IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCR2021/002
Guyana Criminal Appeal No 45 of 2020

BETWEEN

MARCUS BISRAM **APPELLANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Before the Honourable: **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr Darshan Ramdhani, QC with Mr Sanjeev Datadin, Mr Dexter Todd and Mr Arudranauth Gossai for the Appellant

Mrs Shalimar Ali-Hack, SC, Director of Public Prosecutions with Mrs Teshana James-Lake, Assistant Director of Public Prosecutions and Mr Nigel Hawke, Solicitor General for the Respondent

Constitutional law – Separation of powers – Independence of Judiciary – Power of Director of Public Prosecutions after discharge of the accused to direct magistrate to open preliminary inquiry and commit the accused for trial – Whether such power is unconstitutional – Whether DPP followed the required procedure in exercise of that power – Whether existing law contravening fundamental rights must first be modified – Constitution of the Co-operative Republic of Guyana Act, Cap 1:01, arts 122A, 144, 152 – Criminal Law (Procedure) Act, Cap 10:01, s 72

SUMMARY

Marcus Bisram, a murder accused, was discharged by the magistrate who heard the evidence at the Preliminary Inquiry ("PI") into his murder charge. The Director of Public Prosecutions ("the DPP"), by two separate letters, nevertheless directed the magistrate to reopen the PI and later to commit Bisram for trial, which the magistrate did. Bisram contended that these directives by the DPP were unlawful and that s 72 of the Criminal Law (Procedure) Act ("the Act"), an "existing law" which empowers the DPP to so direct, is incompatible with the Constitution. He sought Court orders in relation to these claims.

Bisram claimed that the directions were unconstitutional because s 72 was contrary to arts 122A (which entrenches the principle of judicial independence), 144 (which secures the right to the protection of the law) and the separation of powers doctrine. He also claimed that, in any event, the DPP did not precisely follow the steps required by the section.

Morris-Ramlall J granted the orders claimed and ordered Bisram's release on the basis that no *prima facie* case had been made out at the PI and that, in any event, the DPP had not scrupulously adhered to the steps required under s 72. The judge declined to find that s 72 was unconstitutional. The DPP appealed and Bisram cross appealed.

The Court of Appeal allowed the DPP's appeal against the judge's orders and dismissed Bisram's cross-appeal that s 72 infringes the Constitution. That court held that art 122A does not apply to the magistrate's Court as it is not a superior court, and that, as the DPP is not part of the Executive, the directions do not contravene the doctrine of the separation of powers. Further that, because s 72 was an existing law, it could not be held unconstitutional even if it was inconsistent with art 144.

The Court of Appeal accepted that 'there was bungling by the DPP' in the sending of the letters to the magistrate, but it found that there was no prejudice to Bisram. That court thus held that the committal by the magistrate was valid. Bisram appealed to this Court.

The Court first highlighted that a PI, though not a trial, is a judicial proceeding in which the accused is entitled to a variety of legal rights similar to at a trial. However, a discharge at the PI is not an acquittal, and issues of *autrefois acquit* do not apply as the accused was never placed in jeopardy. The Court also noted that, irrespective of the DPP's

independence, what was pertinent was whether the parliament could validly authorise that high official to instruct a judicial officer on how a matter should be decided.

On the question of compliance with s 72, the Court noted that s 72 required the DPP to ***first*** receive the depositions and other material and form an opinion from them that a *prima facie* case has been made out, ***before*** directing the magistrate to reopen the PI and give the accused an opportunity to make a statement or call witnesses. In this case, the DPP made up her mind, before receiving the depositions, that the PI should be re-opened with a view to committing the accused. In doing so, she failed to follow the carefully crafted procedural steps of s 72, which embody substantive principles of fundamental fairness and natural justice conducive to the goal of a fair hearing. This failure rendered the subsequent acts of both the DPP and the magistrate susceptible to being declared a nullity.

On the constitutionality of s 72, and with respect to the separation of powers, the Court noted that art 122A speaks to "official" influence and control which is broader than "executive" influence and control, and that the article itself makes reference to freedom from 'political, executive *and any other form of direction and control*' (emphasis added).

The Court also found that a) the placement of the article before art 123, which establishes the Supreme Court of Judicature comprising of the Court of Appeal and the High Court; b) the reference in art 122A to ***all*** courts unlike the reference in art 123 to ***those*** courts (meaning superior courts); and c) the nature of the magistrates' courts in relation to its functions, scope of jurisdiction and administrative autonomy all point to the magistrates' courts being amenable to the provisions of art 122A.

The Court held that a law that renders the magistrate's professional decision-making subject to the dictates of another official cuts straight through art 122A and must be declared void to the extent of its inconsistency with that article. In this case, art 152, the savings provision, cannot apply as it only relates to inconsistency with fundamental rights falling between arts 138 and 149 and art 122A obviously falls outside that range.

On the question whether s 72, as an existing law was saved and immunised from being held to be in contravention of art 144, the Court re-affirmed the 'modification first' approach initially espoused in *Nervais* and embraced in *McEwan*. The Court held that the savings and modification clauses should be interpreted together so that existing laws should

be first suitably modified before being applied. This approach allows courts to promote fundamental rights and freedoms by permitting them, 'to identify an inconsistency between an existing law and the fundamental rights in the Constitution and to modify the inconsistency out of existence'.

In considering the scope of the modification power in s 7(1) of the Constitution Act, the Court accepted the opinion of de la Bastide CJ in *Roodal v The State*, which was later specifically relied on by Lord Bingham in *Mollison* and cited by Lord Hoffman in *Matthew*. That opinion was to the effect that the Constitution has entrusted a sweeping responsibility to courts to appropriately construe existing laws that challenge fundamental rights.

Finally, on the question of the consequences that follow the above decisions, the Court separated these into two sets: first in relation to Bisram and secondly in relation to the future of s 72. As to the first, the Court agreed with Morris-Ramlall J that, even if s 72 were constitutional, the DPP's second directive to the magistrate must be declared a nullity. The Court thus agreed with the trial judge that everything that followed the issuance of this directive must be quashed.

The Court also found that it would be unjust, in all of the circumstances, for Bisram to be made to answer any charge of murder in this case on the same evidence as was presented to the magistrate. However, because Bisram, at least in terms of the law, was never placed in jeopardy, nothing prevents the DPP from having him re-arrested and charged again if fresh evidence was obtained linking him to the alleged murder.

In relation to s 72, the Court noted that simply striking down s 72 would leave a substantial gap in the criminal procedure, without any certainty as to when that gap will be closed. Thus, until the National Assembly addresses this matter, s 72 should be modified to provide that a DPP, who is for good reason disappointed with the decision of a magistrate to discharge an accused person, may place before a judge of the Supreme Court the depositions and other material that were before the magistrate on an *ex parte* application for the discharged accused to be arrested and committed if the judge is of the view that the material justifies such a course of action.

In all the circumstances, the Court allowed the appeal and restored the decision to discharge Mr Bisram.

Cases referred to:

A-G v Mohammed (1985) 36 WIR 359 (TT CA); *A-G v Richardson* [2018] CCJ 17 (AJ) (GY), (2018) 92 WIR 416; *A-G of Fiji v DPP* [1983] 2 WLR 275; *Belize International Services Limited v A- G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36; *Bowe v R* (2006) 68 WIR 10 (BS PC); *Boyce v Barbados* (Preliminary Objection, Merits, Reparations and Costs) Inter – American Court of Human Rights Series C No 169 (20 November 2007); *Boyce v R* (2004) 64 WIR 37 (BB PC); *Brooks v DPP* (1994) 44 WIR 332 (JM PC); *Browne v R* (1999) 54 WIR 213 (KN PC); *DPP v Mollison (No 2)* [2003] 2 LRC 756 (JM PC); *Ferguson v A-G of Trinidad and Tobago* [2016] 2 LRC 621; *Halstead v Commissioner of Police* (1978) 25 WIR 522 (GD); *Hinds v R* [1977] AC 195 (JM PC); *Inderjali v DPP* [2019] CCJ 4 (AJ) (GY), (2019) 94 WIR 381; *Maximea v A-G* (1974) 21 WIR 548 (DM CA); *Matthew v The State* (2004) 64 WIR 412 (TT PC); *McCulloch v Maryland* 17 US 316 (1819); *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *Nicholas v R* (1998) 193 CLR 173; *R v Canterbury and St Augustine's Justices ex p Klisiak* [1981] 2 All ER 129; *R v Hussain ex p DPP* (1965) 8 WIR 65 (GY); *R v Jones* (2007) 72 WIR 1 (BS SC); *R v Manchester City Stipendiary Magistrate ex p Snelson* [1978] 2 All ER 62; *Roodal v The State* (Trinidad and Tobago CA, 17 July 2002); *Roodal v State of Trinidad and Tobago* [2004] 2 WLR 652 (TT PC); *Seepersad v A-G of Trinidad and Tobago* [2013] 1 AC 659 (TT PC); *State v Maraj-Naraynsingh* (Trinidad and Tobago CA, 19 December 2006); *Suratt v A-G* [2007] 71 WIR 391 (TT PC); *Watson v R* (2004) 64 WIR 241 (JM PC); *Williams, Re* (1978) 26 WIR 133 (GY CA); *Zuniga v A-G of Belize* [2014] CCJ 2 (AJ) (BZ), (2014) 84 WIR 101.

Legislation referred:

Antigua and Barbuda – Criminal Procedure Act, Cap 117, Magistrate's Code of Procedure Act, CAP 255 as amended by Act 13 of 2004; **The Bahamas** – Criminal Procedure Code Act, CH 91; **Barbados -** Constitution of Barbados 1966, Criminal Procedure Act, Cap 127; **Dominica** – Criminal Law and Procedure Act, Chap 12:01; **Grenada** – Criminal Procedure Code, Cap 72B; **Guyana** – British Guiana (Constitution) Order in Council 1961, Constitution (Amendment) (No 4) Act 2001, Constitution of the Co-operative Republic of Guyana Act 1980, Constitution of the Co-operative Republic of Guyana Act, Cap 1:01, Constitutional Offices (Remuneration of Holders) Act, Cap 27:11, Court of Appeal Act, Cap 3:01, Criminal Law (Procedure) Act 1893, Criminal Law (Procedure) Act, Cap 10:01, Guyana Independence Order 1966, Narcotic Drugs and Psychotropic Substances (Control) Act, Cap 10:10; **Jamaica** – Criminal Justice (Administration) Act, Cap 83; **St Kitts and Nevis** – Criminal Procedure Act, Cap 4.06; **St Vincent and the Grenadines** – Criminal Procedure Code, Cap 172; **Trinidad and Tobago** – Constitution of the Republic of Trinidad and Tobago Act, Chap 1:01, Indictable Offences (Preliminary Inquiry) Act, Chap 12:01.

Treaties and International Materials referred to:

American Convention on Human Rights 1969 (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

Other Sources referred to:

Alexis F, 'When is an "Existing Law" Saved?' (1976) PL 256; 'Report of the Constitution Reform Commission to the National Assembly of Guyana' (17 July 1999); Raznovich L J, 'The Privy Council's Errors of Law Hinder LGBTI Rights Progress in the Caribbean' (2002) 1 E H R L R 65; Seetahal D S, *Commonwealth Caribbean Criminal Practice and Procedure* (3rd edn, Routledge 2010); Shahabuddeen M, *The Legal System of Guyana* (1973); UNODC, 'Commentary on the Bangalore Principles of Judicial Conduct' (2007).

JUDGMENT

of

The Honourable Mr Justice Saunders, President and The Honourable Justices Wit, Anderson, Rajnauth-Lee, Barrow, Burgess and Jamadar

Delivered by

The Honourable Mr Justice Adrian Saunders, President
on the 15th day of March 2022

[1] Marcus Bisram, the Appellant in these proceedings, is accused of murder. A Preliminary Inquiry ("PI") into his murder charge was held and, after hearing the evidence, the magistrate discharged him. The Director of Public Prosecutions ("the DPP") nevertheless directed the magistrate that Bisram should be committed for trial. Bisram contends that the directives by the DPP were unlawful and unconstitutional. He states that the law that empowered the DPP to so direct the magistrate, namely s 72 of the Criminal Law (Procedure) Act[1] ("the Act"), is itself incompatible with the Constitution. He seeks an order from this Court declaring the alleged unconstitutionality and invalidating the acts of the DPP. We agree that those acts should be invalidated and that s 72 is unconstitutional. We shall address later the consequences that arise from these findings.

Background

[2] In or around November 2016, Bisram hosted a party at his home in Corentyne. Among those attending was Faiyaz Narinedatt. Shortly after the party ended, Narinedatt's corpse was discovered on the Corentyne public road. The police had

[1] Cap 10:01 (GY).

reason to believe that his death was the result of a homicide. Bisram and five others were subsequently charged with his murder. It was alleged that Bisram "counselled, procured and commanded" the other men to murder the deceased.

[3] Bisram left Guyana for the USA. The PI into the proceedings brought against him and the other men could not take place in his absence. The charge against him was therefore severed from that against the other five. The case proceeded against the five and a fresh charge was laid solely against Bisram. On the basis of this charge, he was extradited from the USA and taken into custody on his arrival in Guyana on 21 November 2019. A separate PI was held in relation to his charge.

[4] The case against Bisram was based on statements a witness named Chaman Chunilall had provided to the police. It was agreed that at the PI it would only be necessary to hear Chunilall's evidence. At the PI, under cross-examination, Chunilall basically recanted his earlier statements to the police. At the conclusion of the case for the prosecution, the magistrate formed the view that no *prima facie* case had been made out against Bisram. The magistrate accordingly discharged him on 30 March 2020. Bisram went home, an apparently free man. His freedom was short. Later that same day, he was re-arrested, detained and brought back before the magistrate on 2 April 2020.

[5] The DPP was not personally in court when the magistrate discharged Bisram on 30 March 2020. The prosecution was represented by one of her assistants. On that day, the DPP sent an email message to the Assistant DPP who had appeared before the magistrate. Two letters, both signed by the DPP, were attached to the email. One letter required the magistrate to send to the DPP a copy of the depositions taken at the PI. The second letter directed the magistrate 'to reopen the PI and to comply with ss 65 and 66 of [the Act], with a view to committing the accused for the offence for which he was charged.' Both letters were purportedly written under the authority of s 72.

[6] The Assistant DPP received the email, printed the first letter and gave it to the Clerk of Court who then handed over the depositions. The Assistant DPP then

briefed the DPP by telephone on their contents following which the DPP instructed her Assistant to print and submit the second letter.

[7] The magistrate reopened the PI on 2 April 2020. Bisram was called upon to lead a defence. He merely indicated that he was innocent of the charge. At the close of Bisram's case, the magistrate reiterated that there was insufficient evidence to support the murder charge. The magistrate adjourned the hearing to 6 April 2020 for further directions from the DPP. In a subsequent letter dated 3 April 2020, the DPP directed the magistrate to commit Bisram for trial. The magistrate complied with this directive on 6 April 2020.

Proceedings in the courts below

[8] Bisram filed two applications in the High Court of Guyana. The applications were consolidated. He applied to quash the DPP's directives to the magistrate, as well as the decision of the magistrate to commit him to stand trial. He also applied for a number of other orders, including one precluding the magistrate from taking any action other than to discharge him, and another prohibiting the DPP from proffering an indictment in the High Court charging him with murder. He claimed that the decisions of the DPP were unconstitutional because s 72, on which they were based, was contrary to arts 122A and 144 of the Constitution and also the doctrine of the separation of powers. Article 122A constitutionalises the principle of judicial independence and is set out below at [30]. Article 144 deals with the fundamental right to the protection of law.

[9] On 1 June 2020, Morris-Ramlall J granted the orders quashing the decisions of the DPP and of the magistrate. The judge agreed that Bisram's arrest and continued incarceration were unlawful. She ordered that he should be released. The judge also granted the order prohibiting the DPP from indicting Bisram for murder. The premise for these decisions and orders was confined to the judge's view that the magistrate was right to determine that no *prima facie* case had been made out against Bisram at the PI and that, in any event, the DPP had not scrupulously adhered to the steps needed to be taken by her for the proper exercise of the powers available to her under s 72. The judge declined to find that s 72 was

unconstitutional whether in violation of arts 122A or 144 of the Constitution or the doctrine of the separation of powers. The DPP appealed and Bisram cross-appealed the judge's decisions.

[10] The Court of Appeal allowed the DPP's appeal against the judge's orders on 31 May 2021. The court dismissed Bisram's cross-appeal that s 72 infringes the Constitution. The Court of Appeal held that the magistrate's Court is not a superior court of record and therefore is not amenable to the provisions of art 122A. The Court of Appeal also held that, even if art 122A applied to the magistrate's Court, the DPP is not part of the Executive and therefore the DPP's directives to the magistrate did not contravene art 122A.

[11] Article 144 encompasses a spectrum of entitlements that the state guarantees to the individual. The Constitution refers to this bundle of entitlements as the right to the protection of the law. In relation to art 144, in allowing the appeal, the Court of Appeal, like the trial judge, adopted the reasoning of Haynes C, in *Re Williams*[2]. The court decided that s 72 was an 'existing law' and therefore art 144 could not be relied upon to hold it to be unconstitutional.

[12] The Court of Appeal accepted that, 'there was bungling by the DPP… in relation to the letters that were issued to the magistrate and the instructions in the circumstances'. That court found, however, that this resulted in no prejudice to Bisram. Ultimately, it would be a question for the jury as to what evidence of Chunilall was credible. The Court of Appeal held that the committal by the magistrate on the directives of the DPP was therefore valid. Bisram appealed to this Court.

Issues for determination

[13] The appeal presents three broad questions for resolution. The first is whether, assuming the constitutionality of the section, there was compliance with the provisions of s 72. The second is whether s 72 is even compatible with the

[2] (1978) 26 WIR 133 (GY CA).

Constitution. The third is what are the consequences that follow if indeed s 72 is unconstitutional.

Was there compliance with s 72

[14] In order to resolve these questions, it is useful to consider -

a. The nature of a PI;

b. The office of the DPP; and

c. The content of s 72 and other relevant aspects of the Act and how they have been applied.

The nature of a PI

[15] Although a PI is not a trial, it is a judicial proceeding and the magistrate is required to perform the functions of a judicial officer. The accused person does not, however, enter a plea. Nor can the accused be found guilty of any offence at a PI. The purpose of the PI is to determine whether, in the view of the magistrate, a sufficient case is made out to justify the DPP laying an indictment against the accused so that the latter may face a trial presided over by a judge of the High Court. At the PI, the magistrate reduces to writing both the statements of the witnesses presented by the prosecution and the answers provided in cross-examination. These statements, or 'depositions', ultimately enable the accused to be fully aware of the case they have to meet at the trial, if a trial is held. In *Inderjali v DPP*[3], writing for this Court, Wit JCCJ observed that:

> The function of committal proceedings, whether by way of preliminary inquiry or paper committals, is to ensure that no one shall stand trial unless the prosecution has made out a prima facie case against the accused. Whether or not such a case has been made out is a decision that is in principle left to an independent magistrate having been presented with all the available evidence and having tested its admissibility and sufficiency. This exercise would also necessarily include testing, albeit summarily, of the credibility and reliability of the witnesses providing the evidence.

The reference in the passage to 'an independent magistrate' is not to be casually dismissed, as will be elaborated upon in due course.

[3] [2019] CCJ 4 (AJ) (GY), (2019) 94 WIR 381 at [16].

[16] Although the PI is not a trial, the accused is entitled to a variety of legal rights that approximate some of those they would enjoy at a trial. These rights are all embraced by the protection of the law clause. So, for example, the accused is entitled to the presumption of innocence, to a fair hearing and, also, to have legal representation. The accused is also entitled to question the witnesses produced by the prosecution and to probe and counter the evidence they present.[4]

[17] Upon conclusion of the PI, if the magistrate considers that no sufficient case is made out to put the accused on trial for an indictable offence[5], the magistrate should discharge the accused. That discharge is not an acquittal[6] and issues of *autrefois acquit* do not apply as the accused was never placed in jeopardy.[7] This effectively means that, despite being discharged, the accused may still subsequently be made to answer again the same charge. As shall be explained later in this judgment, in various jurisdictions the legislature has made provision for what occurs subsequent to discharge by the magistrate if the DPP remains of the view that there is sufficient evidence upon which the accused should be (or should have been) committed for trial. For the moment, however, in Guyana, s 72 may be invoked by the DPP, after the magistrate has heard the whole of the evidence and discharged the accused, to require the magistrate to commit the accused for trial.

The Office of the DPP

[18] For the sake of convenience, the Constitution treats with the position of the DPP under Chapter X which is headed THE EXECUTIVE. It would be a mistake, however, to consider the DPP as a functionary of the Executive as are other officials appointed by the President. The DPP is not appointed in the same way as the other officials referred to in that Title, and those latter officials do not enjoy the independence the DPP does. The DPP is appointed by the Judicial Service Commission (JSC), an independent commission which also appoints Judges. The DPP's remuneration is established by an Act of Parliament and comes directly

[4] Dana S Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure* (3rd edn, Routledge 2010) 152 – 153.
[5] See Criminal Law (Procedure) Act (n 1) s 69.
[6] See *R v Manchester City Stipendiary Magistrate ex p Snelson* [1978] 2 All ER 62, 62[e].
[7] See *R v Canterbury and St Augustine's Justices ex p Klisiak* [1981] 2 All ER 129.

from the Consolidated Fund [8], as is also the case with the superior court Judges. The JSC is responsible for discipline or removal of the DPP.

[19] In the exercise of her prosecutorial powers under the Constitution, the DPP is under no obligation to obey any instruction or direction from the Attorney General or other official of the Executive[9]. The relevant constitutional and legislative framework permits the DPP to exercise her functions in an independent and autonomous manner, similar to that of the Auditor General, who is also a public officer not subject to the direction or control of anyone else. [10]

[20] In Guyana, the DPP therefore has a commendable measure of independence from the Executive, but discussion as to the existence or quality of that independence is not very helpful to a resolution of the question whether the principle of judicial independence enshrined by art 122A is impaired by s 72. Even if the office in issue were that of the Chancellor of the judiciary it will still be a pertinent question whether the parliament can validly authorise that high official to instruct a judicial officer hearing a particular proceeding requiring the exercise of that hearing officer's discretion on how that matter should be decided.

Section 72 and other relevant provisions of the Act

[21] The DPP in these proceedings claims that, at the conclusion of Bisram's PI, she acted in keeping with s 72 of the Act. In essence, s 72 states that if, at a PI, a magistrate discharges an accused person at the close of the evidence of the prosecution, the DPP may request the relevant depositions from the magistrate and then require the magistrate to reopen the PI and to treat the accused as if a *prima facie* case had been made out, that is, to afford the accused an opportunity to make a statement and/or to call witnesses. If the magistrate discharges an accused person after having called upon the accused to make a statement and/or call witnesses, the DPP can then also direct the magistrate to commit the accused for trial. The DPP may instruct a magistrate to commit an accused even if the magistrate considers

[8] Constitutional Offices (Remuneration of Holders) Act, Cap 27:11 (GY).
[9] See *State v Maraj-Naraynsingh* (Trinidad and Tobago CA, 19 December 2006) and also *A-G of Fiji v DPP* [1983] 2 WLR 275.
[10] See art 223(a) of the Constitution

that no *prima facie* case has been made out against the accused. The section states that the magistrate is bound to comply with these instructions from the DPP.

[22] This power of the DPP was discussed by Haynes C in *Re Williams.* The opinion of Haynes C was that it, 'was considered a needed supervisory right and power in colonial times under British administration.' Apart from in Guyana, in the Commonwealth Caribbean, only in St Kitts and Nevis[11] and Antigua and Barbuda[12] is similar authority still granted to the DPP after a magistrate discharges an accused. The legislation in both St Kitts and Nevis and Antigua and Barbuda is, by some 20 years, of even greater antiquity than the Guyanese counterpart. In each State it dates back to 1873. It provides that if the DPP considers that the magistrate ought to have committed the accused for trial, the DPP may remit the case to the magistrate, with directions to deal with the matter accordingly, and with any other directions the DPP thinks proper.[13]

[23] When these Acts were originally passed, the present power under which the DPP is entitled to direct the magistrate in this manner was exercised by the colonial Attorney General. Section 67(2) of the 1893 Act in Guyana[14] empowered the Attorney General, if he considered that a discharged accused ought to have been committed, to remit the case to the magistrate 'with directions to deal with the case accordingly'.

[24] In 1972, in Guyana, s 72 was amended to state:

> (2)(i) Where before the discharge of the accused person the provisions of sections 65 and 66 have been complied with, the Director of Public Prosecutions may, if after the receipt of those documents and things he is of the opinion that the accused should have been committed for trial remit those documents and things to the magistrate with directions to reopen the inquiry and to commit the accused for trial, and may give such further directions as he may think proper.
> (ii)(a) Where before the discharge of the accused person the provisions of sections 65 and 66 have not been complied with and the Director of Public Prosecutions, after the receipt of those

[11] See Criminal Procedure Act, Cap 4.06, s 15 (KN)
[12] Criminal Procedure Act, Cap 117, s 11 (AG).
[13] See Criminal Procedure Act (n 11) s 15 and Criminal Procedure Act (n 12) s 11.
[14] See Criminal Law (Procedure) Act 1893 (GY).

> documents and things, is of the opinion that the evidence given on behalf of the prosecution had established a prima facie case against the accused, the Director of Public Prosecutions may remit those documents and things to the magistrate with directions to reopen the inquiry and to comply with sections 65 and 66, and may give such further directions as he may think proper.
> (b) After complying with the directions given by the Director of Public Prosecutions under sub-Paragraph (a), the magistrate may either commit the accused for trial or he may adjourn the inquiry and, subject to any directions on the matter given by the Director of Public Prosecutions, forthwith notify the Director of Public Prosecutions who shall give any further directions as he may deem fit and, if of opinion that a sufficient case has been made out for the accused to answer, may direct the magistrate to commit the accused for trial.

Section 65 deals with the taking and reducing into writing of the evidence led by the prosecution, while s 66 requires the magistrate to invite the accused to make a statement or lead evidence if the magistrate considers that a prima facie case has been made out against the accused.

[25] These provisions give a sequence in which the DPP should properly form and act on the opinion that an accused ought not to be discharged but should instead be committed for trial. If the magistrate discharges the accused immediately after the prosecution's case (as occurred here), the proper recourse of a DPP concerned about that discharge is as set out in s 72(2)(ii)(a). The DPP must merely requisition the depositions, peruse them and "remit those documents and things to the magistrate with directions to reopen the inquiry and to comply with sections 65 and 66." The DPP is not at this stage authorised to go beyond this.

[26] There is no doubt that in Bisram's case, the DPP was not motivated by bad faith. What occurred here, however, is regrettable. The DPP made up her mind (and worse, expressed that decision in writing) to direct a re-opening of the case with a view to directing a committal before she had received or reviewed the depositions. To this end, she simultaneously despatched to her assistant, to be passed to the magistrate, two letters already signed by her. The problem with this is that the carefully prescribed sequential approach to the matters referenced in those letters

was not followed. The fact that, as the DPP submitted, she had already been briefed about the statements the witness had given in the PI before she wrote the letters, and that she only instructed the assistant DPP to submit the second letter after the latter had told her that the depositions "were in keeping with the evidence", does not meet the required prosecutorial standard of careful deliberation. The prescribed legislative sequence embodies substantive principles of fundamental fairness and natural justice conducive to the goal of a fair hearing. The failure to follow the required legislative steps in the sequence as provided by the law rendered the subsequent acts of both the DPP and the magistrate susceptible to being declared a nullity. See *R v Hussain ex p DPP*[15] and the cases cited in that judgment.

[27] With great respect, we do not agree with the Court of Appeal in euphemising and then excusing these missteps. Again, we reject outright any notion that the 'bungling', as the Court of Appeal called it, was the product of bad faith on the part of the prosecutorial authorities, but we climb a slippery slope were the Court to lend its imprimatur to the disregard of important elements of procedural justice. As Crane J noted in *Hussain:*[16]

> The DPP in the exercise of his powers under the section does so quasi-judicially. It is axiomatic that he must exercise his discretion and arrive at an opinion in a disciplined and responsible manner, and with due regard to the law.

Morris-Ramlall J was therefore entitled and right to quash the decision of the DPP directing the magistrate to re-open the PI with a view to committing Bisram.

Is s 72 compatible with the Constitution?

[28] The issue of the propriety and constitutionality of s 72 and its impact on fundamental rights and freedoms have haunted the law since 1961 when the people of Guyana were afforded a constitutionalised right to the protection of the law. Bisram submits that the section is unconstitutional in at least three respects, namely: that it trenches on art 122A; it is inconsistent with art 144; and it is

[15] (1965) 8 WIR 65 (GY).
[16] ibid at 86.

contrary to the principle of the separation of powers. To interrogate these submissions, we shall -

i. Interpret art 122A and assess the manner in which s 72 impacts on that article;
ii. Examine the relationship between art 144 and art 152 (the savings clause);
iii. Construe art 152;
iv. Consider the relevance of the 1961 Constitution;
v. Analyse the "modification first" method of interpreting together both the savings and modification clauses; and
vi. Set out the nature and scope of the power entrusted to the judiciary to modify existing laws.

Article 122A

[29] Article 122A emphatically entrenches the principle of judicial independence. The article states:

> (1) All courts and all persons presiding over the courts shall exercise their function independently of the control and direction of any other person or authority; and shall be free and independent from political, executive and any other form of direction and control.
> (2) Subject to the provisions of arts 199 and 201, all courts shall be administratively autonomous and shall be funded by a direct charge upon the Consolidated Fund; and such courts shall operate in accordance with the principles of sound financial and administrative management.

Article 199 deals with the appointment of certain officials by the Judicial Service Commission. Article 201 deals with the appointment of certain officers by the Public Service Commission. These articles are not material to the discussion.

[30] Interpretation of art 122A requires us to look not only at the actual text set out above, but also at the surrounding context, the role and place of the article's provisions in the Constitution's structure, the history of how art 122A came to form part of the Constitution, and what has occurred since the article became part of Guyana's supreme law. The article is not found in either the 1966 Independence

Constitution or the original iteration of the 1980 Constitution. Nor is it in the 1961 colonial Constitution. It was deliberately introduced in 2001 along with several other alterations that were simultaneously enacted by Act No 6 of 2001.

[31] Act No 6 of 2001 emerged out of the deliberations of the Constitution Reform Commission established a few years earlier. In *Attorney General v Richardson*[17] this Court had occasion to comment on the work of that Reform Commission. The Commission was a broad-based body consisting of representatives from the political parties in Guyana along with other representatives from among farmers, indigenous people, women's organisations, youth, the Bar, religious bodies and the Labour Movement. It engaged in widespread consultation and received 4,601 proposals which were carefully considered. A thorough review of every facet of the 1980 Constitution was made and specific proposals for improving the Constitution were generated.

[32] Among the several areas the Commission examined was the issue of Judicial Independence. The public were invited to make submissions on the issue. Under the heading "Submissions by Members of the Public", the Commission recorded at para 6.13.3 of its Report:

> The judiciary must be the core support of democracy, upholding political and civil liberties and maintaining the rule of law. Therefore, the main concern expressed in the submissions was the independence of judges as the guardians of the rights of citizens. Lack of corruption and independence from political interference were considered key to confidence in the judicial system. Various suggestions for permitting transparency and integrity in appointments of the judiciary were made. The Judicial Service Commission (JSC) established under the Constitution should also be independent, with powers to appoint and remove judicial officers…

[33] Having received, considered and discussed the issue of judicial independence, the Commission's unanimous recommendation to Parliament was that the Constitution should be altered to ensure that, 'The *Judicial system* should be

[17] [2018] CCJ 17 (AJ) (GY), (2018) 92 WIR 416.

independent and free from official influence and control[18]' (emphasis added). It was in direct response to this recommendation that art 122A was framed and inserted into the Constitution. One notes the wording of the recommendation which speaks to "official" influence and control, which is broader than "executive" influence and control, and the article's reference to freedom from 'political, executive *and any other form of direction and control*.' (Emphasis added)

[34] The DPP submits that art 122A applies only to the superior courts and not to magistrates' courts. We do not agree. It is first useful to have regard to the placement of art 122A in the Constitution. Article 122A is located in Part 1 of the Constitution. That part addresses itself to broad, general, underlying principles, concepts and institutions applicable to the state and people of Guyana. Chapter X in Part 1 deals with The Executive. That chapter ends with art 122. Chapter XI deals with The Judicature. Before the reforms introduced in 2001, the chapter on The Judicature commenced with a Heading '**The Supreme Court of the Judicature**' followed immediately by art 123 which stated"

> There shall be for Guyana a Supreme Court of Judicature consisting of a Court of Appeal and a High Court, with such jurisdiction and powers as are conferred on those Courts respectively by this Constitution or any other law.

[35] Article 123 and all the other articles following it in Chapter XI are clearly concerned with Guyana's higher judiciary, that is **The Supreme Court of the Judicature** including the High Court, the Court of Appeal, the judges who comprise those courts and the Chancellor. It would have been easy enough for the National Assembly to have inserted the provisions of what is now art 122A as sub-sections to art 123 or as art 123A. Their placement, before art 123 et seq., suggests that the drafters intended to ensure that the provisions of art 122A were not to apply only to the superior courts. Interestingly, in art 123, reference is made to ***those*** courts, where reference is to the superior courts. In contrast, the judicial independence provisions of art 122A were literally intended to be applicable (as is specifically stated) to ***all*** courts and ***all*** persons presiding over courts. This would of course include magistrates and magistrates' courts.

[18] See 'Report of the Constitution Reform Commission to the National Assembly of Guyana' (17 July 1999) para 9.9.3.1.

[36] The view that art 122A should be interpreted as being applicable also to magistrates' courts is buttressed by the definition the Constitution gives generally to the word "court". That definition is found in art 233. According to this article, "court" in the Constitution is generally to be interpreted as meaning any court of law in Guyana 'except as otherwise provided or required by the context'. There is nothing about the context surrounding the reference to "court" in art 122A that leads one to the view that the plain meaning of that article ought not to be applied. If anything, the contrary is the case as art 122A expresses the hallowed, overarching principle of judicial independence, which is described by the Bangalore Principles[19] as a prerequisite to the rule of law and a fundamental guarantee of a fair trial.

[37] The principle is even more fundamental and sacred. When art 1 of the Constitution describes Guyana as a 'democratic sovereign state', that definition is devoid of meaning in the absence of independence mechanisms that are suitable to the character of any judicial body that is engaged by a litigant. The mechanisms to safeguard the independence of magistrates' courts need not perhaps be at the same level as those that secure the independence of the supreme court judges, but magistrates' courts do require sufficient independence in order to function and perform their role in the administration of justice in an effective manner.

[38] Article 122A must be interpreted as a safeguard to guarantee the basic independence, integrity and autonomy of ***all*** courts. It is unthinkable that when the National Assembly consciously determined to entrench the principle of judicial independence in the Constitution in this express manner, the intention was to make an exception from that principle for magistrates' courts. Indeed, we underestimate at our peril the importance and seriousness of the work of such courts and their need to be suitably independent. The vast majority of legal disputes taken before a court in Guyana are resolved in the magistrates' courts. The overwhelming majority of litigants experience and form opinions on the justice system through their interface with those courts. The punishment that can be imposed by magistrates can be severe, ranging up to five years. See for example, the Narcotic

[19] UNODC, 'Commentary on the Bangalore Principles of Judicial Conduct' (2007), Value 1.

Drugs and Psychotropic Substances (Control) Act[20]. How can it ever be proper that an accused person facing a possible five-year sentence can be tried by a court that is not clothed with the essential prerequisites of judicial independence laid down by the Constitution? What good is the principle of judicial independence if it is inapplicable to the courts where most cases are tried?

[39] State practice since the introduction of art 122A should also be taken into account. Since the enactment of art 122A, unlike some other Caricom states, the magistracy in Guyana is now fully integrated into the Guyanese judicature. In dutiful obedience to art 122A the State has ensured that the magistrates' courts are "administratively autonomous" from the Executive and "funded by a direct charge upon the Consolidated Fund". In all the circumstances, we are of the opinion that the magistrates' courts are amenable to the provisions of art 122A.

[40] By rendering a judicial officer's professional decision-making subject to the dictates of another official, s 72 cuts straight through art 122A. The two provisions cannot harmoniously co-exist. Since art 122A forms part of the Constitution, in keeping with art 8 which declares the supremacy of the Constitution over all laws, s 72 must be declared void to the extent of its inconsistency with art 122A. Article 152, the 'savings provision', cannot at all be employed to rescue s 72 from this fate. Even if art 152 is interpreted (albeit wrongly, as we shall demonstrate) as preserving in their un-modified state existing laws that are inconsistent with or in contravention of the Constitution, art 152 only claims to have that effect in relation to inconsistency with fundamental rights falling between arts 138 and 149 and art 122A obviously falls outside that range.

The Savings Provision (art 152) and art 144

[41] Bisram alleges that s 72 is also inconsistent with art 144 of the Constitution and that art 152 cannot be interpreted so as to preclude the court from giving effect to that inconsistency. As previously indicated, art 144 guarantees Bisram the fundamental right to the protection of the law.

[20] Cap 35:11 s 5(1)(a)(i).

[42] There can be little doubt that such of the panoply of rights embraced by art 144, as are suitably applicable, extend to proceedings in the magistrates' courts including PIs. For proof of this, one only has to have regard to art 154 of the Constitution and its applicability to art 144. The latter article is to be found in Part 2 Title 1 of the Constitution. Title 1 addresses the protection of the fundamental rights and freedoms of the individual. Words and phrases used in Title 1 are defined in art 154. One of the words defined is "court". The definition unquestionably includes a magistrate's court. Article 154 defines court to mean, '… any court of law having jurisdiction in Guyana other than a court established by a disciplinary law and, in articles 138 and 140, a court established by a disciplinary law…'

[43] The issue of the compatibility of s 72 with the right to the protection of the law should have been definitively resolved in the case of *Re Williams*[21] which went up to a powerful Court of Appeal comprising Haynes C, Crane and Massiah JJA. Unfortunately, the constitutional issue became overwhelmed by procedural and jurisdictional issues.

[44] In *Williams* two men were charged with obtaining a cheque by false pretences. At the close of the case for the prosecution at the PI, the magistrate discharged the two accused. Acting under the powers conferred on him by s 72(2)(ii)(a), the DPP remitted the case and directed the magistrate to re-open the proceedings with a view to committing the accused for trial. When the matter came up again, counsel for the accused urged the magistrate not to follow these directives of the DPP. The accused claimed that the directives were inconsistent with the following provisions of the Constitution then in force, namely art 2 (the Supreme law clause); art 10 (the right of the accused to the protection of the law); art 19 (the right to enforce the fundamental rights provisions); art 47 (which set out the Office and functions of the DPP); and art 73 (the provisions catering to the manner and form for altering the Constitution). The essential argument for the accused was twofold. Firstly, that the 1972 amendments to s 72 effected an alteration of the powers of the DPP and this alteration could only have been validly effected if the Constitution had been

[21] See *Williams* (n 2).

amended but it was not so amended. Secondly, and in any event, s 72 is a violation of the right of the accused to the protection of the law because it collided with the right to a fair hearing.

[45] After hearing counsel, the magistrate in *Williams* neither committed the accused nor acceded to counsel's submission that the DPP's directive was unlawful. In effect, the magistrate sought to steer counsel in the direction of bringing a constitutional action in the High Court. Counsel opted to apply to the High Court, *ex parte*, by originating motion/application for an order *nisi* to compel the magistrate to refer to the High Court the question of the unconstitutionality of the section. The judge dismissed the application. Counsel then appealed to the Court of Appeal.

[46] Most of the Court of Appeal judgment is taken up with procedural issues. All three judges found that the Court of Appeal lacked jurisdiction to hear the appeal. The judges did, however, make statements of varying degrees of brevity on the substantive issue. Haynes C commented on the pre-Independence constitutional changes in Guyana which for the first time provided for individual human rights. The Chancellor stated that throughout these changes:

> it was accepted at the Bar without challenge that …[s 72] … continued in force as "existing law" … Nobody suggested it was ultra vires or unconstitutional or that it infringed any fundamental right written into the Constitution. What was challenged was its exercise after a magisterial discharge at the close of the case for the prosecution as distinct from after the close of the defence.

[47] Haynes C went on to analyse the scope of the protections afforded an accused under the right to protection of the law. He specifically assessed whether an accused enjoyed those protections at a PI which, as everyone accepts, is not a trial. In this regard, the Chancellor was influenced by the decision of Peterkin JA in *Halstead v Commissioner of Police*[22]. Writing for the Court of Appeal of the Eastern Caribbean Supreme Court, Peterkin JA's clear view was that a PI is part and parcel of the indictable offence process. Haynes C preferred to say that the PI

[22] (1978) 25 WIR 522 (GD) at 524.

'is a stage in the judicial proceedings for the proof of guilt of an indictable offence,' part and parcel of the efforts of the prosecution to prove the guilt of the accused. In either event, both eminent jurists agreed that an accused at a PI was entitled to the constitutional rights designed to secure a fair hearing.

[48] Despite his view that the court had no jurisdiction to hear the substantive complaint of Williams and Salisbury, Haynes C offered his opinion on the constitutionality of s 72. The Chancellor first reduced the submissions of counsel for the accused to the proposition that, '*legislation which enables an official to impose his will on the magistrate to commit an accused when the magistrate's opinion at the close of the prosecution [is that] no prima facie case is made out, infringes [the constitutional provisions to secure the protection of the law]'.*

[49] Haynes C's response to that submission was unequivocal. To this end, the headnote of the case in the West Indian Report is somewhat misleading. It attributes to the Chancellor the view that s 72(2)(ii)(a) 'does not collide with or infringe' the rights of the accused. What the Chancellor expressed is more nuanced. The Chancellor had 'no doubt whatever' that s 72 was inconsistent with the right to a fair hearing guaranteed by the right to protection of the law. In his view, however, the law was validated only because it was an 'existing law' and as such, its constitutionality was saved by the savings provision for existing laws then found in s 18 [now art 152] of the Constitution.[23]

[50] Crane JA, for his part, deeply rued the fact that, because the Court of Appeal lacked jurisdiction, the substantive issue could not really get off the ground. He had looked forward to addressing the constitutional point. Given the jurisdictional bar, he preferred to refrain from expressing any decided view at the time, merely noting that there is a presumption in favour of the constitutionality of Acts of Parliament. Massiah JA confined his own views to the jurisdictional issues although he did state that he was in full agreement with the judgment of the Chancellor.

[23] See *Williams* (n 2) at 157 [H].

[51] Even as we remind ourselves that the PI is not a trial, assessed in the light of contemporary standards of fairness, justice and individual constitutional rights, just on the face of it, s 72 is troubling. A magistrate presiding over a PI is neither an amanuensis nor a mere administrative official. The magistrate exercises discretion and adjudicative powers. The magistrate must ultimately decide whether or not a *prima facie* case exists against the accused such that the accused should or should not be committed for trial. Far from being a mere administrative process, a PI is an adversarial judicial hearing of great significance, a stage in the judicial proceedings in the determination of guilt. A magistrate's decision at a PI could have immediate and profound consequences for the liberty of the accused. Every PI must, at a minimum, comport with an appropriate measure of fairness.

[52] Standards of justice have evolved since 1893. The law's notion of what is fair has not remained the same. The quality and training of magistrates have also improved substantially over the years. In Guyana there currently exists a professionalised magistracy where two centuries ago there was not.[24] In today's world, an impartial, informed and objective on-looker would justifiably consider it a legally sanctioned charade for the DPP still to be empowered by parliament to compel a magistrate, a supposedly neutral and independent judicial officer, to commit the accused even though the magistrate, in her own judgment, considered that no sufficient case was made out. In agreement with Haynes C and Massiah JA, we also entertain no doubt whatever that s 72 is inconsistent with the right to a fair hearing embodied in art 144. Even if the justification of the law, when it was originally enacted, was that the DPP may have a better feel of a case than the magistrate, there are constitutionally compliant ways for the law to address instances where a DPP is dissatisfied with a magistrate's decision that no *prima facie* case is made out.[25] Section 72 is not one of them.

The Savings Clause (art 152)

[53] The issue regarding the savings clause has implications that go beyond this case. The question is whether art 152 (the savings clause) requires the court to immunise

[24] M Shahabuddeen, *The Legal System of Guyana* (1973) 105-108.
[25] See, for example *Brooks v DPP* (1994) 44 WIR 332 (JM PC).

existing laws from a finding that they violate the fundamental rights set out between art 138 and art 149 (inclusive) of the Constitution, as s 72 does. The answer to this question hinges on the approach one takes to the interpretation of the savings clause. This Court's majority in the Barbadian case of *Nervais v R*[26] gave an emphatic answer to the question; an answer that was endorsed by a differently constituted majority in *McEwan v Attorney General of Guyana*[27], a decision from Guyana. We reiterate that answer in this case – the modification and savings clauses must be read together.

[54] Section 7 of the Constitution Act, No 2 of 1980 (to which the present Constitution as amended is attached as a schedule), recognises (as did s 5 of the Order in Council to which the 1966 Independence Constitution is similarly attached as a Schedule), that, in each case, the new Constitution had to treat with pre-Constitution or 'existing laws' which could possibly be inconsistent with the fundamental rights granted by the respective Constitutions. Accordingly, in each of these parent legislative instruments, there therefore is to be found a clause[28] that states that the existing laws shall continue in force as if they had been made in pursuance of the respective Constitution. Such existing laws, however, had to be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them into conformity *with this Order* (in the case of the 1966 Constitution) and *with this Act* (in the case of the present 1980 Constitution). This clause is conveniently referred to as the modification clause. It cannot be overstated that this imperative on the courts to modify is an unequivocal statement of legislative intent.

The ongoing relevance of the 1961 Constitution

[55] Most, if not all, of the rights found between arts138 and 149 were first expressed in the Bill of Rights contained in the 1961 Constitution. The Order in Council to which the 1961 Constitution is annexed also provided for the treatment of existing laws that pre-dated 26 June 1961, the date of the making of the 1961 Constitution.

[26] [2018] CCJ 19 (AJ) (GY), (2018) 92 WIR 178.
[27] [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332.
[28] Schedule 2, art 18 of Guyana Independence Order 1966; Article 152 of Constitution of the Co-operative Republic of Guyana Act, 1980.

Section 20 of the Order in Council contained a modification clause that required all laws in force in British Guiana immediately before that Constitution came into effect to be 'construed with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order and of the Constitution ...'. The courts were obliged to continue the force of such laws but to modify them appropriately if they were inconsistent with the fundamental rights.

[56] Among the rights and freedoms for the first time declared and constitutionalised in the 1961 colonial Constitution was the guarantee of the protection of the law to all, including the right to a fair hearing. Article 5(2) of the 1961 Constitution stated that:

> Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court established by law and constituted in such a manner as to secure its independence and impartiality.

[57] It is of the greatest importance to note that the 1961 Constitution did ***not*** contain a savings clause along the lines of the 1966 and 1980 Constitutions. There can therefore be none of the arguments made, in relation to that 1961 Constitution, as to which clause (whether the modification clause or the savings clause) controlled the treatment of pre-1961 existing laws. The savings clause in the 1961 Constitution preserved only the validity of laws during periods when British Guiana was at war or experiencing a state of emergency.[29] All pre-1961 laws therefore fell to be appropriately modified to be in harmony with the Bill of Rights.

[58] The Criminal Law (Procedure) Act, of which s 72 forms part, was enacted in 1893. That law was therefore an existing law at the time the 1961 Constitution was brought into force. It therefore fell to be construed, in 1961, in a manner so as to be brought into harmony with the fundamental rights stated in the 1961 Constitution. This meant that the proper construction of the provisions giving the DPP the powers that are now under scrutiny could only have been one which accommodated suitable modification so as to bring those provisions in line with the constitutionalised right to a fair hearing referenced above at [56]. It matters not

[29] See art 14 of the British Guiana (Constitution) Order in Council 1961.

whether this was appreciated by the Bar or the Bench prior to now. As Haynes C noted in *Williams*, it seems that during, prior to, and since *Williams* no one might have thought to challenge, on this basis, the DPP's continued assumption after 1961 of the invidious powers conferred, initially on the office of the Attorney General but latterly on the DPP, by the 1893 Criminal Law (Procedure) Act. Now that the challenge has been made it is the responsibility of this Court to declare what the law is.

[59] Clearly, when the 1966 Constitution saved the provisions of the Criminal Law (Procedure) Act, what was saved was that law *construed in a manner so as to place it in harmony with the right to the protection of the law contained in the 1961 Bill of Rights*. This analysis of the impact of the modification clause contained in the 1961 Order in Council has implications for all pre-1961 laws that are in tension with the Bill of Rights laid out in the 1961 Constitution. This point was not directly alluded to in *McEwan,* but it represents, without doubt, the law and approach properly to be taken in Guyana. The reasoning here is not dis-similar from the one carried out by Lord Bingham in *Bowe v R*[30] when it was found that the death penalty for murder in The Bahamas had to be construed as a discretionary and not a mandatory penalty.

[60] Subject to what is stated later, s 72 escapes the modification treatment as postulated above because in 1972 the parliament re-enacted s 72 afresh, so it is that re-enactment that was saved by the 1980 Constitution. It is therefore not possible to argue, using this reasoning exclusively, that s 72 must be modified to bring it into consistency with the 1961 Constitution. The same result does, however, flow from the "modification first" approach which this Court's majority applied in *Nervais* and in *McEwan* and to which we must now give attention.

Modification First

[61] "Modification first" refers to the method of interpreting together the savings and modification clauses so that existing laws that infringe fundamental rights are first suitably modified before they are applied. Motley counter arguments have been

[30] (2006) 68 WIR 10 (BS PC).

raised to "modification first". These include the notions that, save for its Schedule, the provisions of the Constitution Act (or parent Order) are spent or of little effect after the Constitution comes into force; that a provision in a parent instrument cannot prevail over a Constitution scheduled to it because the Constitution is the supreme law; that (in the case of the Independence Constitutions) the modification clause is set out in 'mere subordinate legislation', i.e. an Order in Council, of the former colonial power; that the Court cannot make law as that is the province of the legislature; and that the savings clause, because it forms part of the Constitution, should be read literally, without regard to the modification provisions (which do not form part of the Constitution) and notwithstanding its crippling effect sometimes on the enjoyment of fundamental rights.

[62] A convenient place to begin refuting these counter arguments[31] is to remind oneself that we are not engaged upon an exercise of construing ordinary legislation that responds to some discrete economic, social, cultural or other such agenda. As former United States Chief Justice, John Marshall, famously admonished, 'we must never forget that it is a *Constitution* we are expounding.'[32] A Constitution embodies the most fundamental aspirations of a nation and its people. It is crafted to endure through all manner of, sometimes unforeseeable, circumstances. Interpretation of such a document absolutely requires an examination of, not just its text, but also its structure, its history and antecedents, and the moral values and governing principles underlying and/or proclaimed by it. We must also bear in mind that Anglophone Caribbean Constitutions are evolutionary in nature, and the Constitution and its parent enactment constitute a single organic law emanating from an appropriate law giver. In Guyana's case, *the entirety of the Act, not just the Schedule, is a creature of the Guyanese National Assembly convened and making decisions in its unique constituent capacity*. It cannot plausibly be argued that the Act loses its efficacy, save for its Schedule, on the date the Constitution came into force. The Act does a whole lot more than merely provide for the transition from one constitutional state to another. Until repealed, that Act has as

[31] In this regard See: Leonardo J Raznovich, 'The Privy Council's Errors of Law Hinder LGBTI Rights Progress in the Caribbean' (2002) 1 E H R L R 65.
[32] *McCulloch v Maryland* 17 US 316 (1819).

much ongoing force (and work to do) as do other extant statutes. The presumption of constitutionality with which one must approach every Act of Parliament applies with no less vigour to the Constitution Act. And, in the case of Guyana's 1980 Constitution, it is impossible to suppose that the parent enactment is the last hurrah of a departing coloniser.

[63] The fact that the scheduled Constitution declares itself to be, and is indeed, the supreme law in no way detracts from the premise that, as a Schedule to a parent enactment, the Act and the Schedule should be construed together, in a holistic way. Mechanically pitting the Constitution against its parent enactment in a binary fashion should be eschewed when inter-textual interpretation achieves unity of purpose and promotes the goals and spirit of the Constitution. Far from undermining the supreme law, modification first ennobles it by respecting and advancing the Constitution's cherished ethos. It avoids the artificial conundrum that a law that plainly infringes fundamental rights must be held to be constitutional and valid, if, paradoxically, one focuses only on a fundamental rights challenge to it, but the same law may be held unconstitutional and invalid if one focuses on its tension with deep structural constitutional concepts like the rule of law[33], the separation of powers principle[34] or judicial independence[35]. Or that the savings clause, to take yet another example, preserves the validity of an existing law that seriously contravenes fundamental rights, but if parliament makes a valiant good faith effort at mitigating the harshness of that law, the same then becomes liable to be invalidated by the courts as being unconstitutional.[36] In *Matthew v The State* Lord Nicholls stigmatised such incoherence as 'bizarre'. He rightly concluded that, 'the constitutions of these countries should be interpreted … by giving proper effect to their spirit and not being mesmerised by their letter.'[37]

[64] The more enlightened approach to Caribbean constitutional interpretation is neither novel nor opportunistic. It was advocated some decades before emotive, vigorous and sustained legal and ideological battles were fought over the singular

[33] See, for example *McEwan* (n 28).
[34] See, for example *DPP v Mollison (No 2)* [2003] 2 LRC 756 (JM PC) and also *Browne v R* (1999) 54 WIR 213 (KN PC)
[35] *See R v Jones* (2007) 72 WIR 1 (BS SC); *Suratt v A-G* [2007] 71 WIR 391 (TT PC).
[36] See for example *Watson v R* (2004) 64 WIR 241.
[37] *Matthew v The State* (2004) 64 WIR 412 at [69] (TT PC)

issue of the constitutionality of mandatory death penalties. In 1975, Francis Alexis expressed the following lucid opinion on the interplay between the modification clause in the Independence Orders and the savings clauses contained in the Constitutions[38]. He stated:

> It is clear that some existing laws do afford to the Executive dictatorial powers, whereas the Constitutions grant only reasonable powers. That there is conflict between them, therefore, is manifest.
>
> To apply to such existing laws the savings clause in the Independence Orders is to make those laws conform with the constitutional instruments. To apply only the savings clause in the Constitutions is to apply the existing laws replete with their repugnancy. It would appear that, if anything, the clause in the Orders was intended to control the one in the Constitution. At the very least both clauses should be read together.

[65] It took decades before Dr Alexis's compelling logic was embraced by a court. In 2003, in *Roodal v State of Trinidad and Tobago*[39], a bare majority of a five-member Bench of the Judicial Committee of the Privy Council, adopted an approach similar to that adumbrated by Alexis. The result was short-lived. A nine-member Board reconsidered the matter in the cases of *Matthew v The State*[40] and *Boyce v R*[41]. By the slimmest of margins, the counter arguments referenced above prevailed.

[66] In *Nervais v R*[42], and some months later in *McEwan*[43], this Court's majority came down on the side of the approach posited by Alexis, the majority in *Roodal* and the minority in *Matthew* and *Boyce* respectively. The gist of our opinion was that, in a democracy, courts must construe the Constitution and laws so as to promote fundamental rights and freedoms. Where the Constitution can be interpreted in two ways, one which furthers fundamental rights and one which infringes them, a court has a responsibility to adopt the former. The technique of reading together the savings and modification clauses permits the court, 'to identify an inconsistency

[38] Francis Alexis, 'When is an "Existing Law" Saved?' (1976) P L 256 at 281.
[39] [2004] 2 WLR 652.
[40] See (n 38).
[41] (2004) 64 WIR 37 (BB PC).
[42] See (n 27).
[43] See (n 28).

between an existing law and the fundamental rights in the Constitution and to modify the inconsistency out of existence'.[44] Those conclusions are repeated here.

[67] Further, it is an elementary principle of statutory interpretation that domestic law should be interpreted so as to conform as far as possible to a state's international obligations. In Guyana, this is much more than just an unwritten principle of common law. It is a constitutional requirement imposed on courts. Article 39(2), located in that part of the Constitution that sets out overarching principles, gives the court a clear instruction that in the interpretation of the fundamental rights provisions a court must pay due regard to international law, international conventions, covenants and charters bearing on human rights.

[68] The Inter-American Court of Human Rights (IACHR) is an international court that interprets and applies the American Convention on Human Rights to which Guyana is a state party. That court has a clear position on these savings clauses that seek to immunise from challenge 'existing laws' that infringe fundamental rights. In *Boyce v Barbados*[45], referencing the savings clause (s 26) of the Barbados Constitution, the IACHR called on the state of Barbados to:

> adopt such legislative or other measures necessary to ensure that the Constitution and laws of Barbados are brought into compliance with the American Convention, and, specifically, remove the immunizing effect of section 26 of the Constitution of Barbados on its 'existing laws'.

[69] In *Nervais*[46], Byron PCCJ referred to *Boyce* and to other international authorities in this Court's justification of the modification first approach to the savings clause. In all the circumstances, we respectfully disagree with the counter arguments. It is our view that, until the parliament gets around to amending or otherwise addressing them, courts should, when treating with existing laws that challenge the fundamental rights laid out in the Constitution, abide the modification prescription set out in art 7(1) of the 1980 Constitution Act.

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[44] ibid at [58].
[45] (Preliminary Objection, Merits, Reparations and Costs) Inter – American Court of Human Rights Series C No 169 (20 November 2007) at [127].
[46] See (n 27).

The nature and scope of the modification power

[70] Existing laws, like s 72, may 'continue in force' but, if reasonably possible, they must be suitably modified to have them accord with the fundamental rights laid out in the Constitution as set out in s 7(1):

> 7.(1) Subject to the provisions of this Act, the existing laws shall continue in force on and after the appointed day as if they had been made in pursuance of the Constitution but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act

[71] In *Roodal v The State*[47], then Chief Justice de la Bastide gave the clearest exposition on the scope of the modification clause and the relationship between the constitutional supremacy clause, s 2, on the one hand and, on the other hand, the savings clause contained in s 6(1) of the Trinidad and Tobago Constitution and that country's modification clause found in the s 5(1) of the Constitution Act (which is not dis-similar to Guyana's s 7(1)). De la Bastide CJ first made a thorough review of all the applicable authorities before stating, in relation to s 5(1), that"

> The first thing we can say about that section is that though it speaks of existing laws being "construed", the type of 'construing' which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent, nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing laws under this section, goes far beyond what is normally meant by 'construing'. It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law…
>
> It is important to note the close connection between section 2 of the Constitution and section 5 (1) of the 1976 Act. What triggers both sections is inconsistency between a law and the Constitution. When such an inconsistency exists, section 2 is quite uncompromising. It provides that the other law is void though only to the extent of the inconsistency. It may be that only part of a law is inconsistent. That part must be treated by the court as void, but section 5 (1) imposes a

[47] *Roodal v The State* (Trinidad and Tobago CA, 17 July 2002).

> duty on the court to try and save the "good" portion of the law by modification. That may involve simply deleting the inconsistent part. It has been held that such deletion is within the scope of section 5 (1). But the effect of the deletion may be to create a gap which requires to be filled by something compatible with the Constitution. Alternatively, the inconsistency may arise because of the absence of something needed to bring the law into conformity with the Constitution e.g. access to the courts in *Maximea*[48]. The cases show that it is sometimes perfectly legitimate for the court to fill such gaps by way of modification under section 5 (1) provided that in doing so the court does not arrogate to itself a law-making function that should properly be left to the legislature. When may the court fill the gap and when should it refrain from doing so? We suggest that it depends on whether there is a simple and obvious means of filling the gap in a way that will achieve conformity with the Constitution and is in fact dictated by the Constitution. In such a case the court may fill the gap by modification. Where however the solution is not so simple, and filling the gap involves the making of a choice or the establishment of a policy, these are matters which the court should leave to the legislature.

[72] This description of the sweeping responsibility the Constitution entrusts to courts, appropriately to construe existing laws that challenge fundamental rights, has gained broad acceptance. It was, for example, specifically relied upon by Lord Bingham in *Mollison*[49] and cited with approval by Lord Hoffmann in *Matthew*[50]. We gratefully accept it as a correct statement of the law. It is precisely the type of exercise this Court must embark upon with respect to s 72.

The separation of powers

[73] Counsel for Bisram also submitted that s 72 contravenes the separation of powers principle. The argument, in this context, is a variant of the submissions made in relation to art 122A (judicial independence) discussed earlier.

[74] There is no longer any debate as to whether the separation of powers doctrine is an unwritten principle of the Constitution to which courts must give effect. The authorities are legion. These authorities all make the point in one way or another that parliament is not permitted to enact legislation that would compromise the

[48] *Maximea v A-G* (1974) 21 WIR 548 (DM CA).
[49] See (n 35) at 155.
[50] (See n 38) at [21].

decisional authority properly vested in a court. See, for example *Hinds v R*[51]; *Nicholas v R*[52]; *DPP v Mollison*[53]*; Ferguson v Attorney General of Trinidad and Tobago*[54]; *Seepersad v Attorney General of Trinidad and Tobago*[55]; *McEwan v Attorney General of Guyana*[56]; *Belize International Services Limited v Attorney General of Belize*[57]; and *Zuniga v Attorney General of Belize*[58].

[75] In *Zuniga*[59], this Court noted that to offend the doctrine of the separation of powers, it must be shown that the legislature is undermining the decisional authority or independence of the judicial branch by compromising judicial discretion. It is our view that s 72 manifestly and specifically does precisely that.

Consequences

[76] There are two sets of consequences to the conclusions reached above with respect to the invalidity of the steps taken by the DPP and the constitutional points discussed. The first concerns Mr Bisram himself. The second runs deeper, having to do with the future of s 72. As to the first, we bear in mind several factors. In agreement with Morris-Ramlall J, even if s 72 were treated as being constitutional, the DPP's second directive to the magistrate must be declared a nullity. The DPP could not have lawfully directed the magistrate to re-open the PI and contemplate committing Bisram before receiving and properly considering all of the evidence that was placed before the magistrate at that stage. We agree with the trial judge that everything that transpired after that directive was issued must be quashed.

[77] We ourselves have not considered the quality of the evidence that was presented to the magistrate to justify the charge preferred against Bisram. It is not necessary that we should do so. It may even be inappropriate, as this is by no means an appeal against the magistrate's or Morris-Ramlall's J decision to find that no sufficient case was made out. We note, however, that Morris-Ramlall J did carry out such an

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[51] [1977] AC 195 at 212–213 (JM PC).
[52] (1998) 193 CLR 173 at [15], [16], [74], [112].
[53] See (n 35).
[54] [2016] 2 LRC 621 at [14]-[15] (TT PC).
[55] [2013] 1 AC 659, at [10] (TT PC)
[56] See (n 28) and *Nervais* (n 27).
[57] [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [304].
[58] [2014] CCJ 2 (AJ) (BZ), (2014) 84 WIR 101 at [40].
[59] ibid at [41].

exercise, at some length. The judge came to the same conclusion as did the magistrate, namely that 'no prima facie case has been made out' (See [46] of the trial judge's judgment). It is true that the Court of Appeal did not agree with this conclusion of the judge. We bear in mind, however, that Bisram has already been seriously prejudiced by 'the bungling' that transpired in the magistrate's court; that, even if he had been acquitted at a trial, the right of appeal by the DPP is a very limited one, only "on a point of law"[60]; and that the evidence against him has been characterised both by the magistrate and the judge as being weak and insufficient. In these circumstances, we think it would be unjust for Bisram to be made to answer any charge of murder in this case on the same evidence as was presented to the magistrate.

[78] Of course, the loved ones of Faiyaz Narinedatt also deserve justice. There is no question of barring the DPP from ever preferring a charge of murder against Bisram for the death of Mr Narinedatt. At [17] above we pointed out that issues of *autrefois acquit* would not apply here as he was never placed in jeopardy. If the prosecutorial authorities were to obtain fresh evidence linking Bisram to the alleged murder, then there will be nothing to prevent the DPP from having him re-arrested and again charged.

[79] As to the consequence of our finding of unconstitutionality in s 72, all rational roads lead, in a coherent fashion, to a single venue. Whether one holds that s 72 flouts the separation of powers principle; or is repugnant to art 122A; or conflicts with art 144 and is not saved in its pristine form by art 152, the result is the same. The section is required to be suitably modified.

[80] The Court was urged simply to strike it down and we have considered this alternative. To do so will leave a substantial gap in the criminal procedure and one does not know whether and when the National Assembly can get around to closing that gap. Besides, s 7 of the 1980 Constitution Act, as de la Bastide CJ reminds us, is 'quite uncompromising'. Its instruction to courts is that existing laws 'shall continue in force' but must be suitably modified to render them constitutionally

[60] See s 32A of the Court of Appeal Act, Cap 3:01.

compliant. When a court engages in such modification, it is therefore acting well within its constitutionally mandated functions including the separation of powers arrangements that prevail in a democratic state such as Guyana.

[81] It is also a continuing responsibility of the Executive and the Legislature to ensure that existing laws are consistent with core constitutional values and human rights, and to undertake ongoing legislative reform to ensure this. However, when a matter comes before the courts and a gap is shown to exist, it falls to the courts, when necessary or expedient, to modify appropriately the impugned provision(s) in the existing law.

[82] We bear in mind the caution that, especially where there are legislative and policy choices to be made, the matter should be left to parliament. Here, there are options available to the National Assembly as to how the gap should be filled. The parliament may choose to give the DPP the power to prefer a voluntary bill of indictment. As noted by Dana Seetahal[61], this is provided for in The Bahamas[62], Barbados[63], Jamaica[64] and St Vincent and the Grenadines[65]. The DPP is authorised to seek permission from a High Court judge to prefer an indictment without a committal and the judge may do so only if there is sufficient evidence supporting the charge contained in the draft Bill of indictment.[66]

[83] Alternatively, Seetahal points to another option that is available to DPPs in the region, and which does not suffer from the constitutional defects of s 72. The Legislature in Dominica[67], Grenada[68] and Trinidad and Tobago[69] has granted the DPP the power, after considering the evidence given in the committal proceedings, to apply, *ex parte*, to a judge of the High Court to obtain a warrant for the arrest and committal of the discharged person. The judge would grant the application if

[61] Seetahal (n 4) at 169.
[62] Criminal Procedure Code Act, CH 91, s 258(1).
[63] Criminal Procedure Act, Cap 127, s 4.
[64] Criminal Justice (Administration) Act, Cap 83 s 2.
[65] Criminal Procedure Code, Cap 172, s 162.
[66] See *Brooks* (n 26).
[67] Criminal Law and Procedure Act, Chap 12:01, s 17.
[68] Criminal Procedure Code, Cap 72B, s 105.
[69] Indictable Offences (Preliminary Inquiry) Act, Chap 12:01, s 23(5)-(7).

the judge considered that the evidence, as given before the magistrate, was sufficient to put the accused person on trial.[70]

[84] Exceptionally, in Antigua and Barbuda, parliament has given to the DPP the right to appeal to the Court of Appeal on a point of law the dismissal of a charge against an accused person in committal proceedings.[71] We note that, in all of these instances, the ultimate decision maker is clothed with the status, jurisdiction, and powers of a superior court of record.

[85] Given the range of choices available, by far the best solution is for the National Assembly to make appropriate, constitutionally compliant provisions that will cover those circumstances where a magistrate discharges an accused and the DPP is aggrieved. We respectfully suggest that this be done as soon as practicable. But until it is done, strictly as a temporary measure, we are satisfied that s 72 should be modified to accommodate the second option above. Pending legislative intervention, a DPP, who is for good reason disappointed with the decision of a magistrate to discharge an accused person, may place before a judge of the Supreme Court the depositions and other material that were before the magistrate, on an *ex parte* application for the discharged accused to be arrested and committed if the judge is of the view that the material justifies such a course of action. In a sense, Morris-Ramlall J has already undertaken that exercise, *inter partes*, in relation to Bisram. For this reason as well, he may not, on the evidence led before the magistrate, be committed for trial on that same evidence.

The Orders of the Court

[86] In all the circumstances, the Court makes the following orders:

a) The appeal is allowed.

b) The decision of the magistrate to discharge Mr Bisram is restored. He may not be committed for trial only on the evidence led before the Magistrate.

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[70] See *A-G v Mohammed* (1985) 36 WIR 359.

[71] See Magistrate's Code of Procedure Act, CAP 255 as amended by Act 13 of 2004, s 191 B.

c) It is hereby declared that s 72 of the Criminal Law (Procedure) Act violates the separation of powers and is also inconsistent with arts 122A and 144 of the Constitution.

d) The Order of this Court dated 11 June 2021, with respect to Mr Bisram is spent and no longer in effect.

e) Until the National Assembly makes suitable provision, s 72 is modified to excise those provisions permitting the DPP to direct the magistrate. In lieu thereof, a DPP aggrieved at the discharge of an accused by a magistrate after the whole of the proceedings at a PI, may apply *ex parte* to a judge of the Supreme Court for an order that the discharged person be arrested and committed, if the judge is of the view that the material placed before the judge justified such a course of action.

f) The issue of costs is reserved.

/s/ A Saunders

The Hon Mr Justice A Saunders, President

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr D Justice Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar