THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV2019-02271

BETWEEN

VIJAY MAHARAJ

Substituted on Behalf of the Estate of SATNARAYAN MAHARAJ for

SATNARAYAN MAHARAJ

First Claimant

CENTRAL BROADCASTING SERVICES LIMITED

Second Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: January 13, 2020

Appearances:

1. Mr. Ramesh Lawrence Maharaj S.C., Mr. Jagdeo Singh, Mr. Kiel Taklalsingh, Mr. Dinesh Rambally, Mr. Stefan Ramkissoon instructed by Mr. Roper, Ms. Rhea Khan, Attorneys-at-law for the Claimants.

2. Mr. Fyard Hosein S.C., Ms. Vanessa Gopaul, Mrs. Josefina Baptiste-Mohammed instructed by Mr. Vincent Jardine, Attorneys-at-law for the Defendant.

DECISION

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Introduction:

1. Before the Court for its determination is the fixed date claim filed on 31st May 2019. The Claimants are essentially challenging three provisions of the **Sedition Act Ch. 11:04** namely sections 3, 4 and 13 (the impugned provisions). The specific relief prayed for is as follows:

    1. A declaration that sections 3, 4 and 13 of the **Sedition Act Ch. 11:04**: (1) contravene the principle of legality and/or legal certainty, in that they are vague, uncertain and therefore illegal, null and void and of no legal effect; and (2) are unconstitutionally vague and offend the rule of law.

2. A declaration that sections 3, 4 and 13 of the Sedition Act infringe the following fundamental rights and freedoms guaranteed under the Constitution of the Republic of Trinidad and Tobago ("**the 1976 Constitution**"):

   i. section 4(a) - the right of the individual to enjoyment of property and the right not to be deprived thereof except by due process of law;

   ii. section 4(i) - the right of the individual to enjoy freedom of thought and expression;

   iii. section 4(k) - the right to freedom of the press;

   iv. section 4(e) - the right to join political parties and express political views;

   v. section 4(j) - the right of freedom of association and assembly; and

   vi. section 5(2)(h) - the right not to be deprived of the right to such procedural provisions as are necessary for the purpose of giving effect and protection of the aforesaid rights and freedoms.

3. A declaration that in so far as Section 6 of the Constitution (the existing law provision) may operate to save the impugned enactments of law, it would amount to a denial of the protection of law and/or an unlawful ouster of the Court's jurisdiction to determine and preserve the constitutional rights of the Claimants.

4. A declaration that Section 6 of the Constitution itself is inconsistent with the Claimants' fundamental rights, including access to justice, and is further inconsistent with basic

underlying principles of the Constitution and therefore is illegal, null and void and of no effect.

5. A declaration that sections 3, 4 and 13 of the Sedition Act, either individually or collectively, infringe Section 1 of the Constitution in that they are inconsistent and/or incompatible with the characteristics, features and tenets of a democratic state and therefore void and of no effect pursuant to Section 2 of the Constitution.

6. An order that the Defendant, his servants and/or agents and/or police officers and all those acting in concert with them or howsoever otherwise be restrained and enjoined pending the final determination of the issues arising in these proceedings and on that determination be permanently restrained and enjoined from exercising any of the powers, rights or duties respecting the enforcement of the Sedition Act against the Claimants insofar as it purports to confer such rights, powers and duties on the Defendant, his servants and/or agents including police officers.

7. Such other orders, writs and directions as it may consider appropriate for the purpose of enforcing or securing the provisions of this chapter to the protection of which the person is entitled.

8. Costs.

9. Such other and further relief as the Court deems appropriate.

2. Subsequent to the filing of the fixed date claim, Satnarayan Maharaj, the first named claimant, departed this life.

3. This Court, in a separate judgment, granted an order and substituted Vijay Maharaj to act on behalf of the deceased First Claimant's estate.

Resolution of the substantive matter:

4. The parties agreed that the resolution of the substantive matter revolved around questions of law and was not fact dependent.

The Evidence:

5. The Claimants relied upon an affidavit of the deceased First Claimant sworn on 31st May 2019 and a supplemental affidavit sworn on 26th July 2019.

6. The Defendant relied upon two affidavits, namely, the affidavits of Wayne Stanley and Raymond Patrick both dated 7th October 2019.

RELEVENT FACTUAL BACKGROUND:

7. The deceased First Claimant was a Hindu civil rights leader, religious leader, cultural activist, media personality and journalist.

8. The deceased First Claimant hosted a 'call-in' talk-show called "*The Maha Sabha Strikes Back*". This talk-show was aired through the Second Claimant and he frequently offered commentary and callers expressed their opinions on various issues which touch and concern life in Trinidad and Tobago.

9. The deceased First Claimant was also very outspoken and was viewed by some as a controversial figure. He was not known to be measured and was unapologetically critical of several politicians including the current Government and governmental policies. He often used his talk-show to vigorously critique the Government and to convey strong and at times, provocative and or sensational statements on matters of public interest.

10. The Second Claimant is a company duly incorporated under the Laws of Trinidad and Tobago and operates from Corner Pasea Main Road extension and Churchill Roosevelt Highway Tunapuna. It is engaged in the business of multi-media services.

11. The deceased First Claimant was the founder and managing director of the Second Claimant and was authorised by the Board of Directors of the Second Claimant to swear to and sign the affidavits filed in support of the present application.

12. In April 2019, the deceased First Claimant made certain statements which were viewed by the Telecommunications Authority of Trinidad and Tobago (the "**TATT**") as statements which "*can be seen as divisive and inciteful*" and the TATT issued the Second Claimant with a warning on April 17, 2019.

13. The statements made by the deceased First Claimant on the programme, "The Maha Sabha Strikes Back" were included in the affidavit of Wayne Stanley filed on October 7, 2019 and are as follows:

> *"…And now let's get down to Tobago ah little bit and what's happening there. Nothing going correct in Tobago. They lazy, six out ah ten of them working for the Tobago House of Assembly, getting money from Port-of-Spain. They doh want wok and when*

they get a job. They go half pass nine and ten o clock they go for tea, breakfast. The rest of them able bodied men, they doh wah no wok ah tall. Run crab race, run goat race and go on the beach hunting for white meat. Yuh see ah white girl dey. They rape she, they take away all she camera and everything. This record inno. That is what Tobago is all about but anything they want, they going to get. So now we have a lot of ferries ahready. Our Prime Minister is renting a ferry to take Tobagonians from Scarborough bring them to Port-of-Spain so they could buy market in Port-of-Spain market. They ain't growing nothing dey, they coming to make market inno. From Tobago we paying for them to come and pay market. And you know how much our Prime Minister paying our money? Everyday two hundred and sixty three thousand five hundred and eighty dollars a day. For this boat to bring them lazy people from Scarborough to come and make market in Port-of-Spain and take them back. They wouldn't grow nothing they. They wouldn't grow nothing, when they ketch they crab is to run race and when they mind they goat, is to run race. They come in Port-of-Spain, growing nothing. We paying, we the tax payers in Trinidad, we paying. Whatever Tobago wants, Tobago gets and I am saying, we should they change the name of this country? We are no longer Trinidad and Tobago, we are Tobago and Trinidad. We are subservient to them, right. And this big mouth man, rasta man called Attorney General Fitzgerald Hinds, when people make statements, he like to chastise them, insult them. A lady made a statement. Hadad said, 'the government mix messaging of the situation in Tobago was not helping the sea bridge' because the government was giving different messages. The response of Fitzgerald Hinds is that, 'if the woman normal'. Once you disagree with them, you are not normal.

Once you point out the truth you are not normal. Well I say Hinds, go and spend time seeing about your hair because it takes you two days to plait them. The woman is normal and I believe she is more normal than you. That is why the fella in Sealots kick water on you, right."

14. On April 18, 2019, police officers purportedly executed a search warrant on the premises of the Second Claimant.

15. Attorneys-at-Law acting for the Claimants wrote to the Commissioner of Police, requesting a copy of the said search warrant.

16. Judicial review proceedings were subsequently filed as the warrant was not provided. The Court in **Central Broadcasting Services Limited v The Commissioner of Police CV 2019-02135** subsequently declared that the said failure was unlawful and ordered, *inter alia*, that the Commissioner of Police had to provide a copy of the search warrant and make the original available for inspection within 7 days of the Court's order.

17. The deceased First Claimant's affidavits outlined that he harboured significant fear and concern that he would have been prosecuted under the Sedition Act.

Locus Standi of the Second Claimant:

18. In its submissions the Defendant argued that the Second Claimant is not properly joined in the matter before the Court.

19. Section 16 of the **Interpretation Act Ch. 3:01** provides as follows:

> Words in a written law importing, whether in relation to an offence or not, persons or male persons include male and female persons, corporations, whether aggregate or sole, and unincorporated bodies of persons.

20. In **Attorney General and Minister of Home Affairs v Antigua Times Limited (1975) 21 WIR 560** the Privy Council held, in reference to the Antiguan Constitution, that "person" in the Constitution includes artificial legal persons.

21. In **Smith (et al) v L.J. Williams Limited (1980) 32 WIR 395** Kelsick JA frontally addressed the issue as to whether a company can be afforded protection under the 1976 Constitution. The Court rejected the argument that individual rights under Section 1 of the 1962 Constitution are rights of natural persons and not artificial persons and affirmed that companies were protected under the 1976 Constitution.

22. Having considered the relevant law as outlined, this Court holds the firm view, that the Second Claimant, is afforded protection under the 1976 Constitution and has an entrenched and valid continuing concern as to the validity of the impugned provisions of the Sedition Act. Accordingly, the Second Claimant can seek judicial determination as to whether the said provisions impose unacceptable restrictions on press freedom.

23. The Court is of the view that the reliefs sought, were not personal to the deceased First Claimant and they relate to the Second Claimant as well as to every citizen who in this Republic.

24. In arriving at the aforesaid conclusion the Court carefully considered the decision of the Judicial Committee of the Privy Council in **Attorney General v Dumas [2017] UKPC 12**. In that case, the claimant did not allege that he was directly affected by the challenged circumstances but claimed to have commenced the proceedings as a "concerned citizen". On a preliminary point brought by the Attorney General, the judge struck out the claim on the ground that the court could only interpret the Constitution, where a claimant alleged a breach of his or her own rights. On appeal, the Court of Appeal reversed the first instant judge and declared, *inter alia*, that it was open to the court, in the exercise of its supervisory jurisdiction and as guardian of the Constitution, to entertain public interest litigation for constitutional review, provided that three tests are met i.e. 1) that the matter is bona fide, 2) it is clothed with a real prospect of success and, 3) it is grounded in a legitimate public interest.

25. The matter was appealed to the Board of the Privy Council who upheld the judgment of the Court of Appeal. The Board referred, *inter alia*, to Section 5(2)(b) of the Judicial Review Act Ch. 7:08 which gives the court the power to grant relief to a person or a group of persons, if the court is satisfied that the application is justifiable in public interest in the circumstances of the case.

26. This Court also carefully considered the reasoned decision delivered by Jamadar JA who at paragraphs 43 to 48 commented on the purpose of *locus standi* and the role of the Court. In addition the Court was guided by paragraph 95 of Jamadar JA's decision.

27. The Second Claimant and the deceased First Claimant raised issues which touch and concern the constitutionality of the Sedition Act.

28. The Second Claimant is a media house and the right of freedom of expression is fundamental to its operations and to the preservation of democracy in Trinidad and Tobago. In fact, all citizens must enjoy, subject to lawful limitations, the freedom to candidly express opinions and political views.

29. The Court also addressed its mind to the evident public interest in relation to the enforcement of provisions of the Sedition Act and it noted that within the recent past, that issues in relation to same have affected media houses as well as trade union leaders alike.

30. As a member of the media fraternity, the Second Claimant is entitled to know the parameters within which it is allowed to act when exercising its right to express opinions.

31. The instant claim has enabled the ventilation of important issues relative to the constitutionality of the Sedition Act and this Court is of the view that it is in the public interest to have these constitutional issues determined.

32. The Second Claimant, in this Court's opinion, does have the capacity to litigate the issues raised herein and this claimant is not a mere busybody. The Court is also of the view that the instant action has not been undertaken for an ulterior motive or some collateral purpose.

Summary of the Claimants' arguments in relation to the substantive relief sought:

33. Essentially the Claimants' case is primarily premised upon two principal arguments namely:

i. The impugned provisions of the Sedition Act offend the Rule of law and the principle of legal certainty, as the legal profile of the seditious offences is too broad, variable and uncertain ("**the legal certainty argument**")

ii. That the impugned sedition offences are inconsistent and incompatible with the characteristics, features and tenets of a sovereign democratic State as guaranteed in Section 1 of the Constitution and are consequently void and of no effect as provided for under Section 2 of the Constitution ("**the democratic State argument**");

34. Before the Court evaluates the merits of the Claimants' arguments, it is important to consider the origins of the law in relation to sedition.

The common law history of Sedition:

35. The offence of seditious libel has its genesis in a 1606 decision of the Star Chamber Court.

36. In 1629, in **R v Elliot (1629) 3 State Trials 293**, three men were charged with uttering words in Parliament, as they delivered speeches which "*tended to the sowing of discord and sedition betwixt His Majesty and his most loyal subjects*".

37. Over the next three centuries, the speaking of inflammatory words, publishing certain libels, and conspiring with others to incite hatred or contempt for persons in authority became known as seditious offences in England.

38. The nineteenth century saw a more liberal, democratic political environment, and a changed view which acknowledged the rights of citizens to freely express criticisms of the government. In the nineteenth century, a view of sedition based on the idea that the Sovereign or Government was the servant of the people, rather than a divine appointee who could do no wrong, started to gain acceptance and the intention to incite violence emerged as an element of the offence at common law.

39. By the end of the nineteenth century, the term sedition was no longer used in the sense of an insurrection or revolt but was described as the act of inciting or encouraging the revolt.

40. The common law evolved and it recognised the need to show that the offending words which were used were accompanied with an intention to cause violence.

41. In **Boucher v R, [1951] 2 DLR 369** the Supreme Court of Canada considered the common law of sedition. Although seditious intention was required for the seditious offences under the Canadian Criminal Code, it was not defined. The majority judges comprehensively reviewed the nineteenth and early twentieth century common law, and summarised their views as to what amounted to seditious intention. Although each judge expressed conclusions as to the meaning of "*seditious intention*" in slightly different terms, the general consensus was that to render utterances seditious, there must be an intention to incite violence or create public disorder, for the purpose of resisting or disturbing constituted authority.

This Republic's Sedition Legislation:

42. Trinidad and Tobago inherited the British common law on sedition at a time when it was governed as a Crown Colony and the government was led by the Governor who represented the King in England.

43. In 1919, the Seditious Publications Bill was introduced in the Legislative Council which consisted of the Governor and members appointed by him. The Governor introduced the Bill and same was passed into law as the Sedition Ordinance of 1920.

44. Under Section 3 of the Act "*Seditious intention*" was and still is defined as an intention:

1. to bring into hatred or contempt, or to excite disaffection against Government or the Constitution as by law established or the House of Representatives or the Senate or the administration of justice;
2. to excite any person to attempt, otherwise than by lawful means, to procure the alteration of any matter in the State by law established;
3. to raise discontent or disaffection amongst inhabitants of Trinidad and Tobago;
4. to engender or promote :
    i. feelings of ill-will or hostility between one or more sections of the community on the one hand and any other section or sections of the community on the other hand;
    ii. feelings of ill-will towards, hostility to or contempt for any class of inhabitants of Trinidad and Tobago distinguished by race, colour, religion, profession, calling or employment; or

5. to advocate or promote, with intent to destroy in whole or in part any identifiable group, the commission of any of the following acts, namely:
    I. killing members of the group; or
    II. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

45. Although the common law required evidence of an intention to incite violence, the Act did not incorporate the intention to incite violence. Consequently, in Trinidad and Tobago, a person may be found to have acted with seditious intention under section 3(1), even if he or she does had no intention to incite lawlessness.

46. Section 4(1) of the Sedition Act provides that a person is guilty of an offence who: (1) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; (2) communicates any statement having a seditious intention; (3) publishes, sells, offers for sale or distributes any seditious publication; and (4) with a view to it being published prints, writes, composes, makes, reproduces, imports or has in his possession, custody, power or control any seditious publication.

47. Section 4(2)(b) provides that a person guilty of an offence is liable on conviction on indictment to a fine of $20,000 and to imprisonment for 5 years.

48. Section 13 of the Sedition Act provides that:

> *"If a Magistrate is satisfied by information on oath that there is reasonable cause to believe that an offence under this Act*

has been or is about to be committed he may grant a search warrant authorising any police officer to enter any premises or place named in the warrant, with such assistance as may be necessary, and if necessary by force, and to search the premises or place and every person found therein and to seize anything found on the premises or place which the officer has reasonable ground for suspecting to be evidence of an offence under this Act".

THE ISSUES:

49. In its determination of the merit of the Claimants' arguments and having considered the historical context and current status of the law in relation to sedition, the Court formed the view that it had to determine the following issues:

    i. Whether Sections 3, 4 and 13 of the Sedition Act are vague and offend the principle of legal certainty and the Rule of Law.

    ii. Whether the sedition offences undermine, without justifiable public interest rationale, the constitutional right to freedom of speech and expression and are provisions which cannot be reasonably justified in a society which has respect for individual rights and freedoms and whether they are inconsistent and incompatible with the characteristics, features and tenets of a sovereign democratic State as guaranteed in Section 1 of the Constitution and whether they ought to be viewed as being void under Section 2 of the Constitution.

ISSUE 1: Whether Sections 3, 4 and 13 of the Sedition Act are vague and offend the principle of legal certainty and the Rule of Law:

Legal certainty

50. Laws generally and criminal laws in particular should be framed in language which is clear, unequivocal, precise, predictable and certain. All citizens are bound by the laws of the land and these laws should be accessible. Where laws contain penal provisions the need for clarity of language is heightened.

51. Lord Diplock in **Merkur Island Shipping Corporation v Laughton [1983] 2 AC 570** stated at page 612 as follows, "Absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it".

52. An express commitment to the rule of law is expressed in the preamble of the 1976 Constitution. Section (d) of the Preamble states as follows:

> Preamble:
> Whereas the People of Trinidad and Tobago:
>
> (d) Recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.

53. In the **Attorney General v Joseph [2006] CCJ 3 (AJ)** Wit J characterised the preamble as, "filling the Constitution with meaning" and breathing "life into the clay of the more formal provisions in that document".

54. The Judicial Committee of the Privy Council in the case of **Sabapathee v The State [1999] 4 LRC 403** held that the principle of legality embodied in the Constitution of Mauritius required that an offence against criminal law had to be defined with sufficient clarity to enable a person to judge whether his

acts or omissions would fall within the definition and potentially render him liable to prosecution. The court opined that legislation which was hopelessly vague should be struck down as unconstitutional.

55. In **SW v United Kingdom; CR v United Kingdom (1995) 21 EHRR 363** the principle of legal certainty was articulated as follows:

> *"The principle enables each community to regulate itself: 'with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible- an individual must have an indication of the legal rules applicable in a given case-and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law."*

56. In **R v Misra and Srivastava [2004] EWCA Crim 2375**, the Court of Appeal (Criminal Division) opined as follows:

> *"34. ....Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty."*

57. **This Court unreservedly feels that every citizen in a sovereign democratic society should not be subjected to punishment under a law unless that law is sufficiently clear and certain. Each citizen has a right to know what**

conduct is forbidden and the consequences which can flow from engaging in specified prohibited conduct, should be clear and unequivocal.

58. In **Odgers' Construction of Deeds and Statutes (5th edition)** at page 366 the learned author stated:

> "unless penalties are imposed in clear terms they are not enforceable".

59. **Where laws are vague their interpretation is then delegated to functionaries such as prosecuting authorities and jurors and such a circumstance is undesirable as the interpretation can be coloured by subjective and arbitrary considerations.**

60. **The need for clarity and certainty in laws which create criminal liability, is without question a position which is consistent with the Rule of Law and is pivotal to the principle of due process.**

61. In **Secretary of State for the Home Department, Ex Parte Simms Secretary of State for the Home Department [1999] 3 All ER 400** Lord Hoffman at pages 412 to 413 summarised the principle of legality and its interplay with freedom of expression.

62. In **Shreya Singhal v Union of India (Criminal) No. 167 of 2012**, the Supreme Court of India expressed its disapproval of vague laws.

63. More recently, in **Gallagher v Secretary of State for the Home Department and others [2019] UKSC 3** Lord Sumption at paragraph 17 stated:

> "17. … For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what

its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, "a government of laws and not of men". A measure is not "in accordance with the law" if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable…"

64. Saunders J, President of the Caribbean Court of Justice, in **Quincy Mc Ewan (et al) v The Attorney General of Guyana [2018] CCJ 30 (AJ)** at paragraph 80 commented on vague laws as it related to a law purporting to criminalise cross dressing in Guyana. He stated:

"80. A penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the prohibited conduct. It must not be vaguely worded. It must define the criminal offence with sufficient clarity that ordinary people can understand what conduct is prohibited. It should not be stated in ways that allow law enforcement officials to use subjective moral or value judgments as the basis for its

enforcement. A law should not encourage arbitrary and discriminatory enforcement."

65. Having considered the aforementioned authorities, this Court holds the view that the language used in legislation must be legally certain if the Court in defence of the rule of law, is to hold that same qualifies as a law.

Correlation between the impugned provisions and Section 6 of the Constitution i.e. the savings law clause.

66. There are two types of savings clauses in Commonwealth Caribbean Constitutions namely, 1) the general savings clause which purports to carry forth all the laws from the old regime and, 2) the special savings clause which insulates from challenge specific penalties or punishments that were in existence at independence.

67. In Trinidad and Tobago the general savings clause of the 1976 Constitution saves all "existing law" i.e. pre independence laws from challenge on the basis that they are incompatible with fundamental rights guarantees outlined under sections 4 and 5 of the Constitution.

Treatment of savings law clauses in the Commonwealth Caribbean:

68. There is an abundance of case law and commentaries on the treatment of savings law clauses in the Commonwealth Caribbean. These clauses have plagued the Commonwealth Caribbean constitutions since the first independence constitutions over fifty years ago. Most recently, Rampersad J in **Jason Jones v The Attorney General (et al) CV 2017-00720** considered

the treatment of savings clauses in the Commonwealth Caribbean at paragraphs 39 to 44.

69. Tracy Robinson, Arif Bulkan and Justice Adrian Saunders in their book **Fundamentals of Caribbean Constitutional Law** at paragraph 6-010 commented extensively upon the impact of savings law clauses on Caribbean countries.

70. The Caribbean Court of Justice in **Jabari Sensimania Nervais v R and Dwayne Omar Severin v R [2018] CCJ 19 (AJ)** examined section 26 of Barbados's Independence Constitution which is in *pari materia* with the Section 6 of the 1976 Constitution.

71. Their Lordships summarised the savings law clauses in the Caribbean at paragraphs 52 to 58. They also reviewed the authority of **Boyce (et al) v R [2005] 1 AC 400.** Their Lordships expressed the view that ensuring that the laws are in conformity with the Constitution cannot be left to the legislature and the executive but rather it is a role which only the Judiciary can fulfil.

72. At paragraph 58 their Lordships condemned the idea that where a provision is inconsistent with a fundamental right a court should be prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime.

73. A few months later the CCJ again addressed the savings law clause but this time in the Guyana Constitution in the case **Quincy Mc Ewan et al (supra).** At paragraph 39 their Lordships stated:

> **39**. By shielding pre-Independence laws (referred to as "existing laws", because they were laws in existence at the time of Independence) from judicial scrutiny, savings clauses pose severe challenges both for courts and for constitutionalism. The hallowed concept of constitutional supremacy is severely undermined by the notion that a court should be precluded from finding a pre-independence law, indeed any law, to be inconsistent with a fundamental human right. Simply put, the savings clause is at odds with the court's constitutionally given power of judicial review."

74. This Court applauds the approach adopted in ***Nervais*** (supra) in relation to the treatment of the applicability of the savings law clause and pre-independence laws. However, in this sovereign democratic state we are bound by the Board's decision in **Boyce (et al) v R [2005] 1 AC 400** and **Matthew v The State of Trinidad and Tobago [2005] 1 AC 433**.

75. Local courts are fettered and constrained by the doctrine of *stare decisis* and are constrained by the Privy Council decision in ***Matthew*** (supra).

76. **The position articulated by the CCJ in *Nervais* (supra), is logical, sound and suggestive of the approach that all proud independent countries should adopt, if there exists a true desire to give meaning and life to the concept of independence.**

77. **The Judiciary, as guardian of the Constitution, has a duty to protect individuals from Acts of Parliament which seek to infringe on their rights and must, without compromise, uphold the rule of law. This Court is resolute in its view that the doctrine of constitutional supremacy must be the cornerstone upon which our legal system is premised. The use of savings law clauses was designed, in the interests of legal certainty and**

continuity, to ensure an orderly transfer of legislative authority to newly independent states.

78. **After 57 years of independence it cannot be reasonably advanced that we are still in that transitional phase and the abdication by every Parliament since independence to align pre-independence laws with the bill of rights enshrined under sections 4 and 5 of the 1976 Constitution must be condemned in the strongest terms. In the absence of such alignment or radical constitutional reform, the position in *Matthew* (supra) will continue to plague the Court and curtail its ability to adequately protect the rights and freedoms of individuals which are enshrined under the Constitution.**

79. **This Court also feels constrained to point out the bare margin by which the Board ruled in *Matthew* and *Boyce* and holds the view that the opinions of the dissenting members of the Board as well as the position articulated in *Nervais* (supra), should guide the executive and the legislature.**

80. **It is hoped that a commitment to independence and self-governance would finally motivate our Parliament to unshackle us from the bondage imposed by antiquated pre independence laws and that comprehensive constitutional reform which includes the revocation of the savings law clause must be prioritized.**

81. **Since the decision of the Board in *Boyce* and *Matthew*, Caribbean jurisprudence has undergone a revolutionary transformation with the growing case law emanating from the Caribbean Court of Justice in its Appellate (and Original) Jurisdiction. The CCJ's ruling in *Nervais* (supra)**

puts added perspective to what was enunciated by Lord Bingham in *Matthew*.

82. **There is merit in the argument that: If Caribbean people want to be free of the shackles of our colonial past, Parliaments should do so through constitutional reform. Given the post-independence refusal to align pre independence laws with the constitution coupled with the stagnation of Commonwealth Caribbean law precipitated by *Boyce* and *Matthew,* respectfully, the Privy Council is urged to reconsider its ruling in *Boyce* and *Matthew*, so as to enable local courts to act in defence of the Constitution, if the Legislature continues to abdicate its responsibility to align all our laws with the bill of rights.**

83. **There is hardly a more suitable case to prompt such a review than the instant matter involving the Sedition Act. It may be that the legislative and executive branch of Government (fused together by the Westminster inheritance) has no motivation to alter a state of affairs which may be used to its advantage. If this is so then the people must speak up and though mindful of the doctrine of separation of powers, the Judiciary as an equal arm of government, must commit to the fierce protection of the supremacy of the Constitution, defend its independence and exercise creativity of thought so as to keep the legality and constitutionality of executive action and laws in check.**

84. In relation to the interplay between the principle of legal certainty and the savings law clause, the learned authors in **Fundamentals of Caribbean Constitutional Law** at paragraph 6-017 stated as follows:

> Legal certainty and savings law clauses:

> The general savings law clauses in Caribbean constitutions provide immunity from constitutional challenges, on bill of rights grounds, to certain existing laws. That clause generally precludes challenges to restrictions on guaranteed rights that are "contained in any *law* in force immediately before the appointed day". Arguably to qualify as "law" for these purposes, the existing law must meet the standard of legal certainty. Although this point is yet to be decided by Caribbean courts, it follows from the current application of the principles of legal certainty. The principle of legal certainty as an element of rule of law is already considered relevant when courts are undertaking an evaluation of whether a law infringes a guaranteed right and must assess whether the restriction on the right serves a legitimate goal and is proportionate. A fortiori, legal certainty should apply to those instances in Caribbean constitutions in which a person is facing a categorical shut-out of fundamental rights through savings law clauses. No one should suffer the harsh effects of a savings law clause in relation to provisions that do not meet the criteria of legal certainty.

85. **This Court, though constrained by the decision in ***Matthew*** (supra) is inclined to adopt the approach as suggested by the learned authors referenced above and holds the view that to qualify as 'law', legislation must satisfy the criteria of legal certainty as a condition precedent. If it does not, even though it may have been enacted prior to independence, same cannot be viewed as an existing law, so as to be saved under Section 6 of the Constitution.**

Resolution of the issue:

86. **When one considers the historical backdrop against which the codification of the common law of sedition occurred, it is possible to conclude that the primary intent behind sedition laws was to protect the interests of those who governed in the colonial era.**

87. **In 1919, dock, railway and utility workers protested against a backdrop of racism and low wages. There was a turbulent period of labour riots and in 1920 the Sedition Act was passed.**

88. **The Act sought to clamp down on speech and publications which posed a threat to the Colonial order. The banned calypsonian King Radio wrote "they want license we mouth, they don't want we talk". Under the codified Sedition law, labour hero Uriah Buzz Butler who fought for the rights of workers, was prosecuted, convicted and jailed.**

89. **After Independence in 1962, political power became more accessible but the pre-existing colonial systems, institutions, educational framework and laws endured. The relative unchanged nature of the status quo restricted the formation of a truly independent state. Independence requires independent thought and a willingness to forge a truly free and regulated society which operates within the boundaries delimited and defined under its Constitution.**

90. **The Court cannot be confined by a conservative and overtly cautious approach and must within the parameters of the rule of law, vigorously defend and uphold the rule of law and the Constitution.**

91. **Sections 3 and 4 of the Sedition Act are framed in language which is wide in scope and general in nature.**

92. **The words used do not indicate with sufficient certainty, the specific conduct which is prohibited and which is subject to criminal sanction. Section 3(1) defines seditious intent as the bringing of hatred or contempt or the inciting of dissatisfaction against the government. What does dissatisfaction mean? The democratic process is strengthened by vibrant opposition which can challenge the efficacy and effectiveness of governmental policy and performance thereby acting as an essential check and balance against the abuse of executive power. While the Act does provide for, pointing out via lawful means, errors and defects, with a view of effecting reform, the character of what may be viewed as "lawful means" may vary from generation to generation and the pointing out of defects and errors may not necessarily be engaged without inciting dissatisfaction.**

93. **The language used is obviously bad and bitterly broad. Section 3 effectively confers a discretion dangerously wide in scope in relation to the nature of the conduct which can amount to a seditious offence. This discretion is so wide and sweeping that the interpretation afforded may primarily depend upon the motives, malice, inherent bias, personal and/ or political agenda of those who are empowered to engage in the interpretation exercise and apply the law. The likelihood of arbitrary or discriminatory enforcement is as real as it is repulsive.**

94. **Penal provisions should never be selectively or arbitrarily activated. Vague and ambiguous words have no place in legislation generally and must be avoided where criminal liability is involved. Such imprecise language can inevitably lead to an unequal application of the law.**

95. **In a democracy, laws which are not clear can lead to the evisceration of the fundamental rights of citizens. Laws must facilitate predictability and avoid arbitrariness. If they do not, their existence cannot be reasonably justified in a democratic society which prioritises the Rule of Law. Hopelessly vague legislation should therefore be struck down.**

96. In **R (Gillan) v Commissioner of Police of the Metropolis [2006] 2 AC 307** at paragraph 34, the Court described and framed these following principles within the context of the Rule of Law:

> *"The lawfulness requirement in the Convention addresses* ***supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose*** *other than that for which the power was conferred.* ***This is what, in this context, is meant by arbitrariness, which is the antithesis of legality****. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."(Emphasis Court's)*

97. **In Trinidad and Tobago, "*seditious intention*" under the Sedition Act can range from exciting disaffection against the Government, to raising discontent or disaffection amongst the people of Trinidad and Tobago, or engendering ill-will between different classes of people. Unlike many other jurisdictions, here, it is possible to allege a seditious intention in the absence of evidence to establish an intention to incite violence against established authority.**

98. **Under the Act as framed, a very wide range of circumstances can potentially initiate prosecution.**

99. **It has been argued, that in this Society, where there is an evident measure of discontent and dissatisfaction between the major ethnic groups, that the Sedition Act and the offences outlined therein serves as a deterrent and that its retention assists in the minimization and management of hostility and hateful speech predicated upon political, ethnic and religious views, which can catalyse social unrest. Other laws however, such as legislation which governs hate speech can be utilised to ensure that there is a balance between the maintenance of good social order and the preservation of national security on the one hand and the rights of free speech and responsibility as well as the ability of individuals to criticise the State and each other, on the other.**

100. **The linguistic vagueness and overtly wide definition of seditious intent under Section 3 of the Act unequivocally demonstrates that the offences lack the requisite degree of clarity to qualify as law ,as citizens can be subjected to arbitrary, selective and /or subjective enforcement. Such provisions offend the Rule of law and have no place in a sovereign democratic state. They are dangerous and archaic as they can be used to unjustifiably fetter free speech, suppress political dissent and restrict freedom of the press.**

101. **Free speech, open public debate, respectful non defamatory statements or utterances, even if caustic or critical of governance, government, public officials or of the various groups of bodies who make up this rainbow Republic and or the cultural and social norms and dynamics which**

characterise the society, either in reality or by way of perception, must be robust and uninhibited.

102. **In relation to all criminal offences, an inherent evidential obligation exists to establish beyond a reasonable doubt, that the accused intended to commit the crime.**

103. **Section 4(1)(a) of the Sedition Act creates liability for persons who do or attempt to do any act with a seditious intention. In other words, to attract liability the person must have so acted or attempted to so act with seditious intention as defined under Section 3(1).**

104. **Under Section 4(1)(c), a person need only to publish a statement that expresses a seditious intention. Accordingly, a newspaper, for example, could be found guilty of sedition even if it only reported a "seditious" statement made by someone else.**

105. **There is no express requirement in section 4(1)(c) that the publisher of the statement knowingly or recklessly intended to incite others to commit an unlawful act. However, there is a common law presumption that *mens rea* is an ingredient of every criminal offence, so it must be presumed that, to be found guilty, there is evidence to establish beyond reasonable doubt that the publisher was aware of the nature of the material. It is therefore unsatisfactory that on its face, Section 4(1)(c) seems not to require such knowledge given that the focus is upon material which expresses a seditious intention.**

106. **With respect to Section 13 of the Sedition Act which provides for the issue of a search warrant, this Court notes that while the wording of this section**

is clear, the definition and meaning of an 'offence' under Section 4 is critical to the operation of this section. Given the Court's view that the wording of Sections 3 and 4 lacks legal certainty and violates the rule of law, the powers to be exercised pursuant to this section are premised upon provisions which violate the rule of law.

107. **The Court also notes that the Schedules to the Act reveal, that, the type of material considered seditious and banned, can include Marxist, socialist and communist materials. How can this democracy justify possible imprisonment if someone were to espouse or teach or advance socialist or communist agendas? The idea that there are ideologies which, if espoused, published and distributed, warrant criminal censure, while those ideologies remain undefined, is not compatible with the principle of legal certainty or the rule of law.**

108. **The generality of sections 3 and 4 of the Act favours the protection of the Government and lawfully constituted authority.**

109. **The rule of law and the ability to enjoy constitutionally enshrined rights are of paramount importance but sections 3 and 4 of the Act impose unreasonable and arbitrary restrictions.**

110. **There is the need for justified limits on freedom of expression in order for example, to protect national security and public order. Suppressing speech that proximately encourages violence is a justifiable limitation in a democratic society, since national security concerns must outweigh an individual's right to freedom of expression. But such suppression must only operate where it is strictly necessary to prevent societal harm. The seditious offences provided for under the Sedition Act have the potential**

to prohibit conduct which is far wider than conduct which incites violence or insurrection against lawfully constituted authority. The sedition laws as currently worded potentially permit interference and over reach which materially contradicts the fundamental freedoms enshrined under the Constitution. The wide parameters of the offences, and the lack of interpretative clarity creates the potential for abuse by prosecuting authorities which can result in the arbitrary and subjective prosecution of persons who may express unpopular or disturbing opinions.

111. **The State should be entitled to punish statements or conspiracies advocating imminent violence against it, the community or individuals. The Sedition Law in its current form is however not an appropriate way to achieve such an objective.**

112. **Where the protection of public order or the preservation of the Constitutional authority of the Government is at stake, there are other more appropriate criminal offences which can be used to prosecute offending behaviour; offences that do not carry with them the risk of abuse or the tainted history which attaches to the pre independence sedition laws.**

113. **It should not be an offence in the twenty-first century to make statements or conspire to make statements expressing a section 3(1)(a) intention, namely an intention to bring into hatred or contempt, or excite disaffection against the Government of Trinidad and Tobago or the administration of justice. Statements bringing into contempt the Government are the sort of dissenting statements that, without more, should be protected by the principles of freedom of expression and are**

statements which a healthy democracy should be well able to absorb and withstand.

114. **The intention to incite violence against lawfully instituted authority must be the foundation upon which any justifiable Sedition Laws are premised.**

115. **Offences of incitement or conspiracy to use force for the purpose of overthrowing the Government may be addressed by section 2 of the Treason Act (Chap. 11:03).**

116. **Unpopular or distasteful views are best debunked within the market place of ideas, in that regard, freedom of expression is curative of its own occasional adverse effects; freedom of expression may lead to unsavoury commentary by members of society however the very freedom permits those more responsible members to challenge such ideas for the benefit of society.**

117. **It could neither be legitimate nor proportionate to suppress unpopular or even divisive views which express discontent and/or disaffection in the absence of the incitement of violence.**

118. **This Court therefore holds the view that sections 3 and 4 of the Act are not clothe with the prerequisite criteria of legal certainty to qualify as law and they violate the rule of law. Accordingly, Section 6 of the Constitution provides no protection.**

Issue 2: Whether the sedition offences are inconsistent with characteristics, features and tenets of a sovereign and democratic State:

119. The claimed reliefs under Section 14(1) of the Constitution relate solely to sections 4 and 5 of the Constitution and evidently cannot apply to Section 1 as Section 1 does not form part of Chapter 1 of the Constitution. The instant claim however is not confined to Section 14 relief.

120. The Court considered its powers under Chapter 7 of the Constitution and noted the dicta of Wooding CJ in **Collymore v The Attorney General (1967) 12 WIR 5** at page 9 where the then Chief Justice stated:

> "…I am accordingly in no doubt that our Supreme Court has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is *ultra vires* and therefore void and of no effect because it abrogates, abridges or infringes or authorises the abrogation, abridgment or infringement of one or more of the rights and freedoms recognised and declared by s 1 of the chapter. I so hold."

121. The Claimants' claim is essentially hybrid in nature and in addition to the relief sought under Section 14 the Constitution, they also prayed for administrative orders under Part 56.7 of the CPR.

122. This Court, as guardian of the Constitution, undertook earlier in this judgment, a detailed examination of the impugned provisions to determine if the provisions contravened the principle of legality and legal certainty and found that section 3 and 4 of the Act, do. The Court, in those circumstances, has further adopted the view that the impugned sections 3 and 4 of the Sedition Act also stand in violation of Rule of law.

123. The Defendant argued that Section 1 cannot disable the savings law clause. This Court has also articulated the view that the savings law clause should be narrowly interpreted and that same cannot be applied to sections 3 and 4 of the Sedition Act as those provisions do not have the quality of and do not qualify as law. Accordingly, the said provisions cannot be treated as existing law to be saved by Section 6 of the Constitution. In relation to the Defendant's argument viz a viz Section 6 and its applicability to Section 1 of the Constitution, the Court holds the firm view that an "existing law" may be invalidated if it conflicts with provisions of the Constitution other than sections 4 and 5.

124. In **Josine Johnson, Yuclan Balwant v The Attorney General of Trinidad and Tobago [2009] UKPC 53** at paragraph 22 the Board stated as follows:

> "22. … Section 6(1) of the Constitution applies only to sections 4 and 5 of the Constitution. An existing law is not to be invalidated by anything in those sections. But, if an existing law were inconsistent with some other provision of the Constitution, then, by virtue of section 2 of the Constitution, it would be void to the extent of the inconsistency…."

125. In the Fixed Date Claim Form filed on May 31, 2019, an express relief sought was a declaration that Sections 3, 4 and 13 of the Sedition Act, either individually or collectively, infringe Section 1 of the Constitution of Trinidad and Tobago in that they are inconsistent and/or incompatible with the characteristics, features and tenets of a democratic state and therefore void and of no effect pursuant to Section 2 of the Constitution.

126. Section 1(1) of the 1976 Constitution provides:

> "(1) The Republic of Trinidad and Tobago shall be a sovereign democratic State."

127. Section 2 of the 1976 Constitution provides:

> "This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

128. Reference has been made earlier in this judgment to the history of the law of sedition and particularly sedition as it relates to Trinidad and Tobago.

129. The Court notes that the 1962 Constitution did not establish Trinidad and Tobago as a sovereign democratic State. It was only with the passing of the 1976 Constitution that Trinidad and Tobago disavowed allegiance to the Queen and the office of the Governor General who was appointed by Her Majesty (Section 19 of the 1962 Constitution) was replaced by an appointed President.

130. This was a major turning point in the history of this Republic because it meant that the sovereignty of Trinidad and Tobago which previously resided in the person of the King or Queen now lay in the people of Trinidad and Tobago.

131. On January 22, 1974, the Report of the Wooding Commission on Constitutional Reform was presented to the then Governor-General, Sir Ellis Clarke and it was laid in Parliament . At paragraph 138 the Commission forcefully recommended that there was a preference to replace the Monarchy and to form a Republic.

132. One of the main pillars in a democracy is the right of free speech which empowers people to challenge, criticize and condemn the government.

133. The late Caribbean legal luminary, Professor Simeon McIntosh, in his book **"Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence" (2005)** wrote extensively on the importance of freedom of speech in a democratic society. Relevant extracts from his book are as follows :

> Page 93:
>
> "But free speech is above all an invaluable means of civic education and participation in governance- specifically, democratic governance.
>
> 'Democracy', in other words, is very prominent and important form of social order which the value of free speech embraces. It speaks to all the complicated forms of social interaction by which we govern ourselves. From a political standpoint, democracy strives to create a structure of governance of 'a common will, communicatively shaped and discursively clarified in the political public sphere'. According to Professor Schauer [Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982)], the argument from democracy is taken to be one of the independent arguments that help to define freedom of speech as an independent principle of political philosophy. The argument from democracy presupposes the *a priori* acceptance of democratic principles as the appropriate guidelines for the organisation and governance of the state. Schauer's working definition of democracy is a system of governance that acknowledges that ultimate political power

resides in the population at large; that the people as a body are sovereign; and that they, either directly or through their elected representatives, in a significantly non-fictive sense actually control the operation of government. The argument for democracy therefore views freedom of speech as a necessary component of a society premised on the assumption that the population at large is sovereign".

…

Page 94:

"In a constitutional democracy, freedom of speech is seen as crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power, and to engage in the deliberative process requisite to the intelligent use of that power. Moreover, the freedom to criticize makes it possible to hold governmental officials and public servants properly accountable to the people".

…

Page 97 - 98:

"The democratic justification for protecting free speech thus grants priority of protection to public debate on issues of civic importance. That is to say, speech about matters of public concern serves the value of democratic self-governance in a way that speech about matters of purely private concern does not. Public debate must be protected in a democracy because all citizens should, so far as possible, understand the issues which bear upon their common life. This underscores the importance of the right of the freedom of the press as a subset of the right of free speech, given that the press is the core component of a public forum, an indispensable condition for the formation of a public opinion on matters of public concern and interest.

> ..... Open debate and public deliberation are an intrinsic and indispensable feature of any society premised on the principle of self-government. The argument for democracy therefore enjoins the necessity of making all relevant information available to the sovereign electorate so that they, in the exercise of their sovereign powers, can decide which proposals to accept and which proposals to reject.
>
> So, from the standpoint of the argument for democracy, freedom of speech and the press is seen as the necessary correlate of the truism that the people as a whole are sovereign".

134. **In a democracy, it is contradictory and unacceptable to bestow onto the people the power to freely choose their government on the one hand, but, on the other to deny them the right to exercise freedom of speech and engage in discussion even if same seeks to criticise and condemn the government.**

135. The principles of sovereignty and democracy are expressed in Section 1 of the Constitution. Although sections 1 and 2 of the Constitution do not form part of Chapter 1 and they were inserted under the heading 'Preliminary', the structure of the Constitution places emphasis on the jurisdiction of the Supreme Court and Section 2 empowers the Court to void laws to the extent of their inconsistency with the Constitution.

136. The savings law clause i.e. Section 6 of the Constitution does not apply to Sections 1 and 2 but is limited to Sections 4 and 5 of the Constitution. Accordingly, the Court's jurisdiction in relation to violations of Sections 1 and 2 of the Constitution is not fettered or curtailed by Section 6.

137. In the Privy Council decision of **The State of Mauritius v Khoyratty [2006] UKPC 13** the Board examined Section 1 of the Constitution of Mauritius, which is similar in wording to Section 1 of the 1976 Constitution, with respect to an Act which sought to deny bail to persons charged for certain offences.

138. Lord Steyn, who delivered the leading judgment of the Board, at paragraph 15 commented on Section 1 of the Mauritius Constitution and said as follows:

> "15. First, section 1 of the Constitution is not a mere preamble. It is not simply a guide to interpretation. In this respect it is to be distinguished from many other constitutional provisions. **It is of the first importance that the provision that Mauritius "shall be … a democratic state" is an operative and binding provision. Its very subject matter and place at the very beginning of the Constitution underlies its importance.** And the Constitution provides that any law inconsistent with the Constitution is pro tanto void: section 2."(Emphasis Court's)

139. This Court notes that although Section 1 of the Mauritian Constitution and the 1976 Constitution are worded similarly, Section 1 of the Mauritian Constitution carries with it a deep level of entrenchment in accordance with Section 47(3) but no similar provision is found in the 1976 Republican Constitution. In addition, the Mauritian Constitution does not have a savings law clause.

140. Lord Steyn in ***Khoyratty*** (supra) commented that the placement of the section at the very beginning of the Constitution underlies its importance. In drafting the 1976 Constitution the draftsmen elected to insert Section 1 at the very beginning, following the Preamble under the heading “Preliminary". This suggests that it was likely the foundation upon which the rest of the Constitution was premised. The positioning reinforced the fundamental change away from a Monarchy to a proud Republic which was to be defined by all the inherent features which characterise a democratic sovereign state.

141. In the case **Garvin Sookram v Conrad Barrow (Commissioner of Prisons) CV 2014-02199** Gobin J addressed Section 1 of the Constitution in relation to legal professional privilege and considered whether it was a concept fundamental to “a democratic state”. The court considered but rejected the argument that ***Khoyratty*** (supra) was not applicable because the decision did not turn on an interpretation of Section 1 of the Mauritius Constitution but rather on the specially entrenched status of Section 1 as opposed to Section 1 of the 1976 Constitution which is the least entrenched provision in the Constitution. This Court agrees with and adopts the position articulated by Gobin J at paragraphs 32 to 34 of the said judgment.

142. In the case of **Director of Public Prosecutions v Mollison [2003] 2 AC 411** the Board of the Judicial Committee of the Privy Council held that Section 2 of the Constitution by its terms vests in the High Court the jurisdiction to declare as unconstitutional, laws which are incompatible with the foundational principles of the Constitution, namely the doctrine of separation of powers and the rule of law. The Board decided that an existing law which violated the separation of powers could not be saved by the

savings law clause and in the exercise of its discretion modified the law to bring it into conformity with the Constitution.

143. In the instant matter this Court is however unable to modify the impugned provisions because as the Court has found, the wide manner in which the language of the sections is framed, the lack of legal certainty and absence of clarity violate the rule of law, which is a foundational pillar of a sovereign democratic state.

144. Having considered the law as outlined, this Court holds without reservation that the declaration in Section 1 of the 1976 Constitution provides an express, substantial and binding guarantee that the Republic of Trinidad and Tobago is a sovereign democratic state and Section 6 of the Constitution can offer no immunity to pre independence laws which violate Section 1 of the Republican Constitution .

The concept of freedom of expression as being a fundamental feature of a sovereign democratic state.

145. International bodies have made it very clear that freedom of expression and information are important human rights. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

146. The importance of freedom of expression to a democracy has also been underscored by a number of international courts.

147. The Inter-American Court of Human Rights in **Advisory Opinion OC-5/85 of November 13, 1985** stated at paragraph 70 that:

> 70. "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."

148. This position has repeatedly been affirmed by both the UN Human Rights Committee and the European Court of Human Rights.

149. The fact that the right to freedom of expression exists to protect controversial expression as well as conventional statements, is also well established.

150. In **Nilsen and Johnsen v Norway, November 25, 1999 Application No. 23118/93** at paragraph 43 the European Court of Human Rights stated:

> "According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such

are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society".

151. The guarantee of freedom of expression applies with particular force to the media, including the broadcast media.

152. Given their fundamental role in informing the public, the media as a whole merits special protection.

153. In **Regina v. Secretary of State for the Home Department Ex Parte Simms (A.P.) Secretary of State for the Home Department Ex Parte O'Brien (Consolidated Appeals) [1999] 3 All ER 400** Lord Steyn at page 408 summarized the utility of Freedom of Expression as follows:

“Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self fulfillment of individuals in society. Secondly, in the famous words of Mr. Justice Holmes (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market.": Abraham v. United States 250 U.S. 616, at 630 (1919), per Holmes J. (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country:”(Emphasis Court’s)

154. **Freedom of thought and expression is a critical part of a functional democracy and must be protected and preserved in any sovereign democratic state. Accurate information and open expression breathes life into a democracy and as Sparrow said, "the people of a country should be free to talk their mind". When there is the imposition of undue restrictions upon freedom of speech, expression and thought, there is a stifling of both information and democracy. Freedom of expression enables a population to challenge and question governance and to spark the desire and absolute need for accountability. Any law which seeks to criminalize the articulation of unpopular political, religious, social or cultural views must be clearly defined and even if it is characterised by clarity, it has to be established that the imposition is justified in the public interest.**

155. **This Court feels compelled to record its disapproval of the statements made by the deceased First Claimant. The statements were divisive, inappropriate and unsuitable in a plural society. Its disapproval notwithstanding, the Court recognises that the deceased First Claimant enjoyed the right to speak freely and to engage in an analysis of the society guided by his perception of prevailing circumstances. There is however, an evident need when dealing with situations such as the one which arose when the deceased First Claimant uttered his statements, for citizens to understand the individual power which each person has, to reject unacceptable or divisive programs and policy. There are simple solutions for the everyday listener which includes not tuning into programs which promote offensive content. On a corporate level, advertising funding can be withheld, as market forces can effectively regulate improper and inappropriate conduct.**

156. No right in a democracy is absolute and where limitations are imposed, the burden of proof lies on the person who seeks to challenge such a limitation

or law, to establish that same cannot be reasonably justified in a society which adheres to democratic principles .

157. The Defendant in its submissions relied, *inter alia*, on **R v Oakes [1986] 1 SCR 103**. Rampersad J in **Jason Jones v The Attorney General (supra)** neatly laid out the Oakes test.

158. At paragraph 139 the judge stated that:

> … "The Oakes test has two parts.
>
> First, it requires that the objective pursued by the limit be of sufficient importance as to warrant overriding the right.
>
> Second, the limit must be proportionate, which has three aspects: there must be a rational connection between the measures containing the limit and the objective pursued; the degree of infringement must be minimal; and there must be an overall proportionality between the deleterious and salutary effects of the measure."
>
> (Emphasis Court's)

159. When one considers the long title of the Sedition Act it seems that the purpose of the Act was meant particularly for the riots which were taking place at that point in Trinidad and Tobago's history. It cannot be said that this remains a relevant consideration in Trinidad and Tobago, as a sovereign democratic state which has proper regard for the rights and freedoms of the individual.

160. With respect to the second limb of *Oakes* (supra) i.e. how well has the legislative garment been tailored to suit its purpose, the Court notes the following:

1. From the time the Sedition Act was enacted in 1920, the last amendment to the Act took place in 1971 i.e. before Trinidad and Tobago became a sovereign democratic State;

2. The Sedition Act essentially had the purpose of limiting a people's ability to speak against the Monarch. Unlike the pre 1962 and 1976 position where the people were subservient to the Monarch, after 1976, the people were the sovereign, so the retention of such a law is baseless and obsolete.

161. With regard to the degree of infringement being minimal, the Court notes that apart from the Sedition Act, there are other laws which criminalize similar actions such as the following:

1. Section 4 and 5 of the **Riot Act Ch. 11:05**;
2. Section 49 and 50 of the **Summary Offences Act Ch. 11:02**; and
3. Section 2 of the **Treason Act Ch. 11:03**.

162. **The Court is of the view that an application of the Oakes test demonstrates with clarity that the impugned provisions of the Sedition Act disproportionately infringe upon fundamental rights which are pivotal in a sovereign democratic State.**

163. **The fundamental right of freedom of expression must be defended and the Court cannot adopt a myopic view and disregard the evolving international trends including the position adopted in the England which repealed its sedition laws.**

164. **In Trinidad and Tobago, given the struggles which our forefathers endured in the pre-independence era which saw the suppression of rights, exploitation of workers and riots, laws which perpetuate unjustified limitations on the freedom of expression and press freedom, must be rejected. The constitutional Section 1 guarantee must be defended and**

guarded by the Court and it must fearlessly intervene when the legislature fails to align laws with the Constitution.

165. **This Court holds the view that Sections 3 and 4 of the Sedition Act are patently inconsistent and are at odds with Section 1 of the Constitution which guarantees that Trinidad and Tobago is a sovereign democratic State, as these provisions impose disproportionate and unjustified restrictions on free speech, expression and thought. In addition, they violate the Rule of Law because they lack certainty, are vague and so their status as law cannot be reasonably justified in this sovereign democratic state.**

Conclusion:

166. This Court has found that the vagueness, lack of clarity and uncertainty in the relevant provisions of the Sedition Act leads to an arbitrary application of the law.

167. One of the core principles associated with the rule of law is the principle of legal certainty. The rule of law demands that citizens should be able to regulate their conduct. Legislation which is hopelessly vague does not facilitate such regulation and cannot qualify as law.

168. This Court is resolute in its view that sections 3 and 4 of the Sedition Act violate the rule of law. They do not qualify as law and must be struck out as these sections do not meet the criteria of legal certainty. Given the evident lack of clarity and having found that they do not meet the standard to qualify as a law, they cannot be treated as “existing law" so as to be saved by Section 6 of the Constitution.

169. Given the history of Trinidad and Tobago from the period when there was a Monarchy to the post 1976 era when Trinidad and Tobago became a Republic, the impugned provisions now have no place in this sovereign democratic state where the people are sovereign. The unjustified limits which the impugned provisions of the Sedition Act impose upon the freedom of expression and the freedom of the press violate the binding guarantee that this Republic is a sovereign democratic state as outlined under Section 1 of the Constitution and pursuant to Section 2 of the Constitution, laws which are inconsistent with the Constitution are void to the extent of the inconsistency.

170. For the reasons outlined, the Court hereby issues the following declarations and orders:

1. The Court declares that sections 3, 4 of the Sedition Act contravene the principle of legality and/or legal certainty, in that they are vague, uncertain and therefore illegal, null and void and they offend the rule of law;
2. The Court declares that sections 3 and 4 of the Sedition Act infringe the right of the individual to enjoy freedom of thought and expression, the right to join political parties and express political views and the right to freedom of the press which are all rights which are tenets of a sovereign democratic state and individually or collectively these provisions infringe the binding declaration recorded at Section 1 of the Constitution;
3. The Court declares that sections 3 and 4 of the Sedition Act are inconsistent and/or incompatible with the characteristics, features and tenets of a democratic state and pursuant to Section 2 of the Constitution they are void to the extent of their inconsistency with the Constitution;

4. The parties shall be heard on the issue of costs.

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FRANK SEEPERSAD

JUDGE

Assisted by Liam Labban
Judicial Research Counsel