claimant's experience in his applications for bail before the High Court as a plain example of the manner in which the judicial discretion to grant bail has been eroded. According to the Claimant's evidence in support of his claim[61], he made several applications for bail but was unsuccessful as he was not afforded full disclosure and on the papers available, the judge stated that he was unable to grant bail due to the Claimant

[61] Claimant's affidavit filed on 25th August, 2020

not being able to demonstrate that he fell within the only factor available to him to be granted bail.

[64] Queen's Counsel submitted that the inability of the judge to have considered any other factor besides the single factor of the strength of the case as provided under section 5A, demonstrates the extent to which the judicial discretion had been eroded. On this issue of a residual discretion and the separation of powers, the Court refers to the case of **The State v Dlamini; Dadla; Schietekat; & Joubert**[62] from the Constitutional Court of South Africa. This case is in fact four separate appeals which concerned challenges to the constitutionality of the right to bail arising out of various circumstances pertaining to the four appellants. Relevant to the case at bar, are the appeals of ***Schietekat*** and ***Joubert***, which were appeals by the State, following upon provisions relating to bail having been struck down as unconstitutional. Those provisions arose from the statutory regime for bail, in which the court was required to conclude whether it was in the interests of justice to grant or refuse bail; and in coming to that conclusion, the criteria to be considered by the court were prescribed by the legislation.

[62] [2000] 2 LRC 239

[65] Additionally, persons charged with more serious offences, (of which the appellant ***Schietekat*** was one such person), were obliged to demonstrate that there were exceptional circumstances justifying their release.

The decision from which the State appealed, was to the effect that the legislation breached the separation of powers principle, as the State had in fact dictated to the judiciary, what criteria was to be taken into consideration in coming to a conclusion that the grant or refusal of bail was in the interests of justice. The finding of the Constitutional Court on this issue was as follows[63]:-

> *"Shortcomings in the drafting notwithstanding, it was clear that the subsections did not have the effect of commanding a court to come to an artificial conclusion of fact. On the contrary, their effect was to point judicial officers towards categories of factual findings that could ground a conclusion that bail should be refused. In short, through the sections, the legislature provided guidelines as to what were factors for, and what were factors against, the grant of bail. Such guidelines did not represent interference by the legislature in the exercise of the adjudicative function of the judiciary, but were a proper exercise by the legislature of its functions, including the power and responsibility to afford the judiciary guidance where such was regarded as necessary. Furthermore, the inclusion of a vague hold-all provision (s 60(8)(d) which allowed 'any other factor' to be taken into account when deciding whether the 'interests of*

[63] ***State v Dlamini*** et al supra, @ paras 267-269

> *justice' required that bail should be granted) indicated that a court could look beyond the factors listed in the impugned subsections and ultimately make its own evaluation.*
>
> *The impugned subsections were not intended to provide an exhaustive checklist of factors that were to be taken into account by a court and it followed that s 60(4)–(9) did not represent an unconstitutional encroachment by the legislature upon the powers reserved for the judiciary"*

[66] In addition to the above, the legislation was found not unconstitutional, as the court was required to give full consideration to the criteria but come to its own conclusion as to where the balance in relation to the grant or refusal of bail lay. Further, it was found that the legislation required that a full and inquisitorial hearing be conducted, and that the broad range of criteria prescribed, enabled the court to take factors other than only trial related factors into account. Contrary to the submission of the defendants, the Constitutional Court found that the discretion afforded by the legislation, albeit guided by the legislature, was a wide one which allowed for a true and proper exercise of discretion by the Court[64]. The State's appeal on this issue was allowed.

[67] The Court considers at this point that sufficient authorities have been examined which are pertinent to and clearly illustrate what lies in the balance when considering an asserted breach of the separation of powers principle in

[64] ***State v Dlamini et a***l, supra, @ 275 et seq.

relation to limitations placed on pre-trial detention or bail. The premise, is that the grant or refusal of bail, being a process that arises out of criminal proceedings, is a matter that has always been and remains vested in the hands of the judiciary. The right to bail, is underpinned by the Constitutional right to liberty, as well as the presumption of innocence, but is however not absolute. That the right to bail is not absolute, is clear from the Constitution itself[65] and authorities,[66] which show that the Executive as actioned by the Legislature, may make laws which restrict the circumstances in which bail may be granted; make laws which guide the factors to be considered in the grant or refusal of bail; or may even make laws which make it more difficult for persons charged with very serious offences to be granted bail.

[68] Given that this case (unlike the ***AG St. Lucia v Theophilus***, or ***Khoyratty***), does not turn upon there being an absolute prohibition on bail, it is necessary to ascertain the extent and effectiveness of the discretion that does remain, in order to determine whether there has been a breach of the separation of powers by the enactment of section 5A. Compared to the original section 5 of the Bail Act which remains applicable to offences charged outside of those prescribed by section 5A, the discretion of the judge to grant bail has been seriously

[65] Section 11 – the Chapter rights granted are subject to the limitations therein stipulated; section 13(3)(b) contemplates that a person may not be released before trial, but the balance to that deprivation of liberty is the right to be released if not tried within a reasonable time.
[66] ***AG for Gambia v Jobe; State v Dlamini et al***

eroded. In response to the Court's question, Counsel for the Crown was obliged to acknowledge that under the original section 5, the strength of the case against the defendant, was but one of many factors which the Court could consider in deciding whether to grant bail. Counsel was further obliged to acknowledge, that the strength of the case against the accused, was not the determinative factor in deciding whether or not to grant bail.

[69] In these circumstances, what is clear, is that the only discretion retained by a court in applying section 5A, is to take a view of the strength or otherwise of the case against an accused person, and that view cannot be formed, unless the judge is in possession of the material intended to be used by the prosecution at trial (disclosure). The Court considers in the final analysis that a discretion to grant bail does remain, but it is a discretion that is severely curtailed. The Court considers the position regarding the alleged breach of the separation of powers to be a very narrow one, as there is that small measure of discretion afforded by section 5A. The more relevant question in the Court's view, is whether the discretion is worth being termed such, when one considers the seriousness of the right to liberty, and the pre-existing discretion in the original section 5, which has been taken away. Such a determination however, is more a question of proportionality and not a breach of the separation of powers. On this note, the Court finds it convenient to segue into

its consideration of proportionality, in relation to section 5A. The finding at this juncture, is that as a result of there being a discretion retained by the court to grant bail (albeit slight), sections 5A(1) and (2) of the Bail Amendment Act, No. 13 of 2019, are not unconstitutional on the basis of infringing the principle of separation of powers.

(ii) Proportionality

[70] Queen's Counsel for the Claimant, commenced his submission on the principle of proportionality as it is now known in relation to the exercise of determining the constitutionality of legislation, with reference to the prior position stated by Lord Diplock in **Hinds et al v R.**[67] That statement was to the effect that in determining whether or not the provision of any ordinary law was inconsistent with the Constitution, the court was not concerned with the propriety or expediency of the law impugned. The only concern of the court, if the provisions of the law conflicted with an entrenched provision of the constitution, was to ensure that the law was validly passed by means of alteration of the entrenched provision, in the manner laid down by the constitution to do so.[68] Queen's Counsel submitted that the state of the law

[67] [1977] AC 195
[68] Ibid @ 214

has moved on, to the point where the court now scrutinizes the proportionality between the law passed and its intended purpose.

Queen's Counsel referred to a number of cases which put it beyond doubt, that the principle is an established one, which is properly applied to the case at bar.

[71] These cases are **DeFreitas v Permanent Secretary, Ministry of Agriculture etc[69], Weel v Attorney General of Barbados[70],** and **Huang v Secretary of State[71].** There was no account however, of the apparent movement from the position expressed by Lord Diplock in ***Hinds***, to what is now clearly treated as a general principle applied in constitutional interpretation. It is always useful to understand where and how principles originated and developed, so that they are correctly applied in relation to varying circumstances both factual and legal. Therefore, before attempting to examine the legislation before the court in relation to the principle of proportionality, a necessary starting point is for the Court to get a grasp, of from where and how the principle has derived, and precisely what it entails, so that it can be appropriately applied. In ***Hinds***, this Court would say that Lord Diplock's statements regarding courts in effect not looking behind the policy or rationale of any law passed

[69] [1999] 1 AC 69
[70] (2011) 78 WIR 22
[71] [2005] 3 All ER 435

by Parliament (there the Jamaican Parliament), were made with reference to the circumstance of the addition of new courts to a structure and hierarchy that was entrenched in the Constitution (the Judiciary Chapter) of Jamaica.

[72] In that context, Lord Diplock's statement is perfectly understandable, as it would have been entirely within the purview of the Executive and Legislature to seek to introduce changes to the court structure to address the serious gun crime issues in existence at the time. The concern of the court indeed, could only be that such a new court structure, or alteration of the existing and entrenched court structure, was legislated within the constitutional requirements to validly do so. One would have to surmise, that that statement in ***Hinds***, might not be so readily transferrable today, to the individual's right to liberty, as is under consideration in this case. In ***DeFreitas,*** the Court notes that what was under consideration was the right of freedom of expression as provided under section 12 of the Antigua and Barbuda Constitution, which right had built into it, the room for restrictions to be placed on public officers, but constricted to a prescribed standard of being reasonably required for the performance of the functions of the public officer, and reasonably justifiable in a democratic society.

[73] In ***DeFreitas*** therefore, the Court would observe that any observation or test for proportionality was not applied as a matter of general principle, it was applied as required by Constitutional right itself.

In ***Weel v Attorney General of Barbados***, the Constitutional right under consideration was similarly to that in ***DeFreitas***, the right of freedom of expression as guaranteed under section 20 of the Barbados Constitution. Not unlike the Antigua provisions, section 20(2) of the Barbados Constitution permits limitations on the right to freedom of expression. The limitations permitted, are subject to similar albeit not the same requirements, to those reasonably required for the purposes set out in sections 20(2)(a – c). In ***Weel***, the determination of constitutionality turned on the Court of Appeal's construction of what was 'reasonably required in the interests of public health', which is a standard emanating from the provision for the right itself (section 20(2)(a)). In seeking to find that meaning, the court applied the general principle of constitutional interpretation to broadly construe its provisions, in order to give effect to the constitutional right.

[74] This broad construction saw the court drawing from analogous words 'reasonably justifiable in a democratic society' as interpreted in cases from other commonwealth jurisdictions. ***DeFreitas*** was one such case, as was **Surratt v Attorney General of Trinidad & Tobago**, as well as Canadian

authority **Royal College of Dental Surgeons of Ontario et al v Rocket et al**[72].

The Court has already observed that the standard against which the interference of the right in ***DeFreitas*** was measured emanated from the right under consideration (section 12(4) of the Antigua and Barbuda Constitution). The case of ***Surratt*** from Trinidad & Tobago concerned an appeal by the State arising from the finding of unconstitutionality of a tribunal established under the Equal Opportunity Act 2000. The basis of finding of unconstitutionality was that the composition of the tribunal by lay persons offended against the separation of powers principle. Also, that the jurisdiction of the tribunal (to determine claims of discrimination alleged against the State), impinged upon the jurisdiction of the high court without a constitutional alteration to do so.

[75] It was held that the tribunal established under the EOA was not unconstitutional and Baroness Hale, delivering the majority decision on behalf of the Board, stated as follows[73]:-

> *"It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in ss 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. <u>These are both</u>*

[72] [1990] 71 DLR (4th) 68
[73] Surratt supra, @ para 58

> *qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance."*

A few observations must be made in relation to this authority submitted as it were, as illustration for the proportionality principle. The reference therein to proportionality must be viewed from the context of section 13(1) of the Trinidad Constitution, which permits derogations from fundamental rights by means of ordinary acts of Parliament, passed in accordance with the requirements prescribed therein. Further, the standard against which proportionality is adjudged is built in to section 13(1), i.e. that the purposes of any act passed in furtherance of section 13(1), must be shown to be '*reasonably justifiable in a society having proper respect for the rights and freedoms of the individual*.'

[76] There is no equivalent to that provision in the Barbados Constitution. In relation to ***Rocket*** from Canada, the Canadian Charter (Chapter III equivalent), has as its very first provision, (emphasis mine):-

> *"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits*

prescribed by law as can be demonstrably justified in a free and democratic society."

In **Huang et al v Secretary of State for the Home Department**[74], reference was made to the approach to proportionality articulated in **DeFreitas**, as having been derived from Canadian ***R v Oakes.***[75] In this latter case, the approach is plainly seen, but it derives entirely from the existence of section 1 of the Canadian Charter as extracted above. The purpose of the Canadian Charter's section 1 was stated to be to firstly guarantee the fundamental rights and freedoms therein, and secondly, to state explicitly the criteria against which any limitations on such rights must be justified. The standard of '*demonstrably justified in a free and democratic society*' is not replicated in Barbados in exact terms, nor in respect of all rights contained in Chapter III.

[77] The rights in ***DeFreitas*** and ***Weel***, were described by Baroness Hale in ***Surratt,*** as 'qualified rights' and this would be by virtue of the nature of limitations prescribed by the rights themselves. Further, there are built in standards against which to assess any limitation placed on those rights. The Canadian and Trinidadian Constitutions expressly prescribe[76] the standard of '*reasonably justifiable in a democratic society*' in relation to limitations on

[74] [2007] UKHL 11 @ para 19 (this was a case of appeal against refusal of leave to enter the United Kingdom and as such is not considered within the authorities relating to this issue of proportionality in constitutional interpretation).
[75] [1986] 1 SCR 103
[76] Section 13(1) Trinidad & Tobago Constitution; Section 1, Canadian Charter

fundamental rights across the board. This standard is not comparatively prescribed by way of general application to Chapter III rights in the Barbados Constitution, however there are instances in which certain rights as per ***DeFreitas*** and ***Weel***, are qualified with reference to the same standard of having to be '*reasonably justified*' for the various purposes limited by those rights themselves. In particular, the right under consideration - section 13(3) does not contain similarly expressed broad restrictions along with requisite criteria for justification of limitations. It is not considered that there is any express grounding within section 13(3), that gives life to the proportionality principle.

[78] Instead, what is broadly prescribed, is the qualification in section 11 to the effect that the enjoyment by the individual, of the rights thereinafter set out in Chapter III, is '*subject to the rights and freedoms of others, and the public interest'*. This qualification is what the Court considers to be the most appropriate basis upon which to broadly apply the principle of proportionality, outside of the specific standards contained within certain qualified rights, such as sections 19 and 20. The provision in section 11, speaks to the fact that enjoyment of the protected rights by the individual, has to be balanced against the rights of others and the public interest. As stated by Baroness Hale in ***Surratt***, whilst it is for Parliament in the first instance to strike that balance,

the courts may on occasion have to decide whether Parliament has achieved the right balance.

[79] Finally with respect to the appropriate grounding for the application of the proportionality principle, (in this case as pertains to the section 13(3) right to liberty), reference is made to **R v Oakes**, as despite the absence from Barbados' Constitution of the precise terms of the Canadian Charter's section 1, it is accepted that the exercise of balancing rights is a necessary and proper one, which is usefully informed by the approach taken by the cases identified above. The Court finds support for its position in paragraph 63 of ***Oakes,*** which starts the Supreme Court's consideration of the proportionality issue, by acknowledging the underlying premises of the exercise as being to ascertain whether the limits on the rights imposed by the law in question were reasonably justified, in light of the commitment to uphold the other rights and freedoms set out in the Charter.

[80] In addition to that premise, this Court extracts in full, the following statement, which can equally and forcefully be applied to Barbados, even without the precise terms of Canada's section 1, but within the terms of section 11 (emphasis mine):-

> *"64. A second contextual element of interpretation of s.1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on*

> *rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.*
>
> *65. The rights and freedoms guaranteed by the Charter are not, however, absolute.* ***It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."***

[81] In relation to the above extract from ***Oakes***, it is considered, that the elucidation of the values and principles of a free and democratic society, must be accepted, as embodying the values and principles of a society such as Barbados. In accepting the values and principles so stated, the last sentence extracted above concerning the need to limit rights and freedoms where their

exercise would be inimical to the realization of collective goals of fundamental importance, this last sentence, captures precisely what in this Court's view, section 11 means, in its qualification that the enjoyment by the individual of the rights and freedoms of Chapter III, is subject to the rights and freedoms of others, and the public interest. With this position and context now clearly established, the Court can now fully address the question of whether or not section 5A of the Bail Amendment Act, No. 13 of 2019 is proportionate to the objective of the law.

[82] The test is shortly stated in the following terms:-

(i) The objectives of the measures limiting a fundamental right must be of sufficient importance to warrant the interference with the right;

(ii) (a) The measures adopted must be carefully designed to meet the objective, in the sense that there is a rational connection between the measures and the objective;

(b) The means adopted should impair the right affected as little as possible; and

(c) There must be proportionality between the effects of the measures which limit the right and the objective, i.e. – the objective which is of sufficient importance.

[83] One would clearly have to begin by acknowledging that the right affected is that of the individual's right to liberty.

The legitimate objective of section 5A, can without difficulty, be accepted as that which is broadly defined in the preamble to Act No. 13 of 2019 as 'for the public interest' and 'to maintain law and order'. Even though stated in such broad non-specific terms, there is no need to question whether the objective of the Act is of sufficient importance as required by part (i) of the test and in any event, the presumption of constitutionality with respect to the objective would be appropriately applied. In relation to the further aspects of part (ii) however, the remainder of the test cannot be positively assessed with the same ease. Paragraph (ii)(a) requires there to be a rational connection between the objective and the measures adopted. The measures adopted in this case are that unless the court is satisfied that the case against a person charged is weak, the person charged with a firearm offence is precluded from obtaining bail for a period of 24 months. The question of rational connection in relation to the objective versus the measures adopted is more particularly interrogated in the following terms:-

(i) The assessment of the strength of a case requires the material upon which the prosecution intends to rely. The Court needs no formal evidence to accept that the provision of disclosure by the

prosecution is not generally available on the first to perhaps third or even fourth appearance of an accused person in court. In that regard, there is no evidence before this Court to answer the question begged, as to why the restriction of 24 months is tied to a factor which more than likely cannot be assessed at the earliest opportunity available to a person charged, to apply for bail;

(ii) The right infringed is the individual's right to liberty, which is perhaps second only to the individual's right to life. As stated by Sykes J in **Stephens v DPP**, given its place in the Constitution, the human right to liberty must not be restricted without very good reasons.[77] The broadly defined objective of the public interest and maintaining law and order take this Court no further in relation to a justification for the infringement of the section 13(3) right in the manner legislated. Given the weight of this right, the restrictions imposed should in the Court's view be justified with far greater particularity.

The Court would find relevant questions to be - What is the nexus between the restriction of 24 months and firearm offences? Is there some feature of the investigative process to which the 24

[77] Stephens v DPP supra, @ para 25

month period relates, for example intimidation of witnesses or corruption related tampering of evidence? Is there some statistical basis regarding repeat offending or recurrent charges for firearm offences within 24 months after an initial charge?

The Executive is entitled to its policies, but no material has been provided to the Court, which accounts for the relationship between the period of 24 months and the imposition of the restriction on bail unless capable of satisfying the single factor generally outside the control of the person charged;

(iii) Besides the limitation on the time period, the grant of bail is now dependent on the court being satisfied of the strength of the case against the defendant. As shown in ***State v Dlamini***, it is accepted that the grant of bail can be made more difficult[78] by limitations effected by legislation. However, in that case, the limitations were imposed in circumstances where there was an accompanying legislative obligation to effect trial within a short period of time[79]; there was a crime situation almost as debilitating

[78] **State v Dlamini** supra.
[79] Restrictions on bail were counteracted by the provisions of the Speedy Court Trials Act, 2002 which was instituted to give effect to the constitutional requirement for trial within a reasonable time.

as a civil war; and the restriction on bail was countered with a discretion to grant bail in 'exceptional circumstances.'

(iv) In the instant case, not only is the right to bail restricted with barely a sliver of judicial discretion retained in terms of the single exception provided, there is an indirect lack of timeliness sanctioned by the legislature, by virtue of the measure remaining in place for 24 months, if the person charged is unable to fall within the strength of case exception;

(v) Is there some evidence that the majority of persons charged with firearm offences fail to attend court for their trial, flee the jurisdiction, interfere with witnesses or in some other way seek to frustrate their criminal proceedings?

In the circumstances of the above, the Court finds that there is no rational connection apparent on the one hand, between the limiting measures of (i) the denial of bail for 24 months, and (ii) the restriction of factors available for consideration to grant bail to the singular factor of a weak case against the accused - to on the other hand, the objective of the measures which the Court accepts as being the maintenance of law and order, or even the need to reduce and control crimes involving the use of firearms. It has to be recalled, that bail, is not punishment.

[84] This point of rational connection in the proportionality test is illustrated with reference to a few authorities:-

(i) Queen's Counsel for the Claimant, referred to **Danielle St. Omer v Attorney-General of Trinidad & Tobago**[80], *inter alia*, as an example of the kind of evidence which ought to have been submitted by the Defendant in response to the claim that section 5A is unconstitutional. This case concerned a challenge to a temporary restriction on the right to bail for certain scheduled offences, which included any offence involving a firearm.

The right to bail was precluded for 120 days. The provision was struck down as inconsistent with the Constitution, but Queen's Counsel makes the point that in response to the challenge to the legislation, the State produced substantial evidence from Government officials pertaining to the reasons behind the its enactment. The point is made that in the instant case, there has been no attempt made by the Defendant to adduce

[80] TT 2016 314. NB, this decision was reversed on appeal, but on a basis other than that which had been advanced and considered in the court below. That alternative basis involved applying a principle of interpretation which allowed a 'reading down' of the impugned provision, to bring it into conformity with the Constitution. But for application of this principle as a means of saving the provision, the Court of Appeal stated that they agreed with the trial judge's categorisation of the impugned provision in its unaltered form.) See Civ. Apps Nos 350 & 351 of 2016, decided 8th March, 2019).

any evidence which explains or otherwise justifies the reasons informing the particular measures implemented.

(ii) The Court makes reference to **Allyson Major v Attorney General of Belize**[81] in which the constitutionality of an amendment to the Firearms Act of Belize was challenged. Section 6A of the Firearms (Amendment) Act, 2010 deemed all persons ordinarily resident at premises in which a firearm was discovered, to be in possession of the firearm, unless able to disprove the deemed fact of possession. Bail for firearm offences was prohibited save for exceptional circumstances.

During a search of premises, the police discovered firearms concealed in the exterior (yard) of the premises, which housed more than one dwelling. The claimant, an occupant of the premises, was not at home when the discovery was made, but there were workmen in the yard, whose presence along with a certain aroma, had attracted the police. The workmen were all arrested and charged for possession of the firearms, as was the claimant, even though he was not at home at the time the firearms were found in the yard.

[81] (2016) 90 WIR 136

The claimant was detained for 38 days before he was able to obtain bail and the charge was subsequently dismissed against him with no case to answer. The claimant brought an action declaring section 6A to be unconstitutional and for damages for breach of his rights to liberty and presumption of innocence. The provision was declared unconstitutional and the successful argument was that of proportionality.

The test argued was much the same as presently under consideration by this Court in the case at bar. The effect of the impugned section was that any person over the age of criminal responsibility, including minors and even elderly persons, would be caught by the net of the criminal liability attached to the person ordinarily resident at premises at which an unlicensed firearm was found.

In examining the proportionality of the legislation, the learned trial judge (then) Arana J. accepted the validity of the legislative objective in the following terms:-

> *"…the appalling increase in crime in Belize is such that the amendment needed to be passed in an effort to control firearm and ammunition related offences. No one, not even learned*

Defence counsel, can quarrel with the indisputable fact that the legislative objective is a valid one…"[82]

In answer to the additional questions as to the rational connection of the measures to the desired objective or the minimal interference with the rights infringed, the learned judge was unable to come to a conclusion in favour of constitutionality. Arana J. referred to the fact that she had perused the Hansard; referred to the example of a New Zealand authority[83] in which the scheme of the legislation itself made it evident that there was a detailed and methodological process which underpinned the offences prescribed in relation to possession of certain quantities of certain classes dangerous drugs.

In relation to the case before her however, Arana J said thus:-

"Alas, when I examine provisions of the Firearms (Amendment) Act in the case at bar, I cannot say that there is any rational connection between the lofty and indeed, essential legislative objective of reducing the prevalence of firearms and ammunition related offences, and the means used to achieve that objective. I have perused the Hansard to discern the reasoning of Parliament in passing the amendment but with the greatest of respect I do not see

[82] Major v AG Belize supra, @ para 27
[83] ***Paul Rodney Hansen v The Queen*** SC58/2005

> *anything which would lead me to find that this amendment was anything other than a spontaneous reaction to an admittedly terrifying, frustrating and vexing problem plaguing Belizean society.*
>
> *I would have been in a position to answer this question in the affirmative, and I would have gladly done so, if there were some evidence presented in this court by the Learned Attorney General, for example, that in passing this Amendment to the Firearms Act 2010, Parliament had taken into consideration comprehensive reports on offences involving firearms and ammunition related offences prepared by key players such as the Police, the Director of Public Prosecutions, Civil Society, Church and community leaders involved in the day to day fight against crime"*[84]

(iii) Reference is finally made on this issue of 'rational connection', to Eastern Caribbean Supreme Court decision **Attorney-General for Grenada v Ehsan.**[85] This case concerned, *inter alia*, a challenge to section 9(2)(b) of the Citizen's Act of Grenada, which permitted the Minister to revoke a person's naturalized citizenship and deport that person without a hearing, in the interests of national security. This course of action was taken against the claimant Ehsan, on the basis of information received as to him having terrorist connections.

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[84] Ibid @ para 29
[85] GDAHCVAP2019/0020

The claimant filed a constitutional claim challenging the validity of section 9(2)(b) of the Citizenship Act, of Grenada, as being inconsistent with the constitutional right to protection of the law. The section was declared unconstitutional on the basis, *inter alia*, of the application of the proportionality test as originated in ***R v Oakes,*** and adopted in ***DeFreitas v PS Ministry of Agriculture;***[86] ***and subsequently restated in Bank Mellat v HM Treasury (No.2).***[87]

The State appealed, asserting that there was justification for the acts of revocation and deportation on the basis of the highest interests of national security, which the court was not at liberty to question. The decision as to the unconstitutionality of the section was upheld, the high policy and interests of national security having to give way to the supremacy of the Constitution and the process for determining constitutionality.

The Court finds the dictum of Blenman JA quite instructive with reference to the case at bar, as the underlying government interests giving rise to the respective impugned provisions are similar. In ***Ehsan***, the interest was that of national security arising in

[86] Oakes & DeFreitas supra;
[87] [2013] UKSC 39

connection with a person alleged to have ties to terrorism. In the case at bar, the interest is also that of national security, but arising from crime control, particularly the incidence of serious firearm related offences.

There are several statements made by the learned Justice of Appeal which this Court considers to hit home with uncanny accuracy in relation to the case at bar. The Court apologises for over citing, but extracts extensively as follows:-

(a) In answer to the State's submission that the high interest of national security justified the action taken by the Minister and without nothing more ought to satisfy the presumption of constitutionality -

> *"In all of this, to be clear, I give full weight to the presumption of constitutionality, but I think that this in no way releases the legislation from the scrutiny of the court in order to ascertain its constitutionality."*[88]
>
> *"Concerns about national security are a legitimate interest of the State and restrictions on citizens' fundamental right are permissible, however they must be proportionate. Cognisance is paid to the fact that the application of the Oakes test should not be approached in a mechanistic fashion, rather, it should*

[88] Ehsan supra, @ para 73

be applied flexibly having regard to the factual and social context of each case, as was done in Bank Mellat"[89]

(b) The following is self-explanatory -

"I am of the considered opinion that although the response necessary to protect national security was a matter of political judgment for the Executive and Parliament, where fundamental rights are in issue, especially where they are buttressed by a written constitution, the court is required to afford them effective protection by adopting an intensive review of whether the fundamental right had been impugned. The court is not precluded by any doctrine of deference to Parliament from examining the proportionality of a measure taken which restricts a person's most fundamental rights, and therefore section 9(2)(b) of the Citizenship Act is called for close scrutiny"[90]

(c) On the manner in which the Court is expected to assess proportionality -

"Where the State asserts that the legislative response to the issue of national security is proportionate, it behooved the State to provide the court with evidence as to the policy, socio-economic and procedural reasons that undergird the draconian amendment to section 9(2)(b) of the Citizenship Act.

[89] Ibid @ para 77
[90] Ibid @ para 84

> *It is noteworthy and quite surprising that the State did not appear to adduce a scintilla of evidence from the requisite high officials in order to justify the invasion of persons fundamental rights by section 9(2)(b). Instead, the State relied upon the affidavit evidence of police officer Leroy Joseph who deposed that the State had received intelligence which indicated negatively about Mr. Ehsan…"*
>
> *"…With no disrespect intended to the police officers, it is strange, where there is a challenge to the constitutionality of legislative provision, for the person who provides the evidence to resist that attack to be a police officer who acted pursuant to the legislation. In my view, the State needed to provide evidence, apart from that of the police officer, upon which the State of Grenada could have relied to show that Parliament, at the date of enacting the legislation, showed fidelity to the relevant principles enunciated in Oakes. At the very least, a senior functionary, perhaps such as a Permanent Secretary, ought to have deposed to evidence which provided the policy reasons that influenced the introduction of the limitations imposed in 1984, to the Citizenship Act"*[91]

[85] The Court's advertence to the above authorities, is to demonstrate that the exercise of ascertaining whether a law is proportionate to its legitimate objective and so within its constitutional remit, is a forensic exercise, that is based on appropriate evidence and not a pro forma response that the Court

[91] Ibid @ paras 86-87.

need only look to what is apparent in the public domain. With respect to the case at bar, the Court has been afforded nothing, from which to make its assessment of proportionality, other than being obliged to take stock of prevailing social conditions in relation to the incidence of serious crime and gun crimes. To have regard only to information in the public domain, unsupported by facts, relevant policies or targeted strategies, is insufficient if not imprudent, given that what is in the public domain will be impacted by what crime is reported, how it is reported, and when reported, reactions will be based upon the magnification of understandable but heightened public emotions and fears.

[86] On the other hand, the persons to whom section 5A apply, are persons entitled to their liberty until convicted of their crimes, or unless deprived of that liberty in accordance with the Constitution. The Constitution itself, demands a reasoned and transparent process of balancing the rights of those persons on the one hand, against the rights of others and the public interest. In relation to this element proportionality of the law, there is a plain infringement of the right to liberty, there is a plain absence of any reasoned bases for imposition of the period of 24 months in which bail is precluded, and the restriction to the single available factor for consideration, being that the case for the prosecution being a weak one. It does not escape the Court's notice that

implicit in the exercise of prosecutorial discretion, is the need for there to be a reasonable prospect of conviction. To hinge the grant of bail to a person charged, to the single factor of the court being satisfied that the case is not a strong one, is therefore somewhat difficult to comprehend. The Court is unable to find, and has not been provided by the Defendant, with any rational basis for the enactment of the impugned provisions of section 5A.

[87] Paragraph (ii)(b) of the proportionality test requires that the measures adopted should impair the right affected as little as possible. In this context, the impairment of the right affected of a person charged with a firearm offence, can be measured by the difference between the regime of the original section 5 and the Amendment Act's section 5A.

(i) The original section 5, reflects what has been acknowledged as the normative position in relation to the liberty of a person charged with an offence. As stated in ***Noordally***[92], and affirmed in ***Hurnam***[93] in relation to a person charged with a criminal offence - *'…that the suspect's remaining at large is the rule: his detention on ground of suspicion is the exception…*'

[92][1987] LRC (Const) 599 @ 602
[93] Hurnam, supra, per Lord Bingham of Cornhill @ para 5.

In keeping with this position, when one examines section 5(1) of the Bail Act, a person charged with any other offence, (which would have included a firearm offence), does indeed start out from the position that their liberty is the norm. The Court is invited to depart from the norm, only in the circumstances prescribed in paragraphs (a) through (g).

(ii) Further, even where an accused person falls within one of the prescribed categories giving rise to a departure from the norm, the court is then obliged under section 5(2), to assess the factors therein prescribed in paragraphs 5(2)(a) through (e). These factors include factors relative to the personal circumstances of the accused person, the circumstances of the offence, and the conduct of the proceedings.

(iii) In relation to section 5A however, the position starts with the refusal of bail in relation to the offences listed in section 5A(1), for a period of 24 months from the date of charge. Thereafter, that position of refusal of bail is qualified by section 5A(2), whereby the court may grant bail, if of the view that the case against the accused person is a weak one.

(iv) Also in relation to section 5A, there is no other factor available for consideration other than the court being of the view that the case is a weak one. This means that the process of weighing factors with appropriate relevance to the person applying for bail is removed.

By way of example, under section 5, a defendant against whom there is a strong case, who has no prior convictions or arrests, is gainfully employed, the firearm is in custody, there are only police witness therefore no risk of tampering, would be considered a strong candidate for bail. Under section 5A, this defendant would no longer have the benefit of the pro bail factors outweighing the single factor against the grant of bail, and because of the strong case against him would be refused bail and detained for 24 months.

(v) Any person charged with a criminal offence, has available to them the possibility of moving the court under section 13(3)(b) of the Constitution, for their conditional or unconditional release where their trial is not heard within a reasonable time. What is or is not a reasonable time, is peculiar to each individual case. A charge of a firearm offence, albeit a charge for a serious offence, may nonetheless be a simple case, by virtue of straightforward, uncomplicated facts and a handful of police witnesses.

A reasonable time within which such straightforward case should be tried, will be much shorter than a reasonable time in relation to a complicated case, perhaps involving forensic evidence, multiple charges and multiple witnesses.

The straightforward firearm offence ought to be ready for trial well within 24 months (whether or not it can be accommodated with a trial date is not the issue.)

Because section 5A is enacted with the express purpose of limiting section 13(3) of the Constitution, the person charged with the straightforward firearm offence such as described above, caught within section 5A because there is a strong case, is unable to obtain bail in the first instance and will nonetheless be subject to the 24 month detention, when that person should have been entitled to be released under section 13(3)(b).

The Court considers, that having regard to the observations made above, there is a significant, as opposed to minimal impairment on the right to liberty affected, therefore this aspect of the proportionality test is also not satisfied by section 5A.

[88] The final limb of the proportionality test ((iic) as stated at paragraph 82 above), is the proportionality of the effect of the measures, relative to the importance of objective that is pursued. In order to ascertain the meaning of this limb of the test, the Court returns to ***R v Oakes*** as cited above.

According to ***Oakes***, the patent effect of the measure is of course the infringement of the right itself but the inquiry into its effects, must go further[94]. It was therein acknowledged that the effect of infringement of some rights is more serious than others; and the more severe the deleterious effects of the right infringed, the more important the objective must be in order for the measure to be justifiable. The effect in this case is the pre-trial loss of liberty possibly for a period of as much as 24 months on the basis of the category of offence charged; and without the benefit of consideration of any other factor relevant to release on bail, except one that is narrowly confined and outside the control of the person charged.

[89] In relation to the need to go further, the effects of the measures of section 5A as detailed in the assessment relating to the minimal infringement of rights, as discussed above, are equally relevant to this aspect of the test. The objective of the measure has been accepted as the maintenance of law and order (as stated by the legislation), or more particularly a desire to control serious crime involving firearms (viewed by the Court as fairly within its grasp as a prevailing social condition). To implement measures in furtherance of these broadly stated objectives, is no more or less that which is expected of the State.

[94] Oakes, supra @ paras 70-71

Given however, that the Court has already found there to be an absence of rational connection to these objectives, and that there is significant impairment to the right to liberty, it is difficult to envision how the Court could view the measures imposed as anything but disproportionate.

Protection of the Law

[90] In addition to the claim that section 5A of the amended Bail Act, is unconstitutional on the bases of the mode of its enactment and a lack of proportionality, it is also the Claimant's case that section 5A is unconstitutional because it conflicts with other constitutionally guaranteed rights of the Claimant, including the broadly recognised right to protection of the law under section 11(c) of the Constitution. The specific rights alleged to be breached by virtue of the enactment and operation of section 5A are the right to liberty and the right to the presumption of innocence. Upon any findings of breaches of specific rights, would rest the primary redress sought by the Claimant, which is that of damages. To a certain extent, it is clear, that a finding of unconstitutionality in relation to the enactment of section 5A, would bring with it breaches of the specific underlying rights to liberty and presumption of innocence, and depending on the view to be taken of its applicability in a case where there are specific breaches alleged and found, a breach of the protection of the law.

[91] The precise interplay, separate affirmation of, and if so, separate redress in relation to, the specific rights alleged to have been breached as a result of the unconstitutionality of the impugned section 5A, requires further deliberation and consideration by the Court. As such, this aspect of the Claim, is further reserved and will be separately decided and written. Until such time, given the immense importance to the public interest, the administration of justice and to an ongoing class of persons who stand to be affected, the Court affirms its oral decision pronounced on the 17th May, 2021, against the constitutionality of section 5A of the Bail (Amendment) Act, No. 13. Of 2019

E. The Fate of Section 5A

[92] Having been found to be unconstitutional, the question now arises as to what should or can be done, in order to preserve section 5A if possible, thereby giving effect to the presumption of constitutionality. As per Rawlins JA in **DPP for St. Lucia v Lorne Theophilus,**[95] that is the course of action that ought to be undertaken, before striking down a statutory provision that is found to be unconstitutional. The Court is obliged to determine whether the impugned provision can be brought into conformity with the Constitution by making reasonable adaptations, additions or modifications to it.

[95] Supra, @ para 39 et seq.

This approach is also echoed in Eastern Caribbean Supreme Court's **Attorney General for Grenada v Ehsan**[96].

[93] Throughout this decision, the Court has referred to the impugned provision as section 5A. That reference was for convenience in broadly identifying the provision under review. In truth however, there are two specific aspects of section 5A which were targeted as unconstitutional. The first is that part of section 5A(1)(d), which provides that a person charged with an offence under the Firearm Act punishable by imprisonment for 10 years or more…

> "*…shall not be granted bail unless a period of 24 months has expired after that person was charged."*

Thereafter, section 5A(2)(b) is the other part of the provision against which complaint is made…

> *"(2) Notwithstanding subsection (1), bail may be granted by the High Court where*
>
> *a. any person is charged with murder in circumstances connected with the discharge of that person's official duties;*
>
> *b. the court is of the view that the strength of the evidence suggests that the accused did not commit the offence with which he is charged; or…"*

[96] GDAHCVAP2019/0020 @ para 102

[94] In relation to the prohibition on bail for 24 months, this aspect of section 5A cannot be adapted, reformed, read down or otherwise amended to be brought within any semblance of constitutionality and has to be struck down. The prohibition on bail is one thing but the prohibition on bail for the period of 24 months cannot stand without that time period in itself having been justified and this has not been done. Once this part of the provision is struck down, the Court agrees with Queen's Counsel for the Claimant that everything else in section 5A, including applicability of the 24 month prohibition to the rest of offences in section 5A(1), must fall. It is also agreed, that the remainder of the section from subsections (2) to (7), is premised on the existence of section 5A(1) and structurally, they cannot stand on their own, if severed. Except for section 5A(3), the provisions of the remaining subsections are supportive, and can be otherwise effected in law, even in the absence of the express terms of statute.

[95] There is also the effect that structurally, applications for bail in respect of the four listed offences in section 5A(1) would revert to a Magistrate, as the amendment No. 13 of 2019 also repealed the original section 5(4) of the Bail Act, which restricted the grant of bail for those four offences, to a Judge of the High Court.

This original subsection 5(4) would have been repealed as it was provided for under the new section 5A(3). The Court considers it plain that the intention of the legislature was to remove the grant of bail for these four offences, from the Magistrate, to a Judge and there was no issue in that regard. This position by way of statute however, will be reverted, given that the Court finds that section 5A cannot be retained in any effective way. It is the Court's decision, that the entire section 5A must be struck down, on the basis that the offending portions which are unconstitutional, cannot be effectively severed, nor can the remainder of the provision be otherwise modified or amended to bring it into conformity with the Constitution.

F. Conclusion and Disposal

[96] The Claim before the Court sought a declaration that section 5A(1)(d) of the Bail (Amendment) Act, No. 13 of 2019 is unconstitutional, on the following bases:-

(i) The mode of alteration to the fundamental right to liberty as provided in section 13(3)(b) of the Constitution, by means of enactment of Act No. 13 of 2019 was not permissible, thereby rendering section 5A unconstitutional;

(ii) In the alternative, section 5A(1)(d) of the Amendment Act, is unconstitutional as it offends against the principle of the separation of powers; it is not proportionate to its objective; it is in breach of other constitutional rights of the Claimant, namely the rights to liberty and protection of the law (sections 11a & c); the presumption of innocence (section 18(2)(a)).

(iii) The Claim sought also an order releasing the Claimant on bail pursuant to section 13(3)(b) of the Constitution and damages for breaches of his constitutional rights.

[97] Following its consideration above, the Court has determined as follows:-

(i) The mode of enactment of the Bail (Amendment) Act No. 13 of 2019, for the purpose altering section 13(3) of the Constitution was permitted by section 49 of the Constitution and as such Act No. 13 of 2019 was constitutionally enacted;

(ii) Sections 5A(1)(d) and 5A(2)(b) of the Bail (Amendment) Act have as their aim, a legitimate objective of maintaining law and order and controlling serious and firearm related crimes. However, the measures imposed by the said sections 5A(1)(d) and 5A(2)(b) which restrict the grant of bail to persons charged with offences provided under section

5A(1)(d), have not been shown to be proportionate to the legitimate aim identified.

(iii) The specific portions of section 5A(1)(d) and section 5A(2)(b) cannot modified, nor can the remainder of section 5A be effectively severed from the portions identified as unconstitutional. As a result, the entire section 5A of the Bail (Amendment) Act, No. 13 of 2019 is declared unconstitutional.

[98] Following upon its finding as to the unconstitutionality of section 5A, the Court now addresses at least one specific order for relief prayed by the Claimant, which is the matter of his release from detention. On the 10th May, 2021, ahead of, but in anticipation of its ruling on the unconstitutionality of section 5A of the Bail (Amendment) Act, the Court made an interim order for the Claimant's release from detention. This interim order was made on the basis that in the absence of the 24 month bar to his continued detention, the Court was able to accept and consider certain facts within the circumstances of this case so as to secure his release pursuant to section 13(3)(b) of the Constitution. The matters leading to the Claimant's release are as follows:-

(i) The Claimant's assertion that he had no previous charges or convictions was not refuted by the Crown;

(ii) Given that the Claimant's release was prayed as part of the relief sought in the Claim, there was no evidence produced by the Crown which established any reason not to release the Claimant – namely –

(a) That there was any risk of flight. The Court accepted from the Claimant's affidavit that he has sufficient ties to the community and as such does not present a risk of flight. In any event the Court, takes note of the prevailing restrictions on travel due to the COVID-19 pandemic;

(b) There have been no allegations made (albeit an affidavit was filed on behalf of the Defendant by a Sergeant of Police), in relation to any fear or belief that the Claimant if released would tamper with any evidence or witnesses;

(c) In the face of the Claimant's asserted good character, there has been no allegations made of any fear or belief that the Claimant if released, is likely to commit further offences;

(d) Even if as has been implied by the prior refusals of his applications for bail, that the judge was satisfied that the case against the Claimant is a strong one, this factor alone is not a basis for the Claimant to remain detained pending his trial;

(e) Albeit, the release of the Claimant was prayed as part of his relief claimed, no indication has been made available by the Defendant as to the state of readiness of the Claimant's trial, or an expected trial date;

(f) The Claimant at present 19 years old is still susceptible to parental supervision and his parents have demonstrated their willingness to undertake duties as sureties and for the Claimant to reside with them for the immediate future;

(g) The Court will secure the Claimant's release with a bond and two sureties, along with other conditions governing his release, as set out by written order of the Court.

[99] In relation to the remainder of the Claim filed, the Court further reserves its ruling on the specific breaches to the Claimant's rights under sections 11(a), 11(c), 18(1) and 18(2)(a) of the Constitution, and in relation to the claim for damages for breach of such constitutional rights. The Court is grateful to and commends all Counsel for their time, patience and excellent research and submissions in this matter.

The partial disposal of the Claim is as follows:-

1. The Court declares that section 5A of the Bail (Amendment) Act, No. 13 of 2019 is unconstitutional notwithstanding that the enactment of the said Act was passed in accordance with section 49 of the Constitution of Barbados, as an Act to alter section 13(3) of the Constitution.

2. The Court declares section 5A of the Bail (Amendment) Act, No. 13 of 2019 to be unconstitutional on the basis that the restrictions imposed by sections 5A(1) and 5A(2) against the right of a person charged with an offence under section 5A(1)(d) to be granted bail have not been shown to be proportionate to any legitimate aim attributed to the enactment of section 5A of the said Act.

3. The Court further declares that section 5A of the Bail (Amendment) Act, No. 13 of 2019 is unconstitutional on the basis that the restrictions imposed by sections 5A(1) and 5A(2) against the right of a person charged with an offence under section 5A(1)(d) to be granted bail are without justification and as such are inconsistent with section 18(2)(a) of the Constitution.

4. Upon its finding of unconstitutionality, the Court is unable to amend or otherwise modify section 5A of the Bail (Amendment) Act, No. 13 of 2019 so as to bring it into conformity with the Constitution and as a

consequence the entire section 5A is struck down as being unconstitutional.

5. The interim order granted by the Court on the 10th day of May, 2021 securing the release of the Claimant pursuant to section 13(3)(b) of the Constitution is, subject to the terms and conditions contained in that order, made final.

SHONA O. GRIFFITH
Judge of the High Court