REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. P-085 of 2013
CV 2012-04052

BETWEEN

STEVE FERGUSON

APPELLANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

INTERESTED PARTY

CIVIL APPEAL NO. P-098 of 2013

BETWEEN

AMEER EDOO

APPELLANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

INTERESTED PARTY

CIVIL APPEAL NO. P-106 of 2013

BETWEEN

MARITIME LIFE (CARIBBEAN) LIMITED
MARITIME GENERAL INSURANCE COMPANY LIMITED
AND
FIDELITY FINANCE AND LEASING COMPANY LIMITED

APPELLANTS

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

INTERESTED PARTY

PANEL: **A Mendonça JA**
P Jamadar JA
G Smith JA

APPEARANCES:

Mr E Fitzgerald QC, Mr F Hosein SC, Mr R Dass, Ms A Mamchan instructed by Mr R Otway
on behalf of Mr Steve Ferguson

Ms S Chote SC and Mr V Deonarine instructed by Ms N Abiraj
on behalf of Mr Ameer Edoo

Mr M Beloff QC, Ms H Singh, Ms C Huggins instructed by Mr R Otway
on behalf of Maritime Life (Caribbean) Limited

Lord Pannick QC, Ms E Donaldson-Honeywell SC, Mr G Ramdeen, Ms Z Haynes and Ms S Maharaj instructed by Ms P Alexander
on behalf of the Attorney General

Mr A Newman QC, Ms E Donaldon-Honeywell SC, Mr S Parsad, Ms N Nabie, Ms Z Haynes and Mr R Chaitoo instructed by Ms P Alexander and Ms A Ramsook
on behalf of the Attorney General

Mr I Benjamin, Ms A Rahaman and Mr S Wong instructed by Ms N Jagnarine
on behalf of the Director of Public Prosecutions

DATE DELIVERED:

Wednesday 4th June 2014

I have read the judgment written by Smith JA.
I agree with it and have nothing to add.

A Mendonça
Justice of Appeal

Delivered by G Smith JA

JUDGMENT

INTRODUCTION

1. The criminal justice system in Trinidad and Tobago is in the process of undergoing critical and urgent reform. One of these reforms consists of a revamping of the process surrounding the hearing of Preliminary Enquiries. Parliament intended to repeal and replace the **Indictable Offences (Preliminary Enquiry) Act (Chapter 12:01)** (the Preliminary Enquiry

Act). This was an act that had been in existence since 1917 and had been modified up to 2011. The Preliminary Enquiry Act was to be replaced by the **Administration of Justice (Indictable Proceedings) Act, 2011 (Act No 20 of 2011)** (the New Act). The New Act was passed in December 2011 after much debate in Parliament and it received the assent of the President of the Republic of Trinidad and Tobago on 16th December 2011.

2. Although the New Act was passed in December 2011, it could not come into effect immediately. The machinery to effect some of the changes introduced by the New Act was not yet in place. So, for example, no Masters of Court had as yet been appointed to administer the Sufficiency Hearing which was meant to replace the Preliminary Enquiry. Therefore the New Act and/or certain parts of it were only to come into force upon proclamation by the President.

3. After some consultation, the government decided to implement one of the reforms as contained in section 34 of the New Act. This reform consisted of the introduction of a time limitation for the prosecution of certain criminal offences.

Following upon the approval of Cabinet, section 34 was proclaimed on 28th August 2012 and became law on 31st August 2012 (Independence Day).

4. Very soon after this, certain serious flaws in this new limitation provision became evident and the government decided to act urgently and decisively to repeal section 34.

5. Parliament was convened for a special sitting and by 13th September 2012 both Houses of Parliament had passed an act which repealed section 34. **This act was entitled the Administration of Justice (Indictable Proceedings) (Amendment) Act, 2012 (Act No 15 of 2012)** (the Amendment). The Amendment was passed with a special 3/5 majority in each House of Parliament pursuant to section 13(1) of the Constitution. The Amendment received the Presidential Assent on the day after it was passed, namely 14th September 2012.

6. The Amendment made it clear that it was being made retroactively; so much so that the Amendment deemed section 34 '***not to have come into effect***'.[1]

7. The Appellants are persons who would otherwise have benefited from the brief enactment of section 34 into law between 31st August 2012 and 14th September 2012. That is,

[1] The Amendment, s 5.

they would have been entitled to the benefit of the time limitations against prosecution for offences, had section 34 not been repealed retroactively by the Amendment.

8. The Appellants claim that the Amendment breached a plethora of constitutional and related rights and they brought a constitutional motion to challenge the validity of the Amendment.

9. The trial judge (Mira Dean-Armorer J.) dismissed the Appellants' motion and the Appellants have now appealed her decision.

10. For the reasons that will appear in this judgment, I would dismiss this appeal.

BRIEF HISTORY SURROUNDING THE AMENDMENT

11. It is necessary to set out some of the historical factors surrounding the Amendment so as to get a proper perspective for the arguments and decision in this case.

12. Sections 34(2) and (3) of the New Act purported to prohibit prosecutions for criminal offences after ten years from the date the offence was allegedly committed.

There were two exceptions to this ten year limit on prosecutions for criminal offences:

(a) Cases where an accused evaded the process of the court; and

(b) Certain offences as mentioned in Schedule 6 to the New Act.

13. Sections 34(2) and (3) created the prohibition as follows:

(a) In the case of section 34(2), there was a prohibition on instituting proceedings or commencing a trial in respect of an offence which had allegedly been committed more than ten years earlier.

(b) In the case of section 34(3), where proceedings had been initiated and an accused was committed to stand trial or ordered to be put on trial, an accused was entitled to apply to a judge who '***shall*** (...) ***discharge the accused and record a verdict of not guilty*** (...)' if the offence was committed more than ten years before the accused applied for such a discharge.

14. Section 34 became law on 31st August 2012. Soon after, certain fundamental flaws in respect of the enactment of section 34 were directed to the government's attention. These flaws were brought to the fore by inter alia:

(a) The public statements of the Director of Public Prosecutions (the DPP) in a press release;[2]

(b) Letters and discussions between the DPP and the Attorney General (the AG);[3]

(c) Articles in the press and commentary in all arms of the media; and

(d) Public outcry in the form of a demonstration and protests.

15. Some of the flaws were that:

(a) Very serious offences, some involving violence, were now going to be subject to the ten year limitation. Among these offences were terrorism, piracy, armed robbery, corruption, fraud and money laundering;[4]

(b) Certain notorious and complex pending fraud trials, like those involving the Appellants were now time barred;[5]

(c) Other probable and notorious and complex fraud matters which were still at the investigative stage could also become time barred;[6]

(d) No allowance was made for otherwise legitimate delays in prosecutions such as results from secretive criminal activity, lengthy internal and international investigations and mistrials;[7]

(e) No allowance was made for delays caused by an accused such as related and satellite proceedings (eg extradition proceedings, constitutional challenges and challenges of bias) which effectively stayed a prosecution (as is alleged in the cases of these Appellants);[8]

(f) Respective stakeholders were not in a state of readiness for the implementation of section 34;[9] and

(g) Public confidence in the criminal justice system could be eroded if the existing prosecutions against the Appellants came to an end without a trial.[10]

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[2] Exhibit RG 12 to the affidavit of Roger Gaspard.
[3] Exhibits RG 10 and RG 11 to the affidavit of Roger Gaspard.
[4] Para 25 of the affidavit of Roger Gaspard.
[5] Para 25 of the affidavit of Roger Gaspard.
[6] Para 16 of the affidavit of Roger Gaspard.
[7] Para 25 of the affidavit of Roger Gaspard.
[8] Para 25 of the affidavit of Roger Gaspard.
[9] Page 4 of exhibit RG 12 to the affidavit of Roger Gaspard.

16. The cases of the Appellants were used as a focal point for comment upon the flaws in the early proclamation of section 34.

17. The Appellants had been accused of serious multi-million dollar fraud in respect of the construction of the new Piarco International Airport in Trinidad. The acts of fraud were alleged to have been committed between 1995 and 2001. Prosecutions by way of Preliminary Enquiry (the Piarco Enquiries) had commenced since 2002. There were voluminous documents and lengthy witness examinations at the Piarco Enquiries. After about two hundred days of hearing, the Appellants had been committed by a magistrate to stand trial in respect of some of those charges in January 2008, but to date no indictments have been laid. The DPP was awaiting the completion of all the Piarco Enquiries before laying the indictments. During the course of the Piarco Enquiries there were contested extradition proceedings and other constitutional law challenges to the Piarco Enquiries. The challenges were hotly contested, some by very experienced English Queen's Counsel, all the way to the Privy Council. Generally, during those satellite proceedings, the Piarco Enquiries would either be stayed or adjourned over lengthy periods.

18. During the two week life of section 34, the Appellants had commenced proceedings to obtain a discharge and not guilty verdict in the Piarco Enquiry in respect of which they had been committed to stand trial. These proceedings were brought pursuant to section 34(3) of the New Act.

Other persons had done this as well, but it was the Appellants' cases that were used as a focal point for the discussion concerning the shortcomings in the early proclamation of section 34.

19. The government recognized and accepted that section 34 as proclaimed was flawed and decided to act swiftly and decisively to repeal section 34.

This was done by passing the Amendment by a special $^{3}/_{5}$ majority in each House of Parliament. The Amendment made it abundantly clear that it was reversing retrospectively the repercussions which ensued from the proclamation of section 34. This was achieved by the following provisions:

(a) Section 2 deemed that the Amendment came into force on 16th December 2011 (the same day that the New Act, which included section 34, was assented to).

[10] Page 4 of exhibit RG 10 to the affidavit of Roger Gaspard (letter to the AG dated 10th September 2012).

(b) Section 5 repealed section 34 and deemed that section 34 never came into effect.

(c) Section 6 voided all proceedings under section 34. This would have included the Appellants' pending applications to a judge for a discharge.

(d) Section 7 stated that '***no rights, privileges*** (...) ***or expectations***' were deemed to have been '***acquired, accrued, incurred or created*** (...)' under the repealed section 34.

Further, the Amendment was declared to have effect even though inconsistent with the fundamental rights provisions of the Constitution of the Republic of Trinidad and Tobago (the Constitution).[11]

20. The Appellants seek to have the Amendment declared unconstitutional. The trial judge entertained extensive argument from very experienced counsel and in a judgment of about one hundred and seventy pages, dismissed the Appellants' action. The Appellants now appeal against the dismissal of their action. They ask that the trial judge's decision be reversed because they allege that she made an error of fact and several errors of law in coming to her decision. I will detail and analyse these alleged 'errors' in the analysis which follows. However, as already mentioned, I state that after having heard extensive submissions on the matter over four days, I would dismiss this appeal.

ANALYSIS

21. In my analysis of the appeal, I will deal with the arguments presented under the following nine topic heads:

A. **There was no error of fact by the trial judge or any factual error that would affect the outcome of this matter** (paragraphs 22-37);

B. **Two settled constitutional law principles** (paragraphs 38-42);

C. **There was no breach of the separation of powers principle** (paragraphs 43-65);

D. **There was no infringement of the rule of law** (paragraphs 66-76);

E. **There was no breach of the due process protections of the Constitution** (paragraphs 77-84);

[11] The Amendment, s 4.

F. **If there was a breach of any due process protections contained in the Constitution they were not shown not to be reasonably justifiable** (paragraphs 85-99);

G. **There was no breach of any legitimate expectation** (paragraphs 100-107);

H. **There was no abuse of process** (paragraphs 108-111); and

I. **There was no populist pressure which would have any bearing on this case** (paragraphs 112-114).

A. There was no error of fact by the trial judge or any factual error that would affect the outcome of this matter

22. The context of the alleged factual error of the trial judge is as follows:

In dealing with the issue of whether the Amendment was not reasonably justifiable (see topic **F** referred to above), the trial judge applied a threefold test and made the following statement at paragraph 467 of the judgment (I will set out this statement in full because it was commented upon extensively by the Appellants):

> *In employing the three fold analysis, the Court was mindful of the undisputed evidence which had been filed. According to the uncontroverted evidence of the Attorney General the legislative objective which led to the enactment of the Amendment Act was the correction of an oversight on the part of the entire Parliament, in that section 34 as enacted and proclaimed provided for dismissal of charges for serious crimes.*

23. This was one paragraph in a judgment of 527 paragraphs. Earlier in the judgment, the trial judge had recited the Appellants' case. The trial judge then referred to several statements of the AG in:

(a) the Hansard Reports of Parliament; and

(b) the affidavits of the AG filed in these proceedings.

These Hansard Reports had gone in to evidence unopposed and as such the 'evidence' they presented was 'undisputed'. Further, the AG was not cross-examined on his affidavits, so that his evidence was 'uncontroverted'. Based on the Appellants' case as presented and the many statements of the AG, the trial judge (as she was entitled to do) preferred to rely on the statements of the AG and she accepted that the Amendment was enacted to correct an oversight by the entire Parliament.

24. The Appellants contended (in summary) that the true purpose of the Amendment was to deprive the Appellants and the other defendants in the Piarco Enquiries (the Piarco Defendants) of the benefit of having their cases terminated pursuant to section 34 of the New Act. In furtherance of this contention, they crafted an argument which, they say, showed that the enactment and proclamation of section 34 of the New Act was not an oversight.

25. These arguments and contentions were speculative, unbalanced and unfair and cannot displace the facts as found by the trial judge that the true purpose of the Amendment was to correct Parliamentary oversight. Further, even assuming that there was force in the argument that the Amendment was not passed to correct an oversight, the Appellants cannot displace the alternative assertion by the AG that the Amendment was passed to cure the flaws occasioned by the early proclamation of section 34.

26. In support of their argument, the Appellants relied on:

(a) the Hansard Reports;

(b) newspaper reports, some with statements by Ministers and other Members of Parliament; and

(c) other events surrounding the Amendment.

When examined with care these sources do not establish the argument that the Appellants seek to advance.

(a) The Hansard Reports

27. The Appellants cited numerous passages from the debates in Parliament concerning the New Act and the Amendment. These passages showed that Parliament knew of the situation of the Appellants and that they would have benefitted from the proclamation of section 34. The

Appellants were also mentioned many times when dealing with the Amendment which repealed section 34.

However, this showed that the cases of the Appellants were a focal point for the discussions concerning both the early enactment of section 34 and the reasons for the need to repeal it. The debates also made numerous references to the other serious issues raised by the early enactment of section 34 and of the need to repeal it. To rely solely on those parts of the debates which focused on the Appellants is to take an unbalanced view of the debates.

So for instance there were contributions on the following issues:

(1) In coming to the decision to repeal section 34, the government had considered the concerns of the DPP and others.[12] These concerns were already referred to above but because of the stress placed on this issue, they bear repeating at this stage but in a more summary manner:

   (a) Very serious offences, some involving violence, were now going to be subject to a ten year limitation;

   (b) Certain notorious and complex fraud cases would now be time barred;

   (c) An unknown number of notorious and complex fraud matters which were still in the investigative stages could become time barred;

   (d) No allowance was made for legitimate delays in prosecuting some complex and serious crimes;

   (e) No allowances were made for delays caused by an accused such as related and satellite proceedings which effectively stayed a prosecution (as is alleged in the cases of these Appellants);

   (f) Respective stakeholders were not in a state of readiness for the implementation of section 34;

   (g) Public confidence in the criminal justice system could be eroded if the Piarco Enquiries came to an end without a full hearing;

(2) Other serious fraud investigations and prosecutions might now be time barred;[13]

(3) Contributions from the AG that, in enacting the Amendment '***we are not legislating in relation to any particular application or any particular case***';[14]

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[12] Hansard 12th September 2012: page 21, line 12; Hansard 13th September 2012: page 28, line 8.
[13] Hansard 13th September 2012: pages 168 and 169, page 29, lines 18-23.
[14] Hansard 13th September 2012: page 184, line 24-page 185, line 6.

(4) The ten year limitation as enacted was inappropriate because it could excuse secretive criminal activity or complex cases;[15]

(5) The government had to protect the public interest;[16]

(6) The government could not support a bad law;[17]

(7) A mere amendment of the Schedule to include fraud trials was an unacceptable 'short cut';[18] and

(8) The early implementation of section 34 may not have been done with full consultation.[19]

These many contributions belie the allegation that Parliament's true purpose for enacting the Amendment was to deprive the Appellants of a section 34 defence. Certainly there were many reasons for enacting the legislation and to choose one of them in the circumstances of the cut and thrust of Parliamentary debate is necessarily to adopt an unbalanced and unfair view of the Parliamentary process.

28. In fact, the current thinking on source materials from Parliament such as Hansard Reports, is that they are of limited assistance to the courts in determining the intention of Parliament. They are useful as background material and are not to be treated as determinative of the intention of Parliament. A fortiori, in a case like the present where there are several competing and complimentary statements from Members of Parliament as to the mischief and purpose behind the legislation, it would be wrong for the court to engage in the process of assessing the relative strength and quality of the arguments advanced and then to choose one of these arguments as being determinative of the intention of Parliament. The courts are to have regard to the will of Parliament as expressed in the language of its enactments. The function of the court is to apply acts of Parliament; not to question them.[20]

At this stage I would take the liberty of referring to an apposite quote (though lengthy) of the principles just expressed from the case *Wilson v First County Trust Ltd (No 2)*:[21]

> ***I expect that occasions when resort to Hansard is necessary as part of the statutory 'compatibility' exercise will seldom arise.*** (...)

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[15] Hansard 13th September 2012: page 168, lines 4-12.
[16] Hansard 12th September 2012: page 33, lines 11-13.
[17] Hansard 13th September 2012: page 29, lines 17-25.
[18] Hansard 12th September 2012: page 23, lines 9-20.
[19] Hansard 13th September 2012: page 52, lines 9-22.
[20] Text to n 32.
[21] [2003] UKHL 40, [2004] 1 AC 816 [66]-[67] (Lord Nicholls).

Should such an occasion arise the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions.

Beyond this use of Hansard as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming

to evaluate the sufficiency of the legislative process leading up to the enactment of the statute.

29. Further to this, there is justification in the Hansard Report for the trial judge's assertions of the AG's affidavit evidence that the Amendment was passed to correct a Parliamentary oversight. In his contribution to the debate over the Amendment, the AG made reference to the fact that while the opposition was now criticizing the enactment of the New Act which included section 34, some of their members had voted for the New Act. They too were guilty of oversight since they were now commenting unfavourably on legislation which they had supported.[22]

30. Further, the AG alluded to the fact that the oversight also consisted of a failure to appreciate the consequences and implications of section 34.[23] Therefore, in the very Hansard Reports there was a case made out that the early proclamation of section 34 was an oversight by Parliament.

31. Another important factor raised in the Hansard Reports concerned certain debates after the Amendment was passed. On 26th October 2012 the Leader of the Opposition moved a motion in Parliament with the basic aim of censuring the AG for the early proclamation of section 34 contrary to certain undertakings he had given.[24] One of the major allegations was that the AG's actions were intentional and there was no oversight in the early proclamation of section 34.[25] There was much debate for and against the motion but in the end it was defeated by twenty five votes to eleven.[26]

Parliament in its collective wisdom absolved the AG of fault in respect of the early proclamation of section 34 and impliedly rejected the contention that there was no oversight in the early proclamation of section 34.

It would be quite anomalous for a court now to accept the contentions of the Appellants that the AG cannot be believed when he stated that the early proclamation of section 34 was an oversight. Further, the anomaly would be compounded if a court were also to proceed to accede to the Appellants' further contention that the real reason for the Amendment was to deprive the Appellants of a section 34 defence.

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[22] Hansard 13th September 2012: page 12, page 15, lines 17-27 and page 24, line 24-page 25, line 8; Hansard 12th September 2012: page 215, line 23-page 216, line 2 and page 25, lines 21-22.
[23] Hansard 12th September 2012: page 25, lines 22-24.
[24] Hansard 26th October 2012: page 6.
[25] Hansard 26th October 2012: page 10 lines 18-21.
[26] Hansard 26th October 2012: page 385.

(b) Newspaper Reports

32. In so far as the Appellants rely on the contents of newspaper reports to bolster their contention that the court should not accept the AG's statement that the Amendment was passed to cure an oversight, this is again an unbalanced view of the facts. Further, these reports are of very little relevance or assistance on this issue of fact.

The trial judge simply disregarded these reports in ascertaining the legislative intention of Parliament because they were inadmissible hearsay on issues on which journalists chose to focus attention.[27] The trial judge was correct to pay no regard to the newspaper reports in respect of this analysis.

33. The Appellants cited one report prior to the proclamation of section 34 and several reports between the proclamation of section 34 and its repeal. In some of the reports post-proclamation of section 34, Members of Parliament were quoted in respect of their views on specific matters concerning inter alia the Appellants.

The Appellants rely on these reports to show that it was public knowledge that the Appellants would have benefited from section 34 and as well that the Members of Parliament concerned did not wish this to happen. Hence they extrapolate from this that the true intention of the Amendment was to deprive the Appellants of their section 34 defence. This argument is tendentious and unbalanced for the following three reasons:

Firstly, the newspaper reports cited were necessarily selective and incomplete. They did not mention the other serious issues which the Parliament actually considered in relation to the Amendment. I have already referred to some of these issues in respect of the Hansard Reports of the Parliamentary debates above.[28] The newspaper reports cited by the Appellants did not deal with these other serious issues, they merely represented the specific preference of the journalists to report on issues which they chose. They did not reflect the 'intentions' of Parliament in a full and balanced manner.

Secondly, even if the reports only mentioned the Appellants' cases, their cases were being used as a focal point to demonstrate one of the flaws in the early proclamation of section 34. The fact that this was a focal point of attention by the press does not assist in deciding whether the early proclamation was or was not an oversight by the Parliament or indeed in

[27] Para 40 of the judgment of the trial judge.
[28] Paras 27 and 29-31 above.

deciding whether Parliament intended that the Appellants were the only true subjects of the Amendment.

Thirdly, insofar as the Appellants cite a newspaper article of 27th July 2012, namely an article before the proclamation of section 34 which suggested that the Appellants would benefit from section 34, this is of little relevance in determining the true intention of Parliament at the time of enacting the Amendment. Even if the public knowledge that the Appellants would have benefitted from section 34 could be attributed to Parliament at the time of the article, it does not follow that this is the same and only knowledge which must be attributed to Parliament at the later time of the Amendment. As I demonstrated above,[29] after the proclamation of section 34 on 31st August 2012, the public awareness, government awareness and indeed Parliamentary awareness of the issues surrounding the early implementation of section 34 had mushroomed dramatically. More specifically, the issues highlighted in the article of 27th July 2012 no longer represented the multifaceted issues that the public, the government and the Parliament had to grapple with at the time of the debates about the enactment of the Amendment. Therefore, the alleged public awareness with respect to the Appellants' cases at the time of the article of 27th July 2012 was of little relevance in respect of the 'intentions' of Parliament at the time of the Amendment.

The newspaper reports were correctly disregarded by the trial judge. They were not a true representation of the full intention of Parliament in enacting the Amendment.

(c) Other events surrounding the Amendment

34. The Appellants recited a full chronology of events from which they ask the court to infer that there was no oversight and that the true intention of the Amendment was to deprive them of their section 34 defence.

This argument is even more tendentious than the others. What Parliament 'knew' or 'considered' can be best garnered from the affidavit of the AG that bore directly on this question and perhaps from a consideration of the Hansard Reports. The AG represents the government, and the government also forms the majority of the Members of Parliament. In this light, the statements of the AG on affidavit must be given serious precedence in considering how the majority in Parliament considered any piece of legislation. Therefore the following statements in the AG's affidavit cannot be displaced by tendentious references to surrounding events:

[29] Paras 14, 15 and 27-31 above.

The reason why the Government introduced the Amendment Bill into parliament was a realisation that section 34 had far-reaching and untenable consequences which had escaped the attention of Parliament at the time of the Original Act's enactment (...)

The enactment of section 34 had been, in the Government's view an unfortunate error and oversight on the part of the entire legislature.

The Government introduced the Amendment Bill because it became clear that in enacting section 34 (...) *Parliament (the Government, the opposition and the independent members) had erred.*

The object of the Amendment Bill was to cure the much broader vice of section 34 (...) *The gravity of that vice had been brought to the 'public eye by application' by the Claimants and others to stay their prosecution, and retrospective avoidance of any pending applications was seen as a necessary incident of the Bill having retroactive effect. Yet the purpose of the Bill was general in nature.*

35. No other member of government or even an opposition Member of Parliament swore an affidavit to contradict or throw light on any statement made by the AG, nor was the AG cross-examined on his affidavit. The probative value of this evidence cannot be undermined by the attempted collateral attacks of the Appellants.

36. Further, as demonstrated above, the Parliamentary debates do not displace the allegations of the AG, nor do they establish that the true intention of the Amendment was other than to correct oversights and flaws in respect of section 34 and its early proclamation. As is usual in the cut and thrust of Parliamentary debate there were a host of viewpoints on the Amendment issue. To single out one of those viewpoints and to deduce that this represents the true intention of Parliament when there is an uncontroverted affidavit from the AG and numerous other viewpoints expressed in Parliament is to take an unbalanced and unfair view of the issue.

37. In all the circumstances the trial judge cannot be faulted for accepting the AG's contention that the Amendment was intended to be and actually was the correction of an oversight by the entire Parliament.

Even if one could argue that this case of 'oversight' was not properly established, there is no escaping the conclusion that the true purpose of the Amendment was to correct certain serious flaws in the enactment and proclamation of section 34 as opposed to the narrow and limited 'purpose' of depriving the Appellants of a section 34 defence.

B. Two settled constitutional law principles

38. It is useful at this stage to mention two fundamental constitutional law principles that are appropriate to this case:

(a) The presumption of the constitutionality of parliamentary enactments; and

(b) The limited function of a court in assessing the constitutionality of a parliamentary enactment.

39. (a) With respect to the presumed constitutionality of parliamentary enactments, a succinct quote that reflects the principle is to be seen in the Privy Council decision of *Grant v The State*:[30] '***It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one*** (...)'.

40. In the present matter the trial judge correctly applied the presumption of constitutionality and accepted the unopposed affidavit of the AG and the supporting statements of the AG and others in the Parliamentary debates and found that the Amendment was passed to correct an oversight. Alternatively, there is the inescapable conclusion that the Amendment was passed to correct the flaws in respect of the early proclamation of section 34. These two findings are consistent with the constitutionality of the Amendment and hence give substance to the presumption of constitutionality.

[30] [2006] UKPC 2, [2007] 1 AC 1 [15].

On the other hand, the Appellants attempted to discharge the 'heavy' burden of proving that Parliament acted unconstitutionally by advancing a case based on inferences. Inferences drawn from statements made in the cut and thrust of heated Parliamentary debate, from limited and unfocused newspaper reports and from tendentious presumptions from surrounding circumstances. This case of the Appellants, based as it is on inferences as opposed to the actual affidavit evidence and supporting Hansard Reports, cannot discharge the 'heavy' burden of proving that Parliament acted unconstitutionally in enacting the Amendment.

41. (b) With regard to the limited function of the courts in deciding on the constitutionality of a parliamentary enactment, I note that the principle is best reflected in two judgments of the Privy Council.

In *Suratt v Attorney General of Trinidad and Tobago*[31] Lord Bingham stated that the court, '(...) ***is not concerned with the propriety and expediency*** (of the impugned legislation), ***but only with its constitutionality***'.

In *The Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* Lord Nicholls stated that:

> (...) ***the courts will, if necessary, declare that an Act of Parliament inconsistent with a constitutional provision is, to the extent of the inconsistency, void. That function apart, the duty of the courts is to administer Acts of Parliament, not to question them.*** [32]

42. In this matter, as I have previously shown and will also demonstrate later in this judgment, the Appellants seek to have the court question the purpose, propriety and expediency of Parliament in enacting the Amendment. Even worse, they ask the court to do this examination based on inferences which are at best unbalanced and tendentious. Were a court to accede to this type of examination upon such evidence it would run afoul of the salutary principles which guide its interpretation of the constitutionality of Parliament's enactments and possibly find itself giving credence to the numerous unfounded and wild conspiracy theories that abound in the local public domain.

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[31] [2007] UKPC 55, (2007) 71 WIR 391 [23].
[32] [2000] 5 LRC 196 (PC) 208.

C. *There was no breach of the separation of powers principle*

43. The State exercises authority through three arms: the executive, the legislature and the judiciary. No arm of the State should usurp or illegitimately infringe upon the powers of another. This is the essence of the constitutional law principle of the separation of powers. It is a fundamental principle of the Constitution even though there is no written provision to that effect.[33]

44. The Appellants contend that the Amendment was an attempt by Parliament to usurp or wrongfully infringe upon judicial power. They rely on the principles which emerge from the seminal case of *Liyanage v R*[34] to launch this attack on the Amendment. For the reasons that will appear below, the case as argued must fail.

45. The proper starting point for this discussion is an examination of the *Liyanage* case. This case was an example of an egregious breach of the separation of powers principle. On 27th January 1962, an attempted coup d'etat was foiled. On 13th February 1962 the government of Ceylon issued a White Paper setting out, inter alia, the names of the conspirators in the aborted coup and the parts they played in it. These conspirators included the appellants in the case. The White Paper also recommended severe punishments for the conspirators. Following on the White Paper, the legislature eventually passed an act of parliament which was clearly aimed at the named individuals who had participated in the coup and were in prison awaiting their fate.[35] Their Lordships accepted that '***the pith and substance of*** (the enactment) ***was a legislative plan ex post facto to secure the conviction and enhance the punishment***' of the conspirators.[36] Importantly, the act was to cease to be operative after the legal proceedings in relation to the coup were determined. The act also retrospectively legalised the arrest and detention of the appellants, created offences ex post facto which related to the coup, altered the laws of evidence to facilitate the successful prosecution of the conspirators and imposed severe mandatory sentences on any convicted conspirator.

The act was struck down. It was a naked attempt to punish specific persons by usurping or wrongfully infringing on judicial power. As such, it was a breach of the principle of the separation of powers.

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[33] *Seepersad v A-G of Trinidad and Tobago* [2012] UKPC 4, [2013] 1 AC 659 [10].
[34] [1967] 1 AC 259 (PC).
[35] *Liyanage* (n 34) 289 [E].
[36] *Liyanage* (n 34) 290 [C]-[D].

Lord Pearce's judgment in *Liyanage* identified three indices of legislation which could usurp or wrongfully infringe upon judicial power namely:[37]

(i) legislation that is not directed to '(...) ***the generality of the citizens or designed as any improvement of the general law***'[38] (*ad hominem* legislation);

(ii) ex post facto or retrospective criminal legislation; and

(iii) legislation which directs a court to act in a specified manner in specified proceedings.

Lord Pearce also made it clear that the three indices were not necessary pre-conditions or requirements for legislation to be in breach of the principle of the separation of powers. '***Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation,*** (and) ***the situation to which it was directed*** (...)'.[39]

Therefore, even if one or more of the indices are present it will not necessarily mean that an act breaches the principle. Similarly, even if all three of the indices are not present, an act may still be in breach of the principle.

46. The Appellants contend that all three indices were present in the Amendment and as such it contravened the constitutional principle of the separation of powers. This contention is without merit. In any event, when one has regard to the true purpose of the legislation and the situation to which it was addressed, it becomes evident that the Amendment was not in contravention of the principle of the separation of powers. As stated above, the true intention of the legislation and the situation it addressed was to cure an oversight and/or to correct the flaws created by the early proclamation of section 34. There was no intention to usurp or infringe upon judicial power in this case.

47. I will now address the three indices mentioned by Lord Pearce and apply them to the facts of this matter.

(a) The Amendment was not *ad hominem* legislation

48. The historical example of *ad hominem* legislation is a bill of attainder, that is, legislation which inflicts punishment on a person or persons without a trial. The more detailed definition of *ad hominem* legislation refers to legislation that is not directed to the generality of the citizens or

[37] *Liyanage* (n 34) 289 [G]-290 [B].
[38] *Liyanage* (n 34) 289 [F].
[39] *Liyanage* (n 34) 290 [A].

is not designed as any improvement of the general law.[40] According to this general definition, many enactments may be *ad hominem* but they will not necessarily be in breach of the separation of powers principle. So, for example, legislation that is aimed at regulating the practice of certain professions such as engineering,[41] law,[42] and medicine[43] does not generally run afoul of the principle. Ad hominem legislation is objectionable where it has as its objective or purpose the usurping or wrongful infringing upon judicial power.

49. A good reference and comparison to the present appeal is to be found in the *Zuniga* case.[44] The parliament of Belize enacted new laws expanding the scope and punishment for contempt of court. The evidence in the case established that in proposing the bill to parliament, the government of Belize quite clearly had the appellants and certain other persons '***within its sights***'.[45] Further, the act was passed '***with the appellants and the interested parties in mind***'.[46] The act was meant to nullify certain arbitration awards made in favour of some of the appellants and to criminalize and impose harsh sanctions upon them if they tried to enforce the awards. Nevertheless, because the act (like the Amendment in this appeal) was drafted in general terms and did not apply only to specific individuals or arbitrations, it was held by the Court of Appeal of Belize and later by the Caribbean Court of Justice (which has replaced the Privy Council as the final appellate court of Belize) that it was not *ad hominem* legislation that infringed the principle of the separation of powers.

50. Similarly the Amendment in this case is not *ad hominem* legislation. I say so for the following four reasons:

Firstly, like in the *Zuniga* case and as the trial judge reasoned,[47] the Amendment itself was expressed in terms of general application. It was not confined to the Appellants or any other individuals or groups.

Secondly, the Amendment was drafted to apply to all persons or groups who may have benefitted from the section 34 limitation defence. No individual or group was to be exempted from the removal of the limitation provisions. Ironically, it is the Appellants who want to receive

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[40] n 38.
[41] **Engineering Profession Act Chapter 90:01.**
[42] **Legal Profession Act Chapter 90:03.**
[43] **Professions Related to Medicine Act Chapter 90:04.**
[44] *Zuniga v A-G of Belize* (2012) 81 WIR 87 (CA) and *A-G of Belize v Zuniga* [2014] CCJ 2 (AJ).
[45] *Zuniga* (2012) 81 WIR 87 (CA) [61].
[46] *Zuniga* (2012) 81 WIR 87 (CA) [63], [2014] CCJ 2 (AJ) [43].
[47] Paras 502 and 503 of the judgment of the trial judge.

individual treatment by claiming exemption from the Amendment so as to benefit from the section 34 limitation. In doing so they want the Amendment to lose the generality of its application.

Thirdly, it does not assist the Appellants to contend that the legislation was passed out of concern for their specific circumstances. Legislatures frequently and quite properly enact legislation to cure a mischief that is exposed by a specific case or cases; this is so with many tax statutes.[48] Once the legislation is drafted in terms that are general in scope and application, then it generally does not invoke the *ad hominem* prohibition.

Fourthly, with regard to the specific facts of this case, the Amendment was passed to correct an oversight of Parliament and/or to correct the flaws that were revealed in the enactment and early proclamation of section 34 (Parliamentary error). Even though the Amendment may also have had the Appellants in its sights (like the appellants in the *Zuniga* case) the Amendment was meant to deal with the larger vices created by the enactment and early proclamation of section 34 as stated in paragraphs 15 and 27 above. It was not directed to the specific Appellants, nor was it a temporary measure to terminate upon the prosecution of the Appellants (as in the *Liyanage* case).

51. While this is enough to deal with this argument, I will refer to an argument raised by the Appellants in furtherance of their case on this issue. The Appellants contend that sections 6 and 7 of the Amendment targeted them specifically, so that these two sections made the Amendment *ad hominem* legislation. This argument is of no merit.

52. As stated before, section 6 of the Amendment voided all proceedings commenced under section 34. Section 7 negatived any rights that may have arisen as a result of the proclamation of section 34.

53. These two sections were not specifically directed to the Appellants. I say so for the following two reasons:

Firstly, the cases of the Appellants were not the only ones that were voided by virtue of section 6. Neither were the rights of the Appellants the only ones negatived by section 7; in fact there were <u>at least</u> thirty five other pending cases affected by sections 6 and 7. Further, there were arguably, an unknown number of cases where prosecutions were not yet commenced to

[48] *National and Provincial Building Society (NPB) v United Kingdom* (1997) 25 EHRR 127 discussed more fully in para 74 below.

which the ten year limitation period would have applied by virtue of section 34(2); these may also have been affected by section 7.

Secondly, as in the *Zuniga* case, the terms of sections 6 and 7 were of general application and as stated before, were meant to be part of an act that caught all cases to which section 34 may have applied.

In any event, even if one could argue that sections 6 and 7 were enacted with '***the appellants*** (...) ***in mind***',[49] it does not in this case render these sections objectionable *ad hominem* legislation. As I stated before, legislation can quite properly be passed to cure a mischief that is exposed by a specific case or cases.[50] In the present matter the Amendment was enacted to correct Parliamentary error. It was not enacted with the purpose of infringing upon judicial power. The Appellants' cases were caught up in the mischief that was being corrected. In these circumstances sections 6 and 7 of the Amendment would not in any event be objectionable *ad hominem* legislation.

(b) Retrospective legislation

54. The *Liyanage* case identified retrospective criminal legislation as one indicia of legislation that may infringe the separation of powers principle. However, the *Liyanage* case also noted that the enactment of retrospective legislation is not in itself a breach of the principle of the separation of powers.[51] The law is replete with cases where this has been decided[52] even in the field of criminal law.[53] It is only where such retrospective legislation is in aid of or in the furtherance of the usurpation or wrongful infringement upon judicial power that it would be struck down as being in breach of the separation of powers principle. So, for instance in the *Liyanage* case the offending act of the parliament of Ceylon purported to legalise the arrest and detention of those appellants as well as to create offences retrospectively with the aim of facilitating the conviction of those appellants. The retrospectivity of that act of parliament was

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[49] n 46.
[50] Para 50 above.
[51] *Liyanage* (n 34) 289 [G].
[52] For example:
(1) *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 (SC Canada) [66-67] and [69];
(2) *Zainal bin Hashim v Government of Malaysia* [1980] AC 734 (PC);
(3) *Anthony Naide v Ceylon Tea Plantation Co Ltd* (1962) 68 NLR 558; and
(4) *R v Humby ex p Rooney* (1973) 129 CLR 231 (HC Australia).
[53] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (HC Australia).

all part and parcel of a naked attempt to usurp or infringe upon judicial power in relation to those appellants, hence it was struck down as being contrary to the separation of powers principle.

55. In the present matter, as I stated before, the Amendment was passed to correct Parliamentary oversight and/or a flawed piece of legislation. The retrospectivity of the Amendment ensured that no one was able to benefit from this flawed law. It was not in aid or in furtherance of an attempt by the legislature to usurp or infringe upon judicial power. The retrospectivity of the Amendment did not breach the separation of powers principle.

(c) A direction to a court in specific proceedings

56. It would be well to appreciate that there are two countervailing philosophies here. Whereas parliament is at liberty to exercise its legislative power so as to abrogate or alter rights and liabilities that would otherwise be subject to judicial determination,[54] it may not do so in a manner which usurps or interferes with the judicial process in specific proceedings.[55]

In the *Liyanage* case, the parliament of Ceylon specifically targeted the coup plotters as was seen in (a) the White Paper, (b) the existence of the legislation for only as long as the plotters would have been on trial, (c) the retroactivity of the legislation and (d) the imposition of severe mandatory sentences. The parliament virtually directed the court to deal harshly with the plotters.

This was not the case here. The Amendment was framed generally to catch all cases where section 34 would have applied. It was not *ad hominem* nor was it limited to a specific time frame. It was enacted as a result of a realisation and acceptance by the government that it had erred in passing a flawed piece of legislation.

57. The Appellants argue that the Amendment was a specific direction to the courts in pending court proceedings and hence was contrary to the separation of powers principle. This argument is without merit. I say so for the following two reasons:

(i) The Amendment was not intended as a specific direction to the courts in pending proceedings. It was, rather, a clear expression by the legislature of the extent and effect of the abrogation of the limitation period created by section 34; and

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[54] *Zuniga* [2014] CCJ 2 (AJ) [44] and *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 (HC Australia) 96-97.
[55] *Liyanage* (n 34) 290 [B] and *Zuniga* [2014] CCJ 2 (AJ) [44].

(ii) Parliament can and did affect vested rights in existing proceedings but not in a manner that contravened the separation of powers principle.

(i) A clear expression of legislative intent with respect to section 34

58. Parliament intended to abrogate the limitation defence created by section 34 both prospectively and retrospectively. The abrogation was to apply to all who could possibly benefit from it.

To achieve this retrospectivity, more specifically'(...) ***for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature***'.[56]

The bill to propose the Amendment was sent to a draftsman, namely the Chief Parliamentary Counsel[57] who, true to his mandate, produced the Amendment bill, which clearly manifested the intention of Parliament to repeal section 34 both prospectively and retrospectively.

59. Section 5 of the Amendment deemed that section 34 never came into effect. Section 6 voided all pending court proceedings for a discharge by a not guilty verdict under section 34(3). This applied to the Appellants and thirty five others who may otherwise have been able to argue that the Amendment did not affect them in clear terms.

Section 7 of the Amendment negatived any argument by those who may not yet have been charged that they could no longer rely on section 34(2) as a limitation defence.

There was clear language manifesting the intention of Parliament to abrogate the section 34 defence prospectively and retrospectively.

60. It would be useful at this stage to refer to the **Interpretation Act (Chapter 3:01)**, which gives expression to the principles of retrospective amendment just stated. Namely, that the clearest use of language is of paramount importance to achieve such retrospective repeal of legislation.

Section 27(1) of the Interpretation Act provides:

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[56] *bin Hashim* (n 52) 742 [C] (Viscount Dilhorne) (emphasis added).
[57] Para 39 of the affidavit of the AG.

> *Where a written law repeals or revokes a written law, the repeal or revocation does not, except as in this section otherwise provided, and unless the contrary intention appears*—[58]
>
> (...)
>
> *(b) affect the previous operation of the written law so repealed or revoked, or anything duly done or suffered thereunder;*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the written law so repealed or revoked;*
>
> (...) *or*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as mentioned above,*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the written law had not been repealed or revoked.*

61. Section 7 of the Amendment mirrors the provisions of section 27(1)(c) of the Interpretation Act to a significant extent. Sections 5 and 6 of the Amendment necessarily indicate a contrary intention to permit retrospectivity as provided for in section 27(1) itself and in sections 27(1)(b) and (e). The draftsman of the Amendment mirrored the intention of Parliament in language almost parallel to that used in the Interpretation Act.

62. Were the provisions of the Amendment not so clear, it may very well have opened the door to the Appellants and many others to defeat Parliament's intention by leaving open to them a limitation defence under section 34 in respect of all those cases ascertained and unascertained that may have pre-dated the Amendment.

[58] Emphasis added.

(ii) The Amendment affected rights in pending court proceedings but this did not contravene the separation of powers principle

63. The principle of the separation of powers is not necessarily breached by legislation which affects rights which may even be vested rights, in pending legal proceedings. It would be well to remember, as I stated at paragraph 56 above that there are two countervailing philosophies here, namely; whereas parliament is at liberty to exercise its legislative power so as to abrogate or alter rights and liberties that would otherwise be subject to judicial determination, it may not do so in a manner which usurps or infringes upon the judicial process in specific proceedings. It is for the court to determine whether the right balance has been struck between these competing philosophies. '[*E*]***ach case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation,*** (and) ***the situation to which it was directed*** (...)'.[59]

64. There is case law, even in criminal cases, where the balancing exercise produces results both for and against the validity of such legislation.[60] The trial judge made a lengthy analysis of such cases and I see no useful purpose in merely setting them out here. In conducting the balancing exercise on the facts of this case the trial judge appears to have been persuaded by her finding that the Amendment was not *ad hominem* legislation.[61] She was also guided by her finding that the wording of the Amendment was general in nature and as such there was no specific direction to the courts.[62] This too is an application of the *ad hominem* principle. In my opinion the trial judge's conclusions are not wrong. However, when I conduct the balancing

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[59] *Liyanage* (n 39).

[60] Examples of cases which validate legislation affecting rights in pending proceedings are:
(1) *Zuniga* (n 44);
(2) *Polyukovich* (n 53);
(3) *Nicholas v The Queen* (1998) 193 CLR 173 (HC Australia);
(4) *Australian Building Construction* (n 54);
(5) *NPB* (n 48).
(6) *bin Hashim* (n 52);
(7) *ex p Rooney* (n 52);
(8) *Naide* (n 52); and
(9) *Miller v French* 530 US 327 (2000).
Examples of cases which invalidate legislation affecting rights in pending proceedings are:
(1) *Liyanage* (n 34);
(2) *Buckley v A-G* (1951) 1 IRC 67;
(3) *Kenilorea v A-G* [1986] LRC (Const) 126;
(4) *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (HC Australia);
(5) *Scoppola v Italy (No 2)* (2010) 51 EHRR 12;
(6) *US v Klein* 80 US 128; and
(7) *Stran Greek Refineries v Greece* (1994) 19 EHRR 293.

[61] Paras 493-533 of the judgment of the trial judge.

[62] Paras 504-519 of the judgment of the trial judge.

exercise I am more persuaded by my findings in respect of the true intention of the legislation as suggested by Lord Pearce in the *Liyanage* case.[63] That is to say, even though the Amendment did affect the rights of the Appellants and several other persons in pending court proceedings brought for a discharge under section 34(3), this did not breach the principle of the separation of powers because the true intention of the legislature was not to interfere with judicial power but rather to correct Parliamentary oversight and/or a flawed piece of legislation. This was a lawful exercise of legislative power by the Parliament. As stated before, the Appellants failed to make out a case that the true purpose of the legislation was to deny them a statutory defence. Their argument that the Amendment breached the separation of powers principle because it affected their pending applications under the repealed section 34 must fail.

General Observations

65. In my opinion, the Amendment did not offend the separation of powers principle. This argument was the most potent one advanced by the Appellants. Many of the arguments on the other challenges raised by the Appellants were closely connected to this one and of necessity I will repeat or refer to my reasoning on this issue in relation to those challenges. But before moving on to them it is convenient to address an issue raised with respect to the authorities cited.

The Appellants argue that the Trinidad and Tobago courts should exercise caution in relation to cases cited from other jurisdictions especially those which have a federal constitutional arrangement. In fact, one of the Appellants even suggested that we should pay little or no heed to the Australian authorities since they tend to place little reliance on jurisprudence from the Commonwealth Caribbean. With greatest respect, this argument is of no moment, especially so with respect to the separation of powers principle. I say so for the following five reasons:

Firstly, the 'foreign' authorities referred to are not binding on this court. They are, at best, persuasive. They can assist in examining and comparing points of principle and reasoning.

Secondly, the Australian jurisprudence on the separation of powers principle, like that of Trinidad and Tobago, was developed outside of any written reference to the same in the respective constitutions and can be of assistance to us.

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[63] *Liyanage* (n 34) 290 [A]-[B].

Thirdly, in this area of law, as *Liyanage* suggests, each case must be decided on its own facts. Therefore, any 'foreign' cases can only at best be cited as examples of how the doctrine was applied and cannot bind us in any way.

Fourthly, it is passing strange that even the Appellants have referred us to cases from Australia, Canada, the United States of America and the European Court of Human Rights (the European Court) in their submissions. It would be quite odd for us to reject these cases when considering their submissions.

Fifthly and most recently, the Caribbean Court of Justice in the *Zuniga* case, a case from Belize which has a similar constitution to Trinidad and Tobago, rejected a similar submission with respect to the use of Australian cases at the Caribbean Court of Justice.[64] I endorse this decision for the reasons therein stated.

D. There was no infringement of the rule of law

66. The rule of law as applied in a constitutional law framework is a concept that requires the power of the state to be exercised through legitimate as opposed to arbitrary channels. Like the separation of powers principle, it is not specifically written into the Constitution of Trinidad and Tobago. Traditionally, it is a principle of limited application requiring '(...) ***that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text***'.[65] '***The rule of law is not an invitation to trivialize or supplant the Constitution's written terms***'.[66]

67. When these general principles are applied to the present case, it is difficult to see how the concept of the rule of law can have any relevance in this matter. The Amendment was passed with a special ⅗ majority of each House of Parliament as required by the Constitution. Parliament exercised its power to repeal section 34 in a legitimate and constitutional manner. This was done in conformity with the traditional concept of the rule of law.

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[64] *Zuniga* [2014] CCJ 2 (AJ) [45].
[65] *Imperial Tobacco* (n 52) [67].
[66] n 65.

68. The Amendment goes contrary to the wishes of the Appellants but the rule of law is not '(...) ***a tool by which to avoid legislative initiatives of which one is not in favour***'.[67] The Amendment was legislation properly and constitutionally enacted and the words of the *Imperial Tobacco* case echo hauntingly here, namely, '(...) ***in a constitutional democracy*** (as in Trinidad and Tobago), ***protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution but in its text and the ballot box***'.[68]

69. More recently, certain cases from the European Court have put an expanded meaning on the concept of the rule of law. I am unsure whether these concepts will apply to, or override the traditional understanding of the principle but I will consider the concept as expanded upon by the European Court and its application to the present matter.

70. The Appellants cite three cases from the European Court which have decided that respect for the rule of law finds expression, inter alia, in Article 6 of the **European Convention of Human Rights** (the Convention). Article 6 of the Convention secures a right to a fair trial. As part of this concept of the rule of law and the notion of a fair trial there is a resulting principle that it may not be proper for a state to enact legislation that affects the outcome of pending court proceedings in its favour.

71. In so far as the principle which limits state interference in pending court proceedings is derived from Article 6 of the Convention regarding the right to a fair trial, the principle is founded upon the express wording of the Convention. It is arguable that the European Court is giving effect to the Convention and not to some amorphous constitutional doctrine.

72. Further, as Mr. Beloff (one of the Counsel for the Appellants) submitted, there is no equivalent doctrine of separation of powers in the jurisprudence of the Convention. Included under the separation of powers doctrine is a parallel principle as is being currently advanced, namely that it may in some circumstances be contrary to the separation of powers for parliament to enact legislation that affects existing rights in pending proceedings (and see paragraphs 63 and 64 above for that discussion).[69] The concept of the rule of law has been used to advance the same principle as has been advanced under the principle of the separation of powers in the Trinidad

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[67] n 65.
[68] *Imperial Tobacco* (n 52) [66].
[69] See also the cases at n 60.

and Tobago constitutional law setting. In fact, I made reference to the two main European Court cases in that discussion. Nevertheless, because of the novelty of the argument, I will consider the three cases cited by Mr. Beloff.

73. In *Stran Greek Refineries v Greece*,[70] an arbitration award in favour of *Stran* was challenged by the Greek state. While those proceedings were pending, the Greek state enacted a law which made that particular arbitration award unenforceable. The law referred specifically to contracts made by the Greek state during a specific period only, and nullified all arbitral and other awards arising from those contracts. Like the *Liyanage* case, this law was *ad hominem* legislation. The law was meant to nullify contracts awarded by a former military regime which the new government felt should not be honoured and specifically, to stymie the arbitral award in question. The European Court held that the law was contrary to the rule of law as expressed in Article 6 of the Convention. As I have already stated, in the present appeal the Amendment was not *ad hominem* legislation. Further, its true purpose was to deal with Parliamentary oversight and/or flawed legislation. On these grounds, the *Stran* case is materially different from the present appeal.

74. By contrast, in the later case of *National and Provincial Building Society (NPB) v United Kingdom*,[71] the European Court decided that Article 6(1) of the Convention cannot be interpreted to prevent any interference by authorities with pending legal proceedings to which they are a party. The facts of that case reveal a situation which is similar in many respects to the present appeal. Certain regulations which made changes to the system of tax had been held to be invalid in judicial review proceedings brought by the Woolwich Society. To plug the loophole created by this decision, the UK government passed an act which retroactively validated the tax system save with respect to the Woolwich Society. The act also extinguished all the remaining and pending judicial review proceedings of the appellants. Relying on the *Stran* case, the appellants argued that it was contrary to Article 6 of the Convention for the government to pass legislation which interfered with the pending court proceedings to which the government was a party such as to make their cases unwinnable. That argument was rejected. The European Court paid regard to the true purpose of the legislation, which was to secure the payment of the relevant tax by building societies amounting to about fifteen billion pounds. The collection of this tax was also a

[70] n 60.
[71] n 48.

compelling public interest reason to validate the retrospective effect of the law. As in the present appeal, the true purpose of the act and the public interest element in the legislation overrode the personal benefits that the appellants sought to achieve.

75. In *Scoppola v Italy*,[72] the appellant had been found guilty in a summary trial of murder and attempted murder under the Criminal Code. At the trial he received a life sentence which upon a summary conviction was converted to a sentence of thirty years imprisonment. On the date of his conviction the law was changed by legislative decree which made the sentence, even on a summary trial, one of life imprisonment. The prosecution then appealed the appellant's sentence and he was sentenced to life imprisonment. The European Court held that the legislative decree was in violation of Articles 6 and 7 of the Convention. The Italian state failed to discharge its objective to grant the appellant the benefit of a more lenient penalty to which he had a legitimate expectation.

Apart from its confirmation of the *Stran* and *NPB* cases, the *Scoppola* case is of little assistance to the present appeal. *Scoppola* was a case where legislation interfered with the process of sentencing in a criminal matter. Sentencing is a particular judicial function.[73] Encroachment on the sentencing functions of the judiciary has been held to be a breach of the separation of powers principle.[74] In the present appeal there has been no encroachment on the judicial power of sentencing. In fact, because of the repeal of section 34, the power of the courts to sentence the Appellants for a possible infraction of the law has now been restored.

Further, arguments in *Scoppola* were more focused on the doctrine of legitimate expectation and the decision did not squarely address the relevant issues in respect of the true intention and purpose of the legislation in question.

76. As I have already stated, the traditional concept of the rule of law cannot invalidate the constitutionally enacted Amendment. However, assuming that it might possibly do so, the European Court cases which assert that it may be contrary to the rule of law for the legislature to interfere in pending court proceedings to which the state is a party, have mirrored a similar principle that has been advanced under the separation of powers doctrine. Further, the European cases also mirror the parallel discussion already advanced and would in my view produce the

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[72] n 60.
[73] *DPP v Mollison* [2003] UKPC 6, [2003] 2 AC 411 and *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539 (HL).
[74] *Liyanage* (n 34) and *Mollison* (n 73).

same result, namely, that on the facts of the present appeal the Amendment does not breach either the principle of the separation of powers or the concept of the rule of law because (1) it was not *ad hominem* legislation; and (2) the true intention of the Amendment was to address Parliamentary oversight and/or a flawed piece of legislation, which purpose overrode the personal benefits that the Appellants sought to achieve.

E. There was no breach of the due process protections of the Constitution

77. Section 4(a) of the Constitution (section 4(a)) recognizes the right of life, liberty, security of the person, enjoyment of property and the right not to be deprived thereof except by due process of law.

The Appellants have sought to argue that the Amendment is an interference by the legislature with their section 4(a) rights contrary to the due process protections contained therein.

However, it must be stated from the outset that this argument is academic in nature because of the provisions of section 13 of the Constitution and its application to the Amendment.

Section 13 of the Constitution validates legislation which is otherwise inconsistent with the fundamental rights and freedoms protected by sections 4 and 5 of the Constitution once it is passed by a special $^{3}/_{5}$ majority in both Houses of Parliament.

In the present appeal the Amendment was passed with the special $^{3}/_{5}$ majority and in the manner specified by the Constitution. Therefore, even if the Amendment contravened the due process protections of section 4(a) of the Constitution, that of itself would not invalidate the Amendment.

Nevertheless, in deference to the industry and time devoted to this argument by Counsel and by the trial judge, I will analyse this argument but in a more summary manner than the trial judge.[75]

78. The 'due process of law' has been aptly described as a '***compendious expression***'.[76] It has been stated and restated in different ways by different courts. In fact, the trial judge devoted

[75] Paras 339-362 and 413-435 of the judgment of the trial judge.
[76] *Thomas v Baptiste* [2000] 2 AC 1 (PC) 22 [B] (Lord Millett).

ten pages of her judgment in an attempt to reconcile these varying statements of this compendious expression.

In my view, such an analysis would serve no useful purpose. I recognize that there is some seeming divergence of view of the scope and extent of this 'due process' concept.

Some judges have defined it in broad terms such as embracing '***the concept of ordered liberty***';[77] '***the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law***';[78] and the protection against the arbitrary infringement of the right to personal liberty.[79] Other courts have limited its scope in a constitutional law context to the '***fundamental principles which are necessary for a fair system of justice***'.[80]

There has also been a discussion as to whether the concept of due process of law should only extend to protect procedural fairness or substantive fairness.

Whatever the conceptual differences may be, there is one common thread in the cases and it is that when one is considering the applicability of the due process protections in the Constitution, one needs to perform '***a realistic assessment of the proceedings considered as a whole***'.[81]

In fact, the more full quote in my view captures the essence of the due process protection and its interrelation with other similar concepts, namely:

> ***In the context of the Constitution of Trinidad and Tobago there is a close link between the three guarantees of due process, protection of the law and fair hearing since the fundamental concept of a fair trial is common to them all*** (...) ***There is therefore no reason to doubt that the issue whether there has been a breach under any of these guarantees must be judged on a realistic assessment of the proceedings considered as a whole.***

79. When I apply that analysis to the present appeal I find that on a realistic assessment of the proceedings considered as a whole, there has been no breach of the due process protections of the Constitution.

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[77] *Lassalle v The A-G* [1971] 18 WIR 379 (CA Trinidad and Tobago) 394 [G] (Phillips JA).
[78] *Thomas* (n 76).
[79] *Lassalle* (n 77) 391 [E]-[G].
[80] *State of Trinidad and Tobago v Brad Boyce* [2006] UKPC 1, [2006] 2 AC 76 [14] (Lord Hoffmann) cited with approval by Kangaloo JA in *Steve Ferguson v The A-G of Trinidad and Tobago* Civ App No 185 of 2010 [40]-[41].
[81] *Herbert Ferguson v A-G of Trinidad and Tobago* [2001] UKPC 3, (2001) 58 WIR 446 [14] (Lord Steyn).

80. The Appellants argued that the Amendment contravened their due process protections in two ways:

(a) The Amendment caused a wrongful termination of their section 34 applications which were pending in the courts; and

(b) The Amendment interfered with their 'vested' right to liberty and (in the case of the corporate Appellants) the enjoyment of their property by retroactively depriving them of the benefit of the limitation provisions of section 34.

These arguments are without merit. I say so for the following three reasons:

81. Firstly, in so far as the Appellants allege that the Amendment was (a) a wrongful termination of pending court proceedings and/or (b) a retroactive deprivation of vested rights, these arguments are a repetition of what was already argued and decided in relation to the separation of powers principle and the related concept of the rule of law.[82] As I stated before, the true purpose of the Amendment was a correction of Parliamentary oversight and/or a flawed piece of legislation. Given these facts, the retroactive reversal of the section 34 limitation provisions by Parliament was not a wrongful termination of or interference with the rights of the Appellants. On a realistic assessment of the Amendment, in the context of (a) the original charges; (b) the passage of section 34; and (c) its repeal by the Amendment (ie the proceedings as a whole), there was no breach of the due process protections of the Constitution.

82. Secondly, when, like the trial judge, I examine the actual criminal proceedings in the Piarco Enquiries as a whole, it is not in contention that the Appellants were receiving and will continue to receive a fair trial. The Appellants had been charged with serious fraud and their matters were progressing by way of Preliminary Enquiry. In fact, during the course of their prosecution, the Appellants have mounted a series of challenges to the proceedings, some of which had progressed to the Privy Council; as a result the prosecution had been delayed over substantial periods. No case has been advanced here that the Appellants were not receiving a fair trial. When section 34 was enacted in August 2012 the Appellants applied for a discharge of the prosecution. Two weeks later, the Amendment retroactively nullified the section 34 limitation provisions. As it stands now therefore, the Appellants will have to face a fair trial again. Facing a fair trial is in conformity with the due process protections of the Constitution. To repeat part of the quote of the Privy Council in the *Herbert Ferguson* case, '***In the context of the Constitution***

[82] Paras 63, 64, 73-76 and 54 and 55 above.

of Trinidad and Tobago (...) *the fundamental concept of a fair trial is common to*' the due process guarantees in the Constitution.

On considering the proceedings as a whole, the Amendment has not interfered with the rights of the Appellants to a fair trial. The Amendment does not contravene the due process protections of the Constitution.

83. Thirdly, even if I consider the more amorphous manifestations of the due process protections such as '***the universally accepted standards of justice observed by civilised nations which observe the rule of law***',[83] there is no breach of due process here.

A time limitation on criminal prosecutions is not a necessary aspect of a fair system of justice. Neither is such limitation a provision that is universally accepted in civilized countries which observe the rule of law. In fact in many Commonwealth nations (as Trinidad and Tobago before section 34) and in other countries there is no general statutory time limitation on criminal prosecution. Therefore, its removal from statute or its non-existence is not in itself a breach of a universally accepted standard of justice.

More specifically, the limitation protection of section 34 was only in existence for two weeks. It was not an ancient common law right or accepted Constitutional convention in the jurisprudence of Trinidad and Tobago such that its removal would run contrary to an accepted standard of justice.

Further, the Appellants take no issue with the prospective application of the Amendment viz. to cases where for example, no application had been filed for a discharge under section 34 or where the ten year period had not yet expired. This itself is a recognition that the lack of a statutory time limitation on criminal prosecutions would very well be otherwise valid and not contrary to an accepted standard of justice.

84. The enactment of the Amendment by the legislature was not a breach of the due process protections of the Constitution. In any event, since in accordance with section 13 of the Constitution the Amendment was passed with the requisite special majority in both Houses of Parliament, it would still be a valid law even if it contravened the due process protections of the Constitution. I naturally move on to consider whether section 13 of the Constitution would or would not validate the Amendment.

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[83] n 76.

F. *If there was a breach of any due process protections contained in the Constitution they were not shown not to be reasonably justifiable*

85. Section 13(1) of the Constitution states:

> *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.*[84]

86. In the present matter, there is no dispute that the Amendment was duly passed with the requisite special majority in both Houses of Parliament. Therefore it is prima facie, a valid law even if it infringes upon fundamental rights and freedoms protected by sections 4 and 5 of the Constitution. The only remaining issue is whether the Amendment can be shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

87. When embarking upon an enquiry of this issue the following four caveats need to be noted:

(i) When an act is passed in accordance with section 13, it '*is the expression of the will of the substantial majority of the elected representatives of the people to which great weight must be attached*';[85]

(ii) The onus is on the Appellant to show that the relevant act was not reasonably justifiable, and that onus is a heavy one;[86]

(iii) Courts must not intervene merely on the basis that a judge or judges may form a view that a more appropriate means could have been devised to achieve the result of the legislation;[87] and

(iv) The legislature enjoys a margin of appreciation in respect of passing legislation that would otherwise seem invalid.[88]

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[84] Emphasis added.
[85] *A-G v Morgan* Civ App No 11 of 1983, (CA Trinidad and Tobago) 18 (Kelsick CJ).
[86] *A-G of Trinidad and Tobago v Northern Construction Ltd* Civ App No 100 of 2002 [21]-[22] (Archie CJ) and *Barry Francis v The State* Crim App Nos 5 and 6 of 2010 [88] (Bereaux JA).
[87] *Northern Construction* (n 86) [22].

88. When one considers these four caveats which overwhelmingly favour the validity of legislation passed with the special majority and one adds that in this case the Amendment has been shown to accord with the separation of powers principle, the rule of law and the due process protections in respect of individual rights, it is difficult to come to any conclusion other than that the Amendment was reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

Nonetheless, the Appellants have sought to argue such a case and I will consider it accordingly.

89. As I stated above, the onus was on the Appellants to prove that the Amendment was not reasonably justifiable. In so doing they had to establish three criteria that have been accepted to apply to a challenge under section 13.[89] These three criteria are an application of a proportionality test[90] and they are that:-

(i) The legislative objective was not sufficiently important to justify limiting a fundamental right;

(ii) The measures designed to meet the legislative objective were not rationally connected to it;

(iii) The means used to impair the right were more than necessary to accomplish the objective.

90. The Appellants have failed to satisfy the three criteria of proportionality for the following two reasons:

Firstly, they sought to prove that the legislative objective of the Amendment was *ad hominem* legislation to deal with the Appellants and as such was not sufficiently important to justify limiting fundamental rights (see criterion (i)). As I have stated above, this argument is without merit. The Amendment was enacted to cure Parliamentary oversight and/or the flaws created by the early enactment of section 34. The Appellants cannot establish criterion (i). Further, the Appellants had pegged their case on the Amendment being *ad hominem* legislation and I have found that it is not; the Appellants did not and cannot go on to argue that the legislative objective of the Amendment was connected to any other improper purpose (criterion

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[88] *Northern Construction* (n 86) [22]-[23].
[89] *Northern Construction* (n 86) [23].
[90] See generally *Suratt* (n 31) [58] and *Public Service Appeal Board v Omar Maraj* [2010] UKPC 29, (2010) 78 WIR 461 [32] as to the applicability of proportionality to section 13.

(ii)); nor can they go on to argue that the means used to achieve any other objective were more than necessary (criterion (iii)). They have failed to establish their case that the Amendment was not reasonably justifiable as *ad hominem* legislation.

Secondly, the Appellants argued in the alternative that the legislative objective was to pass retroactive legislation to deprive them of their rights under section 34 (see criterion (i)). As I stated before, this case was not made out.[91] That being the case they did not and cannot make out a case that the retrospectivity of the Amendment was connected to or was in aid of another improper purpose (criterion (ii)); nor can they argue that the means used to achieve that retrospectivity were more than necessary (criterion (iii)). They have failed to establish their case that the Amendment was not reasonably justifiable because of its retrospectivity.

91. While this is enough to deal with this issue, I will also consider the issue in another way namely, that in any event, the Respondent did establish that the Amendment was reasonably justifiable. This however is not meant to detract from my finding that the Appellants failed to establish the heavy onus which lay on them of proving that the Amendment was not reasonably justifiable. I also state that the shifting of the onus of proof in section 13 to an appellant is a feature which distinguishes the argument of reasonable justification from other cases cited by the Appellants where the onus of proof seems to be on the State and where a more rigorous test of proportionality seems to be applied.[92] Further, it is because of the specific wording of section 13 that the four caveats mentioned at paragraph 87 above apply with full force to a challenge that legislation passed in accordance with section 13 is not otherwise reasonably justifiable.

The appellants have failed to establish that the Amendment was not reasonably justifiable in keeping with the proportionality requirements mentioned above.

92. Assuming that it was the Respondent who had to establish that the Amendment was reasonably justifiable and proportional, the Respondent has satisfied the three accepted criteria mentioned above:

(i) As I stated before, the Respondent established that the Amendment was passed for the legislative aim of correcting Parliamentary oversight and/or a flawed piece of legislation. In doing this, the government paid regard to the public interest concerns as I mentioned at paragraphs 14, 15, 19 and 34 above. The Amendment removed

[91] Paras 81-83 above.
[92] *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [44].

the limitation on all prosecutions and restored the position that all persons will now have to face a fair trial. Undoubtedly, these are important legislative objectives which the Amendment addressed. Further, given the wide margin of appreciation that is usually accorded to the legislature, the Respondent has established that the legislative objective was sufficiently important to justify limiting the 'rights' of the Appellants (criteria (i));

(ii) and (iii) To deal completely and effectively with Parliamentary oversight and/or flawed legislation and the public interest concerns, the legislature removed the limitation on all prosecutions and restored the concept of a fair trial for all crimes through the passage of the Amendment. The measures in the Amendment were designed to meet the legislative objective and were rationally connected to it (criterion (ii)). Further the means used, namely the retrospective repeal of section 34, were no more than necessary to achieve the legislative objective (criterion (iii)). It is not for the court to surmise that a more appropriate means '***could have been devised to achieve***' the legislative objective (see paragraph 87(iii) above).

93. Therefore the Respondent has established that in any event, the Amendment was reasonably justified in accordance with the proportionality requirements of section 13.

94. Recently, a five member panel of the Court of Appeal of Trinidad and Tobago has re-considered this question of the application of section 13 in the *Barry Francis* case.[93] In that case this section 13 issue produced a majority opinion of three judges of appeal and a minority opinion of two judges of appeal. In this case, whichever of the two opinions is applied, the result will be the same; namely that section 13 would in any event, validate the Amendment.

95. For convenience, I will first consider the approach of the minority to the section 13 analysis. This approach suggests a three step consideration of section 13.[94]

In the first step, one determines the inconsistency of the legislation with sections 4 and 5 of the Constitution. In this case, I have already decided that the Amendment was not in breach of the due process protections of sections 4 and 5 of the Constitution.[95] However, for the purpose of this argument only, I will presume that it may be so and hence move on to step two.

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[93] n 86.
[94] *Barry Francis* (n 86) [125] (Jamadar JA).
[95] Topic **E** above, paras 77-84.

Step two requires a determination of the question of reasonable justifiability. In examining this question the minority were of the view that the proportionality test as stated in the *Northern Construction* case[96] which I just considered at paragraphs 87 and 89 above, is an '***analytical tool***'[97] that can be used to resolve this issue.[98] Applying that analytical tool of proportionality, as I have done above, the conclusion which I reached and adopt again, is that the Amendment was proportional in this case. The Amendment satisfied step two in this case.

Step three requires '***the determination of the core inviolable and relevant standards of a democratic society against which*** (the Amendment) ***must ultimately be measured and the undertaking of that measurement***'.[99] I have already decided that the Amendment accords with the separation of powers, the rule of law and due process protections in the Constitution. Core values which have been met. More specifically, as I stated above,[100] a time limitation on criminal prosecutions is not a necessary or core value that is universally accepted in all democratic societies; a fortiori, one that was only in existence for two weeks cannot be considered as an ancient or entrenched right in local jurisprudence. Additionally, the Appellants have not and cannot argue that they will be denied a fair trial. In these circumstances the Amendment was not contrary to the '***core inviolable and relevant standards of a democratic society***'.[101] The Amendment satisfies step three.

96. On the minority interpretation in the *Barry Francis* case section 13 would, in any event, validate the Amendment.

97. The majority in the *Barry Francis* case preferred a two step approach.

Firstly, one considers whether there has been a breach of sections 4 and 5 of the Constitution. As before, while I have already decided that the Amendment was not in breach of the due process protections of sections 4 and 5 of the Constitution, for the purposes of this argument only, I will presume that this may be so. However, the majority were of the view that the question of proportionality was properly to be considered as one of the factors in determining

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[96] n 86.
[97] *Barry Francis* (n 86) [120] (Jamadar JA).
[98] *Barry Francis* (n 86) [124] (Jamadar JA).
[99] *Barry Francis* (n 86) [125] (Jamadar JA).
[100] Para 83 above.
[101] n 99.

whether there was or was not a breach of sections 4 and 5 of the Constitution. This they decided was in keeping with the views of the Privy Council in *Suratt*.[102]

The majority accepted that the proportionality test as suggested in the *Northern Construction* case may be '***formulaic***'[103] but still it was an applicable tool in construing section 13 in this first step.[104]

As before, I have already considered and applied the proportionality test to the facts of this case and I conclude again that the Amendment was proportional in this case.

98. Secondly, one applies a broad appreciation of what is justifiable in '***a society which has a proper regard for the rights and freedoms of the individual***'.[105]

In performing this analysis I would repeat the exercise that I considered in step three of the minority decision at paragraph 95 above and am of the opinion that the Amendment was proper or at least not contrary to the principles of a society which has proper rights and freedoms of the individual.

99. On the majority interpretation in the *Barry Francis* case section 13 would, in any event, validate the Amendment.

G. There was no breach of any legitimate expectation

100. While the principles of legitimate expectation are an accepted part of the law of judicial review, I entertain serious doubt whether these principles can have any place in respect of the legislative powers of Parliament.

101. The trial judge stated general concepts of judicial review in twelve paragraphs of her judgment.[106] I accept what she said there and I see no need to repeat them. In summary the principles of legitimate expectation are applied in situations where it would be unfair or wrong for a public authority to frustrate a legitimate expectation it created in aggrieved persons.

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[102] n 31 [58].
[103] *Barry Francis* (n 86) [95] (Bereaux JA).
[104] *Barry Francis* (n 86) [52] (Bereaux JA).
[105] *Barry Francis* (n 86) [99] (Bereaux JA accepting *Morgan v A-G of Trinidad and Tobago*, [1988] 1 WLR 297 (PC)).
[106] Paras 278-289 of the judgment of the trial judge.

102. The Appellants argue that the statements of Ministers and Members of Parliament and also the very enactment of section 34 created in them a legitimate expectation that they would not be prosecuted for offences committed in respect of the Piarco Enquiries.

This argument is without merit for the following two reasons:

103. Firstly, even assuming that the Ministers and Members of Parliament and the very enactment of section 34 could have created the legitimate expectation the Appellants suggest, there was never any expectation that Parliament would not or could not alter or repeal section 34 as it did with the Amendment. In any event there was no representation that Parliament would not alter or repeal section 34.

It would be contrary to our Constitutional democracy for Parliament to bind itself or its successors to a representation that it will not change the law. The concept that any law which creates rights or expectations cannot later be altered or revoked needs only be stated to be rejected.

The only legitimate expectation that anyone can harbour is that in making laws for the peace, order and good governance of the nation,[107] Parliament will act in a constitutionally legitimate manner. In this case, as I have already decided, there is no argument that the Amendment is not a valid law. A fortiori, the Amendment, if it infringed any rights was passed with a special $^{3}/_{5}$ majority and in accordance with section 13 of the Constitution. Parliament acted constitutionally in passing the Amendment and has fulfilled the legitimate expectations of the people.

In this regard, I find the following quotation very apposite.

In *Reference re Canada Assistance Plan (Canada)*[108] Justice Sopinka of the Supreme Court of Canada stated:

> ***Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in***

[107] s 53 of the Constitution.
[108] 1991 CarswellBC 168 [72] and also *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39, [2013] 3 WLR 179 [39] (Lord Sumption).

> ***the courts. Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy.***

104. The second reason why the principles of legitimate expectation have no application to Parliamentary legislation is closely connected to the rationale just stated. It is that a statute is a source of rights and obligations and not of legitimate expectations. Even if the Ministers and Members of Parliament made statements, their actions of passing legislation (like section 34 and the Amendment) were the expression of their deliberations. This created rights in the black letters of the statute and not outside of it. All expectations or representations are subsumed in the black letters of the statute and not outside of it.[109]

105. It is interesting to note that none of the very learned Counsel could cite a case where a statute itself created a legitimate expectation. Counsel for the Appellants referred to a series of cases which show that in the context of criminal law, the executive and indeed the courts may be bound by representations made to offenders. They extrapolate from this that in the field of criminal law, Parliament could also be so bound. For the reasons stated at paragraphs 103 and 104 above, I disagree with this analysis.

Counsel also referred to obiter dicta in the Caribbean Court of Justice case of *The AG of Barbados v Joseph and Boyce*.[110] The obiter dicta suggested that Parliament may have contributed to a legitimate expectation in a person awaiting sentence of death that he would not be executed until certain appeals to International bodies had been exhausted.[111] But these suggestions were never directed to the issue of whether there was any legitimate expectation that Parliament will not alter or repeal an earlier statute. Neither does the case deal with the question whether a statute can create rather than contribute to a legitimate expectation. In fact at paragraph 77 of the judgment the court expressly noted that the case of legitimate expectation was not argued and that they were making no findings on the doctrine. Further, at paragraph 110, the court was clear that it was the executive which created the expectations by throwing a lifeline to a condemned man; neither the actions of the Parliament nor the legislation was the source of any expectation. Further, the court treated the sentence of death as a special category of case

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[109] *R v DPP ex p Kebilene* [2000] 2 AC 326 (HL) 355 [F]-[G] (Laws LJ).
[110] 2006 CCJ 3 (AJ), (2006) 69 WIR 104.
[111] Joseph and Boyce (n 110) [115]-[116] (de la Bastide P and Saunders J).

'*warranting special procedures before it is carried out*'[112] so that this case and other death penalty cases are not to be taken as representative of the general law in any particular field, especially so in the area of legitimate expectation. This case is not an authority for the argument that a legitimate expectation can be created by an act of Parliament.

106. In any event, even assuming that the Appellants could possibly establish a legitimate expectation that could challenge the Amendment, that expectation would, in this case be overridden by the public interest element behind the Amendment.

107. In *Paponette v AG of Trinidad and Tobago*,[113] at paragraph 34, the Privy Council recognized that even a valid, legitimate expectation may have to give way to an overriding public interest. In this case I have already decided that the Respondent established that the Amendment was passed for the legitimate aim of correcting Parliamentary oversight and/or a flawed piece of legislation. Further, in doing this the government paid regard to the serious public interest concerns mentioned at paragraphs 14, 15, 19 and 34 above. Given the wide margin of appreciation accorded to the legislature in deciding where the public interest lies[114] there was, in any event, a sufficient overriding public interest which allowed the legislature to pass the Amendment and so frustrate any legitimate expectation which may have been created by the statements of Ministers, Members of Parliament and/or the enactment of section 34.

H. There was no abuse of process

108. The Appellants resorted to the concept of abuse of process in an amorphous manner. At times it was linked to arguments of due process and legitimate expectation and at other times it stood as an argument on its own. I have discerned two bases upon which the Appellants have resorted to the concept of abuse of process in support of their claim.

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[112] *Joseph and Boyce* (n 110) [108].
[113] [2010] UKPC 32, [2012] 1 AC 1.
[114] *R (Williamson) v Secretary of State* [2005] UKHL 15, [2005] 2 AC 246 [51] (Lord Nicholls), *Bank Mellatt* (n 107) [21] and *Northern Construction* (n 86) [23].

(i) The Appellants allege that the DPP wrongly intervened in the legislative process to secure the repeal of section 34 and the Amendment should be invalidated for this reason; and

(ii) The DPP wrongfully caused the continuation of the prosecution against the Appellants in the Piarco Enquiries after the passage of section 34. For this reason the prosecution of the Appellants should be stayed.

Both of these propositions lack merit.

(i) There was no wrongful interference by the DPP in the legislative process

109. The Appellants seek to argue that after the passage of section 34 the DPP wrongfully took it upon himself to secure its repeal by writing letters to the AG and to the press. They allege that this course of conduct was an abuse of process by the DPP as it influenced the AG and by extension, the Parliament to repeal section 34. Hence the Amendment which repealed section 34 is invalidated for this abuse of process.

This argument lacks merit for the following four reasons which I will set out in a summary manner:

Firstly, as a matter of law, it is not lawful to impugn the validity of a statute by seeking to establish that Parliament in passing it was misled by fraud or otherwise (see *British Railways Board v Pickin*[115] and *The Bahamas District of the Methodist Church*[116]). Such an investigation could easily lead to conflict between the courts and Parliament and has not been allowed in the courts. The Appellants cannot argue that Parliament was misled or wrongfully influenced into passing the Amendment.

Secondly, there is no evidence whatsoever that Parliament was influenced by the DPP in passing the Amendment. As the Hansard Reports indicate, the Amendment was the product of free, fair and independent deliberations in the cut and thrust of Parliamentary debate.

Thirdly, even if it could somehow be alleged that Parliament was influenced by the DPP, the Amendment was a valid and constitutional piece of legislation. It would be disingenuous to allege that the influence of the DPP in the passage of a valid and constitutional act could somehow be an abuse of process.

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[115] [1974] AC 765 (HL).
[116] n 32.

Fourthly, I agree with the conclusions of the trial judge that in any event, the actions of the DPP were in keeping with his constitutional mandate of keeping the AG '***informed of major and important matters of public interest or which affect the public interest***'.[117] His actions were not an abuse of process as alleged.

(ii) The continuation of the prosecution of the Appellants was not an abuse of process

110. I now set out a brief chronology of facts to enable a proper discussion of this issue:

- On 6th September 2012 the DPP was served with the first section 34 Application for a discharge.
- Notably, on 7th September 2012 the pending preliminary Piarco Enquiry came on for hearing in the Magistrates' Court. At that hearing the DPP requested an adjournment of the enquiry '***to properly consider how the prosecution*** (...) ***might progress in the light of section 34 as then enacted***'.[118] It is noteworthy that none of the Appellants raised any objection to this application for an adjournment. The matter was given a short adjournment to 14th September 2012.
- On 10th and 11th September 2012, the DPP wrote to the AG advising him of his misgivings over section 34.
- On 11th September 2012, the DPP issued a press release informing the public of his lack of a role in section 34 enacted by Parliament.
- On 12th September 2012 the Amendment was debated and passed in the House of Representatives.
- On 13th September 2012 the Amendment was debated and passed in the Senate.
- On 14th September 2012 the Amendment received the President's assent.
- Given the retroactive repeal of section 34, the Piarco Enquiry could now resume.

111. The Appellants cite the Australian authority of *Megitt Overseas Ltd v Grdovic*[119] (a decision of the Supreme Court of New South Wales) in support of their contention of abuse of process. *Megitt's* case decided that it is improper to grant a contested adjournment of legal proceedings for the purpose of enabling one party to take advantage of a proposed amendment of an enacted law.

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[117] Paras 397-399 of the judgment of the trial judge.
[118] Para 15 of the affidavit of Roger Gaspard.
[119] [1998] NSWSC 233.

From the authority of *Megitt*, the Appellants try to extrapolate that the adjournment of the Piarco Enquiry by the DPP which enabled the DPP to take the opportunity to benefit from the retroactive repeal of section 34 was an abuse of process by the DPP.

This argument is wholly devoid of merit and it bears no relation to the uncontested facts of this case, namely:

(a) The adjournment was not contested;

(b) The adjournment was for the purpose of allowing the DPP to consider the section 34 application. It was not sought for the purpose of taking advantage of any proposed amendment;

(c) At the time of the adjournment there was no hint or suggestion of a proposed amendment to section 34; and

(d) The suggestion to amend section 34 came three to four days after the adjournment.

The unopposed adjournment of the Piarco Enquiry was not requested by the DPP for the purpose of taking advantage of any proposed retroactive repeal of section 34. The case of the Appellants on this issue is unfounded. There was no abuse of process by the DPP in the seeking of an adjournment of the Piarco Enquiry. The continuation of the Piarco Enquiry was not invalidated thereby nor is there any ground for a stay of the same.

I. There was no populist pressure which would have any bearing on this case

112. The Appellants argue that the Amendment was unconstitutional since it was an impermissible and disproportionate response by Parliament to populist pressure. The alleged populist pressure being the public outcry against the potential liberation of the Appellants from prosecution in respect of the Piarco Enquiries. In support of this proposition the Appellants rely on the cases of *ex p Pierson*[120] and *ex p Venables*[121] as well as certain general statements about the dangers of populism.[122]

I find no merit in this argument for the following three reasons:

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[120] n 73.
[121] [1998] AC 407 (HL).
[122] 'The Constitution' (1991) Lord Hailsham LC.

113. Firstly, the *Pierson* and *Venables* cases concerned action by a Secretary of State (the executive) in respect of the power of sentencing (a judicial function). They are not authority for the proposition that the legislature is not allowed to consider or even be swayed by popular opinion. Indeed, popular opinion may very well be an appropriate medium for focusing Members of Parliament on topical issues.

Secondly, as I have already found the true purpose of the Amendment was to correct Parliamentary oversight and/or a flawed piece of legislation. Populist pressure, if it at all existed was not the raison d'etre of the Amendment.

Thirdly, even assuming that there was some populist pressure exerted on the legislature, any investigation of the effect of such pressure on the passing of the Amendment is an attempt to impugn the validity of a statute by seeking to establish from Parliamentary debates/ statements of Ministers and Members of Parliament that Parliament was misled by improper purposes in passing such a statute. As I stated before, this is not an investigation that could or should be undertaken in a court of law.[123]

114. The Amendment cannot be invalidated by reference to any alleged wrongful populist pressure.

CONCLUSION

115. This appeal is dismissed and we will hear the parties on the question of costs.

G Smith
Justice of Appeal

Delivered by Jamadar JA

INTRODUCTION

1. I have had the benefit of reading and considering the comprehensive and carefully reasoned judgment of Smith, J.A. and I agree with it. However, there are a few comments that I

[123] Paras 28 and 109 above.

wish to add to all that he has written; comments that are not intended in any way to derogate from what has been written. The relevant law, facts and context have been set out in his judgment and there are only two issues which I would like to address, issues which have caused me some judicial angst.

The Taking Away of Vested Rights

2. The chronology of events demonstrates in relation to these appellants and indeed several others, the following. Subsequent to the proclamation of section 34 of the Administration of Justice (Indictable Proceedings) Act[1] on the 28th August, 2012 and it becoming law on the 31st August, 2012 and before the Amendment Act[2] was passed in Parliament (on the 13th September, 2012) and assented to by the President on the 14th September, 2012 (and became law), these appellants commenced actions pursuant to section 34 in order to benefit from the rights and entitlements created by that section and conferred on them by it.

3. In relation to the appellants these rights are properly characterized as statutory vested rights, as they became vested upon passage into law of section 34 and crystallized for the benefit of the appellants when they commenced legal proceedings pursuant to that law. There can also be no dispute that pursuant to sections 34(2) and (3) of the Administration of Justice Act 2011 and upon its assent, these appellants were legitimately entitled by law to enjoy the benefit of:

(a) no trial commencing against them in relation to the offences for which they had been charged and committed to stand trial;[3] and

(b) discharge by a judge and the recording of a verdict of not guilty on application by them in relation to the offences.[4]

4. The fundamental and overarching constitutional principle of the rule of law, upon which the Constitution of the Republic of Trinidad and Tobago is partly based and which it purports to

[1] Act No. 20 of 2011.
[2] Act No. 15 of 2012.
[3] Section 34(2).
[4] Section 34(3).

enshrine,[5] suggests that legitimate vested rights which have crystallized for the benefit of particular persons, especially where a right to liberty is engaged, ought not to be arbitrarily, unreasonably or unjustly interfered with. In this matter these vested rights and the benefits stated were taken away by the Amendment Act 2012.

5. I am persuaded that the taking away of these vested rights and entitlements of the appellants is not unconstitutional. Ultimately I am persuaded because of the special circumstances of this case; the margin of appreciation to be afforded the Parliament in the context of a constitutional democracy where the principles of the separation of powers and the rule of law exist; and where specific constitutional power is vested in the Parliament to override the fundamental rights and freedoms enshrined in the constitution, once this is not shown not to be reasonably justifiable in a democratic society that had a proper respect for the fundamental rights and freedoms of the individual.[6]

6. As Smith, J.A. has correctly analysed and opined and which accords with the trial judge's own conclusions, the true intention and purpose of the Amendment Act 2012 was (i) to correct a collective Parliamentary oversight (of both the lower and upper houses and of government, opposition and independent members) in passing section 34 as part of the Administration of Justice Act 2011 and/or (ii) to correct the flaws revealed by the early proclamation of section 34. This intention to correct and prevent the implementation of a flawed policy created by the entire Parliament in the enactment of section 34, was triggered by the early proclamation of that section and the focus that the appellants' matters brought to bear on its implications. As such I also agree, that while the appellants' matters did focus attention on the effects of section 34, the Amendment Act was neither intended to specifically target them or limited in its application to so doing, nor was it intended to direct a court to act in a particular manner in their proceedings. Thus, while the Amendment Act was clearly retrospective and did affect the appellants' vested rights, it did not do so contrary to the principles of the separation of powers or the rule of law.

7. To reiterate, there was no breach of the separation of powers because the collective intention of the entire Parliament was not to interfere with or dictate terms in relation to the exercise of judicial power (though the Amendment Act does this to a certain extent by sections 6

[5] See the Preamble to the Constitution and in particular paragraphs (d) and (e).
[6] See section 13 of the Constitution and the majority and minority decisions of the Court of Appeal in **Francis and Hinds v The State**, Criminal Appeal Nos. 5 and 6 of 2010.

and 7), but rather to correct collective Parliamentary oversight and to correct what had become clearly a flawed policy and piece of legislation in the eyes of the Parliament. The Amendment Act was therefore the product of a policy decision and not that of a personal vendetta against the appellants or any others. In this context and on an objective assessment of the totality of the evidence presented in these appeals, particularly the uncontroverted evidence, as duly analysed by Smith J.A. in his discussion on the trial judge's assessment of the facts, the appellants' specific criticism of the Attorney General as intent on targeting the appellants is both unfounded and unfair.

8. In the balance of power between the Judiciary and the Legislature, what is to be guarded against is the illegitimate interference with the exercise of judicial power. The bona fide correction of Parliamentary oversight and of flawed legislation is a proper exercise of Parliamentary power and the Judiciary affords the Parliament a generous margin of appreciation in this regard. In this case it has not been demonstrated that there was any intention by Parliament to target these appellants specifically or to abuse its powers in relation to the Judiciary, as explained by Smith, J.A..

9. There was also no violation of the rule of law. The rule of law is to be distinguished from rule by law. In Trinidad and Tobago the principle of the rule of law, like that of the separation of powers, is a core, even if unwritten,[7] inviolable constitutional value. Though it may form part of the due process protection, it is not constrained by it.

10. Indeed, when one considers not only what the Constitution says, but also what it does, it becomes readily apparent that the doctrines of the separation of powers and of the rule of law are foundational constitutional principles that lie at the very heart of the Constitution. In the same way that the doctrine of the separation of powers is gleaned from the implicit structure of the Constitution itself when read as a single text, so is the doctrine of the rule of law to be gleaned from the Preamble to the Constitution;[8] and both also from the jurisprudential history, traditions, customs, usages and values which have informed and given meaning and content to the structure and text of the Constitution. Thus the Constitution when also viewed in terms of its function and purpose in Trinidad and Tobago, its *sitz im leben*, confirms the status of the doctrines of the separation of powers and the rule of law as core constitutional principles.

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[7] See note 5 above.
[8] See the minority opinion in **Matthews v The State** [2004] UKPC 33, at paragraph 46.

11. For the purposes of these appeals, the following observations of Phillips, J.A. in **Lassalle v Attorney General**[9] are useful (commenting on the 1962 proviso to what is now section 13(1) of the Constitution):

> *"In my judgment, this proviso is intended to operate against the introduction of a system of administration of justice which is contrary to the precepts of the rule of law as we know it. It seeks to preserve the essential elements of the democratic rights and freedoms inherent in that rule."*

Here Phillips, J.A. is positing that the doctrine of the rule of law encompasses "the essential elements of ... democratic rights and freedoms ...".

12. In these appeals, as explained below in the discussion on section 13 of the Constitution, it has not been demonstrated that the Amendment Act compromises any core inviolable standards of a democratic society that has a proper respect for the fundamental rights and freedoms of the individual. There has therefore been no infringement of the rule of law.

13. Finally, the Amendment Act was duly passed pursuant to section 13 of the Constitution, which permits an override of the entrenched fundamental rights and freedoms provided all of the requirements of section 13 are satisfied. In fact the Amendment Act satisfied all of the requirements of section 13 of the Constitution. Indeed, it was passed with unanimous support in both Houses of Parliament.

14. The assertion that the Amendment Act is not reasonably justifiable as stated in the proviso to section 13(1) of the Constitution, is without merit. The Amendment Act is not disproportionate according to the three criteria set out by Archie, C.J. in the **Attorney General v Northern Construction Limited**[10] and as explained by Smith, J.A.. When one considers the legislative objective, which simply put included ensuring that persons charged with committing serious fraud stand trial undeterred by any statutory limitation periods, but subject to all of the common law and other statutory and constitutional protections afforded them, it is clear that this objective is sufficiently important especially in a small society such as Trinidad and Tobago, to justify the abridgment of the section 4(a) and 4(b) rights claimed by the appellants. The measures taken in the Amendment Act to achieve this objective, given the prior erroneous

[9] [1971] 18 WIR 379, at 394E – F.
[10] Civil Appeal No. 100 of 2002, at paragraph 23.

enactment of section 34, are rationally connected to it. Finally, the means used – retrospectivity, voiding of pending proceedings under section 34 and the negation of any accrued rights under section 34, are all no more than were necessary to accomplish this objective.

15. In any event and as again demonstrated by Smith, J.A., it has not been shown that the Amendment Act is not reasonably justifiable in a society that has a proper respect for the fundamental rights and freedoms enshrined in the Constitution of Trinidad and Tobago. Assuming inconsistency with sections 4 and 5 of the Constitution, it has not been shown that taking away of any due process or protection of the law rights that may have accrued because of section 34, are contrary to the core inviolable standards of a democratic society such as Trinidad and Tobago. First and foremost, a statutory limitation for the prosecution of alleged serious criminal offences is not a universally accepted constitutional value in democratic societies that have due regard for fundamental rights and freedoms. Secondly, the Amendment Act does not interfere with the core constitutional values of the right to due process of the law and to a fair trial, or with all of the common law and other statutory and constitutional protections, bars and defences that were available prior to the enactment of section 34 and will continue to be available to these appellants even with the enactment of the Amendment Act.

Abuse of Process

16. The chronology of events shows that the Director of Public Prosecutions (DPP) was served with one of the appellants' applications pursuant to section 34 on the 6th September, 2012 and that on the 7th September, 2012 at a hearing before the magistrate, the DPP sought an adjournment of the ongoing enquiry to consider his position in light of the passage into law of section 34 and, no doubt, the application pursuant thereto.

17. No fault can be found with the DPP seeking an adjournment in these circumstances as prosecutor in the enquiry. His application was unopposed. At the time there was no issue of any amendments being considered to revoke or otherwise alter the effects of section 34.

18. However, the DPP subsequently wrote to the Attorney General expressing his concerns over the effects of section 34 in relation to, among others, the appellants' pending criminal proceedings. These letters were written on the 10th and 11th September, 2012. Also, on the 11th September, 2012 the DPP issued a lengthy press release disavowing him of any responsibility for either the enactment or early proclamation of section 34 and highlighting its implications as aforesaid. The trial judge's assessment of the DPP's interventions and the relevant evidence was as follows:[11]

> *"Thereafter, the Director became more proactive, writing letters to the Attorney General on the 10th and 11th September, 2012 and expressly calling for the repeal of section 34. The letters speak for themselves, demonstrating a clear and undeniable emphasis on the Piarco prosecutions and the prospect of their being brought to an untimely end by the effect of section 34.*
>
> *The Director issued his Press Release in order to enlighten the public as to the effect of section 34 principally on the Piarco prosecutions, but also on serious offences to which section 34 would apply.*
>
> *The Director's involvement deepened when he supplied his views on the draft bill by way of a letter dated 13th September, 2012 to the Attorney General. This letter came to the attention of the Attorney General after the Amendment Act had been enacted."*

19. Clearly section 90 of the Constitution confers on the DPP the duty, responsibility and power to institute, undertake, take over, continue and to discontinue criminal proceedings as provided for in that section.[12] By section 90(1), these powers are expressly made subject to section 76(2) of the Constitution, which vests in the Attorney General the responsibility for the administration of legal affairs in Trinidad and Tobago.

20. In **Dhanraj Singh v The Attorney General,**[13] Bereaux J (as he then was) expressed the following opinion in relation to these two sections of the Constitution, as follows:

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[11] See paragraphs 390 – 392 of the trial judge's judgment.
[12] See section 90(3), (4) and (6) of the Constitution.
[13] H.C.A. No. S 395 of 2001.

"In this regard the words 'subject to 76(2)' place on the Director a duty to keep the Attorney General informed of major and important matters of public interest or which affect the public interest ..."[14]

21. Issues of abuse of process are often fact specific and this case is no exception. Was the DPP's proactive involvement in relation to section 34 within the bounds of his constitutional duty to "keep the Attorney General informed of major and important matters of public interest or which affect the public interest ..."? Or, did his actions exceed those bounds?

22. Both the trial judge and Smith, J.A. have concluded that there was no overreaching of the constitutional duty and responsibility of the DPP in this case. As I have indicated, this aspect of these appeals caused me some judicial angst. It is understandable that the appellants would subjectively feel aggrieved by the DPP's conduct in this matter. He sought an adjournment to consider the implications of section 34 (as he was entitled to do wearing his prosecutor's hat) and then went on subsequently to vigorously advocate (both to the Attorney General and in the public domain) for the retroactive repeal of section 34; and in so doing to seek to deprive the appellants of its benefits (ostensibly wearing his section 76(2) hat in relation to the Attorney General).

23. It is also understandable that the DPP should have felt gravely concerned about the effects of section 34, especially in relation to the criminal proceedings concerning the appellants. The long history and circumstances surrounding these proceedings speak for themselves. No doubt the DPP was under a duty to bring his concerns and even his recommendations to the attention of the Attorney General (pursuant to section 76(2) of the Constitution). But did that role, in the circumstances of these cases, justify his press release and his advocating of his disavowal and his call for the revocation of section 34 in the public domain?

24. Looking objectively at the totality of the evidence in the context of the roles of the DPP and the particular circumstances of these matters, I have concluded that even if the press release was unjustified, looked at in the round, the DPP's conduct did not cross the threshold so as to render his actions an abuse of process sufficient to justify a stay of the criminal proceedings relating to the appellants.

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[14] **Dhanraj Singh v The Attorney General**, H.C.A. No. S 395 of 2001, at page 71.

25. No doubt the overlap of these two constitutional roles that the DPP is called upon to play may in this case have created this conundrum. Prudence needs to be exercised in cases such as this, where the DPP's duty to inform and even make recommendations to the Attorney General on important matters of public interest, can appear to be unfairly seeking an advantage in existing proceedings. The DPP as a 'minister of justice' must always be scrupulous in his conduct so as to ensure fairness in existing proceedings.

26. In the final analysis and in relation to the constitutionality of the Amendment Act, it really matters not which side of the line the DPP's conduct fell on, because there is no evidence to suggest that the DPP influenced the Parliament to pass the Amendment Act. The decision to pass the Amendment Act was a collective decision of the entire Parliament made in light of its openly acknowledged collective oversight and error in enacting section 34 in the first place.

27. In any event, I also accept the analysis of Smith, J.A. on this point, which is that unlike in **Megitt's**[15] case, in this case the DPP's application for an adjournment was unopposed and there was not in existence at the time any proposed amendment to or revocation of section 34.

CONCLUSION

28. In the end these appeals have demonstrated above all else the onerous duty and responsibility on the entire Parliament to carefully scrutinize legislation before enactment; but also, the reality that even with all the care in the world, human error, collective human error, will at times occur. The Amendment Act has not been demonstrated to be unconstitutional and remains the law in force in Trinidad and Tobago. I therefore also agree that these appeals should be dismissed and that the parties should be heard on the issue of costs.

P Jamadar
Justice of Appeal

[15] [1998] NSWSC 233.