[2023] JMFC Full 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2015HCV05731

BEFORE: THE HONOURABLE MRS JUSTICE LORNA SHELLY-WILLIAMS (Senior Puisne Judge, Acting)

THE HONOURABLE MR JUSTICE DAVID BATTS

THE HONOURABLE MRS JUSTICE ANDREA PETTIGREW-COLLINS

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER of an Application by MAURICE ARNOLD TOMLINSON, alleging a breach of his rights under sections 13(3)(a), 13(3)(c), 13(3)(g), 13(3)(i), 13(3)(j)(ii), 13(3)(o), 13(3)(p), 13(3)(6) and 14 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

AND

IN THE MATTER of an Application by MAURICE ARNOLD TOMLINSON for constitutional redress pursuant to section 19(1) of the said Charter

AND

IN THE MATTER of an Application made pursuant to Rule 56.9 of the Civil Procedure Rules, 2002 (CPR).

BETWEEN	MAURICE ARNOLD TOMLINSON	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT
	"THE CHURCHES"	1ST INTERESTED PARTY
	JAMAICA COALITION FOR A HEALTHY SOCIETY	2ND INTERESTED PARTY
	LAWYERS CHRISTIAN FELLOWSHIP LIMITED	3RD INTERESTED PARTY
	HEAR THE CHILDREN CRY LIMITED	4TH INTERESTED PARTY

Constitutional Law – Charter of Rights - Savings Law Clause -Offences Against the Person Act - Whether the savings law clause precludes enquiry by court - Meaning of "*sexual offence*" - Whether court bound by the parties' statement of meaning - Whether buggery is a sexual offence.

Mr Ian Wilkinson KC and Mr Daniel Beckford instructed by Wilkinson Law on behalf of the Claimant

Miss Lisa Whyte and Miss Jevaughnia S Clarke instructed by the Director of State Proceedings for the Defendant.

Miss Danielle Archer instructed by Danielle Archer & Co for 1st Interested Party.

Mr Ransford Braham KC and Miss Shirley Richards instructed by Richards Edwards Theoc & Associates for the 2nd Interested Party.

Mr Wendel Wilkins and Miss Jamila Thomas instructed by Lambie Thomas & Co for the 3rd Interested Party.

Mrs Carolyn P. Hay KC instructed by Carolyn P Hay & Co for the 4th Interested Party.

HEARD: 26th, 27th June and, 27th October 2023.

IN OPEN COURT

SHELLY-WILLIAMS, SNR. PJ Ag.,

BACKGROUND

[1] The Claimant filed a claim in which he sought declarations concerning breaches of his constitutional rights and challenged Sections 76, 77 and 79 of the Offences Against the Persons Act (OAPA). The matter was first heard by Hutchinson J (as she then was) who delivered a judgment on the 19th of January 2022 indicating that all the issues are to be tried together. This decision was appealed and on the 31st of March 2023, the Court of Appeal mandated that:-

> *A separate trial is to be held to determine the preliminary issue of whether the constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act can be enquired into in the light of the savings law clause in section 13(12) of the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica.*

[2] The Court was provided with written submission, that was buttress with oral submissions. The parties were also asked by the Court to file submissions on the definition of sexual offences.

The Defendant's submission

[3] Ms. White, on behalf of the Attorney General, submitted that the savings law clause in section 13(12), protects the stated laws from judicial scrutiny. She submitted the savings law clause prevents this court from enquiring into the constitutionality of Sections 76, 77 and 79 of the OAPA She cited the authorities of ***Lambert Watson v The Queen*** *[2004] UKPC 34*, ***Chandler v State of Trinidad and Tobago*** *[2022] UKPC 19* and ***Boyce v R*** *[2005] 1 AC 400* in support of this position. Counsel argued that in the cases cited, the issue of the savings law clause was deliberated on and the Privy Council concluded that saving law clauses prevented these laws from being constitutional challenge.

[4] Counsel acknowledged that once a statute, that is the subject of a savings laws clause, has been modified, then the saving laws clause would no longer apply. This was found to be the position in L***ambert Watson.*** Ms White argued that in the

instant case as it relates to Sections 76, 77 and 79 of OAPA, there is no express change to the said Act and Regulations and as such the prosecution of the offences under them remains unchanged.

[5] Further, Ms. White contended that if changes are to be made with respect to the inclusion of the savings law clause in the Constitution it must be the legislature that amends same or determines its continued applicability. Counsel's position was that it was not within the remit of the judiciary to effect these changes to the Constitution or laws, and this would be trespassing on the remit of Parliament. Counsel cited paragraph 54 from the decision in ***Lambert*** **Watson** in support of this position.

[6] Counsel for the defendant highlights a number of amendments which have been made to the OAPA since its enactment in Jamaica in 1864. One relevant amendment which was made concerned the Sexual Offences Act (SOA) of 2009 which saw several offences previously listed under the OAPA, transferred to the SOA. Ms White contends however, that the amendments made to the OAPA does not convert the nature of the offences detailed in Sections 76, 77 and 79 and as such they are deemed sexual offences.

[7] Counsel for the defendant noted that neither the OAPA or the SOA defines the term 'sexual offences,' however the entire legislative scheme dictates that offences under Sections 76, 77 and 79 of the OAPA are to be classified as sexual offences.

[8] Ms White contends that under the SOA 'sexual offence' is given a broad interpretation as evidenced by the definition given for instance to *complainant* being a person whom a sexual offence was committed against. Accordingly, Counsel contends that the broad reference to sexual offences under the SOA, captures Sections 76, 77 and 79 of the OAPA as they are by nature sexual offences, though not placed in the SOA.

[9] Counsel for the defendant contends that the entire legislative scheme concerning sexual offences shows that the term sexual offence ought to include any sexual activity, whether or not it involves sexual intercourse. Sexual offences the

defendant submits spans across, non-consensual crimes, crimes against children and crimes that exploit others for a sexual purpose, whether in person or online. The defendant also contends that sexual offences relate to unlawful intimate activity between individuals with or without physical contact.

[10] The defendant submits that under the SOA, sexual offences are not limited to those that relate only to sexual intercourse. The SOA covers offences against a person's body which may or may not involve physical activity. The defendant avers that the SOA does not contain all sexual offences for example, offences relating to child pornography which are stipulated under Section 2 of the Child Pornography and Prevention Act. Counsel submitted that the SOA cannot be said to be the definitive authority on all sexual offences so as to exclude the offences under Sections 76, 77 and 79 of the OAPA.

Claimant's Submissions

[11] Counsel for the claimant, Mr. Wilkinson, submitted that the impugned provisions of the OAPA are not protected by the savings law clause from judicial review. He argued that the savings law clause was not a device to cloak pre-independence laws with absolute immunity or invincibility or to perpetrate unconstitutionality. He relied on a quotation from Sykes J (as he was) in ***Arthur Baugh v Courts (Jamaica) Limited and the Attorney-General*** *Claim No CL. B. 009 of 1997*at paragraph 20 in support of this position.

[12] It was accepted by Counsel that the savings law clause in the amended 2011 Charter only saves preexisting laws relating to specific matters, of which sexual offences is listed, unlike its predecessor that saved all laws. Counsel argued that amended laws are not protected by the savings law clause. Counsel submitted that any post-2011 Charter change to the relevant section of the statute would now be subject to complete judicial scrutiny. Additionally, it was argued that the savings law clause is circumscribed by the principles in ***Lambert Watson*** which encourages not only a narrow construction of the savings law clause (See paragraph 42 of Lord Hope of Craighead judgement) but also supports the

claimant's contention that as soon as the pre-dated laws are changed, adapted, or modified they had to comply with the requirements of the Charter.

[13] Counsel for the claimant submitted that the impugned sections of the OAPA have been so changed, adapted or modified by the SOA and the SOA Regulations so as to make those sections no longer the law that existed at the time of the Charter coming into effect and therefore no longer saved. He argued that this is manifested by the introduction of additional consequences for conviction of those offences which includes: the obligation to register, the obligation to report and the obligation to carry a sex offender's registration certificate. He admitted that the impugned sections of the OAPA may not have been directly changed but argued that based on the *ratio* in ***Lambert Watson***, a statute does not require amendment to the relevant legislation to be considered changed. It is sufficient if the relevant law is adapted, changed, or modified in any respect.

[14] Counsel further argued that support for the contention that the OAPA have been adapted, changed or modified can be found in section 58 of the Interpretation Act. Counsel's position was that this confirms that the OAPA and the SOA and the SOA Regulations must be read together as constituting the law on buggery and gross indecency involving consensual sexual intercourse between adult men in Jamaica.

[15] Mr. Wilkinson further submitted that the nature of some of the amendments are tantamount to punishment against persons who might be found guilty of breaching any of the impugned provisions. Counsel relied on two cases from the United States of America (USA) in support of this contention, ie ***Brian Hope et al v Commissioner of Indiana Department of Correction et al*** (2019) US Dist. Lexis 236341, 2019 WL 11505399 and ***Prynne v Settle*** 848 Fed Appx 93 (2021). Mr. Wilkinson advanced the position that as in ***Brian Hope*** and ***Prynne*** the Court ought to find that placing an offender on a sex offender registry imposes punishment which was punitive, and that this amounted to shaming and banishment.

[16] Counsel urged this court to adopt the reasoning in ***Brian Hope*** and ***Prynne*** to the instant case. He argued that it cannot be denied that the addition of these penalties or punishment to the offence does constitute a change, adaptation, or modification of the pre-independence law.

[17] Mr. Wilkinson urged the court to adopt the position that the offences detailed under Sections 76, 77 and 79 of the OAPA are not classified in the OAPA as sexual offences as the word sex does not appear in these sections. He submitted that these were deemed unnatural offences and outrages on decency as evidenced by the respective marginal notes.

[18] Counsel for the claimant averred that sexual offences involving nonconsensual acts like rape and sexual assaults were treated differently than unnatural offence and outrage on decency. He noted that these (nonconsensual acts) were the offences which were later transferred to the SOA, thus indicating their true nature ie sexual offences, which excluded offences under Sections 76, 77 and 79 of the OAPA as such.

[19] The Claimant submitted that if Parliament had intended to include the offences under Sections 76, 77 and 79 of the OAPA, within the scope of the savings law clause in **Section 13(12) of the Constitution**, it would have referenced *unnatural offences* and *outrages on decency, (*as those are the classification given in the OAPA), in addition to *sexual offences*, *obscene publications and offences regarding the life of the unborn*.

[20] Counsel contended that the modern paradigm as regards what constitutes a sexual offence includes the pertinent element of the lack of consent. This construction, he contends, is in agreement with the dicta, cited above in ***Watson and Chandler*** **cases** (supra). Counsel's position was that lack of consent is not present in any of the offences under Sections 76, 77 and 79 of the OAPA and as such there ought not to be a broad interpretation given, so as to include them.

[21] Mr. Wilkinson posits that sex may be narrowly or broadly defined. Narrowly defined, it is limited to sexual intercourse, which may, when narrowly defined, is limited to penetration of a vagina with a penis. It is then submitted that the offences under Sections 76, 77 and 79 of the OAPA, do not fall within these narrow definitions. Counsel argued that given that the offences under Sections 76, 77 and 79 of the OAPA, do not include any vaginal penetration, they therefore cannot be deemed sexual activities so as to fall under **Section 13(12)(a) of the Constitution,** as being sexual offences. Further, he noted that though sex can be given a broader construction which would include the specified offences under Sections 76, 77 and 79 of the OAPA, for the purpose of interpreting the savings law clause a narrow construction should be employed.

[22] The Claimant further notes that under the SOA there are provisions for offences between members of the same sex (sexual touching and indecent assault) however, it is not the fact of the persons being of the same sex that makes them offences, it is the absence of consent.

[23] Counsel noted that gross indecency under Section 79 of the OAPA, includes a broad range of activities, such as kissing and holding hands, which are not sexual in nature, as such the savings law clause therefore cannot be applied to Section 79 of the OAPA.

[24] Counsel for the claimant posits that the SOA limits the definition of sexual intercourse to penetration of a vagina with a penis, reinforcing the applicability of the narrow definition of both sex and sexual intercourse and further demonstrating the intent of Parliament that sex is limited to consensual relationships between persons of the opposite sex.

[25] It was suggested by Mr. Wilkinson that although Sections 76, 77 and 79 of the OAPA are mentioned in the First Schedule of the SOA, the SOA defines those offences as specified offences for the specific purpose of reporting obligations under the SOA. Other specified offences include offences for the trafficking of persons, and the offence of selling and participating in trafficking of any child.

Those offences, he stated, clearly are not sexual offences. Accordingly, it was submitted that the mere fact of Sections 76, 77 and 79 of the OAPA have not been included in the SOA, confirms that they are not sexual offences within the meaning of Section **13(12)(a) of the Constitution**.

[26] Counsel for the claimant argued that any ambiguity or uncertainty resulting from the application of the SOA to Sections 76, 77 and 79 of the OAPA must inure to the Claimant's benefit, as the savings law clause ought to be interpreted narrowly.

[27] It was Counsel's position that in the alternative that, even if the offences in Sections 76, 77 and 79 of the OAPA are sexual offences, the claimant ought to succeed as due to the timelines, the germane provisions of the respective statutes have not been saved by **Section 13(12)(a) of the Constitution**.

Submissions of the First and Fourth Interested Parties

[28] The first and fourth interested parties had adopted the submissions of the defendant and as such did not make any independent submissions before the court.

Submissions of the second interested party

[29] The 2nd interested party adopted the submissions of the defendant but added that whereas in ***Lambert Watson*** the OAPA had been amended from one category offence which bore the maximum penalty of death to now provide for two categories of murders with different penalties, in the instant case, neither the nature nor the penalty of the offence has been changed.

[30] Counsel Mr. Braham contended the savings clause in Section 13 (12) of the Charter differed from the one introduced post-independence. This was not a wholesale savings clause relating to all laws, but one specific to certain offences. His submission was that the offences in Sections 76, 77 and 79 were covered under the savings law clause.

Submissions of third interested party

[31] Counsel, Wilkins argued that according to sections 30 of the SOA, which speaks to the requirement involving the Sex Offender Registry, is a post-conviction requirement. It is his contention as such that the SOA only becomes applicable after conviction and further that the requirement has nothing to do with the determination of the offence or the sentencing of an offender. Accordingly, he submitted that the laws are in the very same condition as at the time of the passage of the Charter of Rights and is protected from challenge.

[32] Counsel for the third interested party noted that under the **Black's Law Dictionary 7th ed,** sexual offence is defined as an offence involving *unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty and bestiality*. Counsel also noted that under the **Dictionary of English Law Vols 1 and 2 1959,** sexual offences is defined as:

> *The Sexual Offences Act, 1956, [UK] consolidated with amendments, a large number of statutory provisions relating to sexual crimes and abduction, procuration and prostitution of women and kindred offences. See Abduction; Abominable Crime; Abusing Children; Bestiality; Brothel; Buggery; Carnal Knowledge; Defilement Of Girls ; Incest ; Indecent Assault ; Procuration Of Women ; Rape ; Sodomy (See Page 1629)*

[33] Counsel submitted that under **Section 65(2) of the Belize Criminal Code** sexual offence is defined as:

> *65 (2) In this section, " sexual offence " means rape , attempted rape , marital rape , carnal knowledge , forcible abduction , unnatural offence , incest or Indecent assault.*

[34] Counsel submitted that in Jamaica sexual offences include offences detailed under Sections 76, 77 and 79 of the OAPA based on:-

a. The ordinary meaning of the words sexual and offence;

b. The broad and exclusive manner in which the terms sexual offence is used in the SOA; and

c. Taking judicial notice of the ingredients of the said offences clearly makes them fall within the scope of being sexual offences.

These all aid in the conclusion that the offences under Sections 76, 77 and 79 of the OAPA are sexual offences although they do not fall under the SOA.

THE LAW

[35] There have been several cases that have sought to give guidance to the approach to be adopted in relation to savings law clauses. In the cases of ***Lambert Watson v The Queen [2004] UKPC 34*** the defendant was convicted in the Supreme Court of Jamaica of the murder of a mother and her daughter on the 19th of July 1999. The defendant was sentenced to death under s 3(1A) of the OAPA. The Court of Appeal of Jamaica dismissed the defendant's appeal as well as his application for leave to appeal against his conviction. A supplementary petition for leave to appeal to the Privy Council against the mandatory death sentence on grounds relating to its constitutional validity was remitted to the Court of Appeal. The Court of Appeal upheld the validity of the mandatory death sentence and dismissed the defendant's appeal. He appealed to the Privy Council.

[36] The issue to be decided by the Board was whether the mandatory sentence of death imposed on the defendant under s 3(1A) of the 1864 Act, as amended, was unconstitutional. The questions to be determined were :-

(i) whether the fact that murders were classified by the 1992 Act into capital and non-capital saved the mandatory death penalty from the conclusion that it was 'inhuman or degrading punishment or other treatment' within the meaning of s 17(1) of the Constitution and

(ii) whether the law requiring the sentence of death to be passed on the defendant was a law in force immediately before the appointed day within the meaning of s 26(8) of the Constitution.

[37] The Board found that:-

(1) the imposition of the mandatory death penalty pursuant to section 3(1A) of the Offences against the Person Act of Jamaica was incompatible with the prohibition on inhuman and degrading punishment,

(2) that since section 3(1A) had been inserted by amending legislation in 1992, it was not an existing law for the purposes of the savings clause in section 26(8) of the Constitution;

(3) that section 3(1A) must therefore be declared unconstitutional and void under section 2 of the Constitution to the extent that it required, rather than merely authorised, the imposition of the death penalty;

(4) and that, accordingly, the sentence of death imposed on the appellant should be set aside and the case remitted to the Supreme Court of Jamaica to decide what sentences should be pronounced for the crimes of which he was convicted.

[38] Lord Hope of Craighead opined at paragraphs 36 and 37 that :-

> *36. The law in force immediately before the appointed day which provided that the penalty for murder was death was to be found in section 2 of the Offences against the Person Law of 1864: "Whosever shall be convicted of murder shall suffer death as a felon."*
>
> *37. But, as has already been noted, section 2 of the Act of 1864 was repealed by the Offences against the Person (Amendment) Act 1992. The 1992 Act substituted with effect from its commencement on 13 October 1992 a new section which established two separate categories for murder: capital murder and non-capital murder. Section 3 of the 1864 Act, which provided that the court shall pronounce sentence of death upon every conviction for murder, was amended by restricting the mandatory death sentence to every person who is convicted of capital murder as defined in section 2(1) of the Act, as amended. And section 3(1A) of the 1864 Act, as amended, provides that the death penalty is mandatory also in the case of a person who is convicted of two non-capital murders. So the law which was in force immediately before the appointed day is no longer the law. The appellant was sentenced to death under the law which is set out in the amendments contained in the 1992 Act…*

[39] In addressing the issue as to whether the law in force immediately before the appointed day preserved the fundamental rights of Jamaicans, Lord Hope of Craighead found at paragraphs 42 and 44 to 47 that:-

> *42. These observations would plainly have had much force in this case if it were plain that the law under which the appellant was sentenced to death was a law which was in force immediately before the appointed day. But the issue in this case is whether the law under which he was sentenced falls within that description, when the provisions of section 26(8) are read together with those in section 26(9). Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in section 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to. Section 26(8) read with section 26(9) limits that protection. So it must be given a narrow rather than a broad construction. This means that careful attention must be paid to the precise meaning of the words used in section 26(9). If this amounts to what has been described as "tabulated legalism", it is perfectly in order in this context.*
>
> *44 Section 26(9) provides that, for the purposes of section 26(8), a law in force immediately before the appointed day "shall be deemed not to have ceased to be such law by reason only" of the circumstances referred to in paragraphs (a) and (b) of the subsection. The circumstance referred to in paragraph (a) plainly does not apply. The amendments to the 1864 Act were made by Parliament. They were not made by or under section 4 of the Jamaica (Constitution) Order in Council 1962. Nor can the circumstance referred to in paragraph (b) be applied here either. The amendments made by the 1992 Act went far beyond what that provision contemplates. It did not seek merely to consolidate or to revise the existing laws. Its purpose was to amend the 1864 Act, not to confine itself to only such adaptations or modifications of the existing laws as were necessary to effect a consolidation or revision of them.*
>
> *45 Mr Hylton, of course, recognised the difficulty which he faced in trying to bring the 1992 amendments within paragraphs (a) and (b) of section 26(9). That was why he submitted that those paragraphs were not exhaustive of the circumstances in which a law which was in force immediately before the appointed day could survive later changes without losing the status of an existing law for the purposes of section 26(8). But this argument fails to give effect to the words "shall be deemed" and "by reason only of" which precede paragraphs (a) and (b) of the subsection. The words "shall be deemed" indicate that, were it not for that direction, the law in force immediately before the appointed day would have ceased to*

be such law in the circumstances referred to in these two paragraphs. It must be concluded therefore that section 26(9) does not extend to any other circumstances that may be envisaged where the law in force immediately before the appointed day was subject to adaptation or modification which are not expressly covered by those paragraphs. The only circumstances where adaptations or modifications that are made to it are not to have the effect that the law in force immediately before the appointed day has ceased to be such law are those set out in paragraphs (a) and (b).

46 The narrowness of the wording of section 26(9) is no accident. It is entirely in keeping with the philosophy which requires a generous interpretation to be given to the principles which are enshrined in Chapter III of the Constitution. True it is that the laws which were in force immediately before the appointed day are to be taken to have given full effect to the fundamental rights and freedoms that are set out in section 13. This is what section 26(8) provides. It was a reasonable working assumption, in the interests of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy. ***So long as these laws remained untouched, they did not have to be scrutinised. But as soon as they were changed, adapted or modified in any respect, except in the circumstances referred to in paragraphs (a) and (b) of section 26(9), they had to comply with the requirements of Chapter III.*** *This because there was no longer any need to apply the presumption on which section 26(8) proceeds. The opportunity to ensure that the law as changed, adapted or modified gave effect to all the fundamental rights and freedoms of the individual was now available, and it was up to Parliament to grasp that opportunity. Its power to make laws for the peace, order and good government of Jamaica is expressly made subject to the provisions of the Constitution by section 48(1).*

47 It must be concluded therefore that the law as to the mandatory death penalty which was in force immediately before the appointed day ceased to be such law for the purposes of section 26(8) as from 13 October 1992 when it was amended by the 1992 Act. So the protection for existing laws in section 26(8) does not apply to the amendments which the 1992 Act sets out. The power to legislate which Parliament was exercising when it was enacting the 1992 Act was subject to the provisions of Chapter III which, as section 13 declares, have effect for the purpose of protecting the rights and freedoms of the individual.

[40] The Board was again asked to deliberate on the issue of a savings law clause in the case of ***Pittman v State of T& T; Hernandez v State of T& T*** **[2017] UKPC 6**. This was a case where the defendants in two unrelated cases were convicted in Trinidad of murder and sentenced to death, as required by section 4 of the Offences against the Person Act 19251. Their appeals against conviction were dismissed. On an appeal to the Privy Council, expert evidence was offered for the

first time suggesting that the defendant suffered from a mental impairment. The first case was remitted to the Court of Appeal of Trinidad and Tobago, which considered the fresh evidence but affirmed the conviction. Due to the time which had elapsed since the defendant's conviction, the court substituted a sentence of life imprisonment, with a minimum term of 40 years. In the second case it was contended that, as a result of the mental impairment, the sentence of death was unconstitutional. That question was remitted to the Court of Appeal of Trinidad and Tobago, who rejected the argument that the sentence was unconstitutional but, due to the time which had elapsed since the conviction, substituted a sentence of life imprisonment, with a minimum term of 25 years.

[41] The defendants appealed against sentence to the Privy Council, contending that for a person suffering from their level of mental impairment the sentence of death was unlawful, or at least unlawful without a judicial determination of whether, given their impairment, it would constitute cruel and unusual punishment.

[42] Although the death sentences had been quashed, the defendants submitted that the substituted sentences were wrongly premised on the original mandatory death penalty and/or did not sufficiently take into account their mental impairment.

[43] Lord Carswell found that the mandatory death penalty was immune from challenge. He found at paragraphs 42, 44, 45 and 46 that :-

> *The mandatory death sentence for murder, now found in section 4 OAPA has been modified in its language since it was enacted in 1925 (and indeed in the 1842 Ordinance) but only in order to accommodate the removal of the old categorisation of offences into felonies and misdemeanours. It is, accordingly, an existing law to which the prohibition upon parliamentary authorisation of cruel and unusual punishments in* ***section 5(2) does not apply.*** *The Board so held in Matthew v State of Trinidad and Tobago [2005] 1 AC 433 and Boyce v The Queen [2005] 1 AC 400, decided on the same day. As the Board held at para 12 of the Matthew case, a mandatory death penalty is indeed a cruel and unusual punishment but in so far as it is an existing law, it is immune from constitutional challenge on that ground.*
>
> *…*
>
> *44. There has, however, been an important change to the law of murder since the 1925 Act was enacted and after the Constitution was adopted in*

1962. Parliament in Trinidad has given consideration to the position of mentally impaired persons who face charges of murder. It did so by adopting, by the Offences against the Person Act 1985 (chapter 19 of 1985), amendments to OAPA to create the concept of diminished responsibility…

45. …Diminished responsibility was adopted as a means of mitigating the mandatory death penalty in the case of the mentally disordered. Although it proceeds by the machinery of reducing the offence from murder to manslaughter, there is no room for doubt that mitigation of the penalty was its object and rationale. The formulation of diminished responsibility which has been enacted in Trinidad and Tobago exactly follows that of the English Homicide Act 1957. It was clearly enacted for the same reason. It follows that what has happened is a legislative recognition in Trinidad and Tobago that the mental impairment of the defendant at the time of the offence may be a reason why there should not be the cruel and unusual punishment of mandatory execution.

…

***47**. It is necessary to begin with the proposition that a mandatory death penalty is a cruel and unusual punishment: the Matthew case [2005] 1 AC 433, para 12. Section 4 OAPA is saved from constitutional challenge in so far as it is an existing law. The sentence for murder has not changed. But the operation of that existing law has been significantly modified by the enactment of section 4A to cater for those whose mental responsibility is substantially impaired. In order properly to give effect to the combination of this change in the substantive law and the imperative of section 5(2)(b) of the Constitution, it is necessary that the court should be in a position to moderate the mandatory effect of section 4 not only for those who advance diminished responsibility at trial but also for those whose condition meets that statutory concept but who did not, for sufficient reason, then advance the partial defence.*

[44] The same position was adopted by the Board in the case of ***Boyce and Josephs v The Queen*** [2004] UKPC 32. In that case the two appellants were convicted of murder in Barbados and sentenced to death under section 2 of the Offences against the Person Act 1994, which substantially re-enacted the provision in section 2 of the Barbados Offences against the Person Act. Their appeals against sentence were dismissed by the Court of Appeal of Barbados. They appealed to the Privy Council contending, inter alia, that the imposition of the mandatory death penalty under section 2 of the 1994 Act was incompatible with the right under section 15(1) of the Constitution not to be subjected to inhuman or degrading punishment, and that section 2 should be construed, using the power conferred by

article 4(1) of the Barbados Independence Order 1966, as imposing a discretionary rather than mandatory death penalty.

[45] The issue in that case was whether Section 15(1) which stated that no person shall be subject to "an inhuman or degrading punishment", was inconsistent with section 26 which stated that no existing law "shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23".

[46] In a majority decision Lord Hoffman stated at paragraphs 1 and 2 of the Judgement that

> 1. *The law decreeing the mandatory death penalty was an existing law at the time when the Constitution came into force and therefore, whether or not it is "an inhuman or degrading punishment", it cannot be held inconsistent with section 15(1). It follows that, despite section 1, it remains valid.*
>
> 2. *The language and purpose of section 26 are so clear that whatever may be their Lordships' views about the morality or efficacy of the death penalty, they are bound as a court of law to give effect to it. As Lord Bingham of Cornhill said in **Reyes v The Queen [2002] 2 AC 235, 246, para 26** "The court has no licence to read its own predilections and moral values into the Constitution." And their Lordships do not understand Mr Starmer, who ably represented the appellants, to dispute that if one simply reads the Constitution, there is no basis for holding the mandatory death penalty invalid for lack of consistency with section 15(1).*

[47] One if the issues to be decided in this case is whether the Section 76 of the OAPA had been modified and as such cannot be preserved under the savings law clause. The approach to be adopted in approaching savings law clauses can be found in ***Lambert Watson*** where Lord Hope of Craighead stated at paragraph 42 that :

> *The rights and freedoms which are declared in section 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to. Section 26(8) read with section 26(9) limits that protection. So it must be given a narrow rather than a broad construction.*

[48] This was also the position of the Privy Council in the case of ***Jay Chandler v The State (No. 2) (Trinidad and Tobago)*** [2022] UKPC 19 at paragraph 69 where Lord Carson stated that :

> *It is a tenet of the jurisprudence of both the Board and the CCJ that savings clauses are to be given a strict or narrow interpretation.*

[49] In **Chandler** the Court went on to state at paragraph 42 noted that:

> *It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in s 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to. Section 26(8) read with s 26(9) limits that protection. So it must be given a narrow rather than a broad construction. This means that careful attention must be paid to the precise meaning of the words used in s 26(9). If this amounts to what has been described as "tabulated legalism", it is perfectly in order in this context.*

[50] There have been a number of cases delivered by the Caribbean Court of Justice that has sought to strike down savings law clauses which included ***McEwan and another v The Attorney General of Jamaica*** **[2018] CCJ 30** where the issue in that case concerned human rights associated with a gay cross dresser, and ***Nervis v the Queen: Servin v The Queen*** **[2018] CCJ 19** (AJ) where the issue was mandatory death penalty. These decisions were considered by the Privy Council in the case of **Chandler** and at paragraph 73 Lord Hodge stated :-

> *In the Board's view there is force in the suggestion that savings clauses served a historical purpose in avoiding the legal uncertainty which the unqualified introduction of a written Constitution would have entailed. In Belize, the savings clause was only for a transitional period of five years; in other countries, including Trinidad and Tobago, no time limit was imposed on the savings clause, but the purpose of avoiding legal uncertainty was the same. The "modification first" approach is open to the criticism Page 29 that it ignores the historical context in which the savings clauses were*

enacted in the 1962 and 1976 Constitutions and in the Constitutions of other Caribbean nations. Further, there is surely force in the Board's observation, summarised in para 32(vi) above, that the meaning of the savings clause does not change over time, unlike the general statements of rights and freedoms in section 4 of the 1976 Constitution which, in accordance with the living instrument doctrine, can adapt to changes in a society's understanding of those rights and freedoms. In the Board's view, the problems caused by the preservation of laws that were enacted in a different time do not entitle the Board to overlook the historical purpose of the savings clause.

ISSUES

[51] There are two issues to be decided in this case, which are :-

a. Whether the reference to sexual offence at Section 13 (12) of the Charter includes offences under Sections 76, 77, and 79 of the OAPA?
b. Whether Section 76 of the OPA has been so modified that it cannot be deemed to be saved?

ANALYSIS

[52] In analysing as to whether the offences listed under Sections 76, 77 and 79 of the OAPA can be considered to be sexual offences I first looked at the offences that are created under these sections. Sections 76, 77 and 79 of the OPA state that :-

76 Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned kept to hard labour for a term not exceeding ten years.

77. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of my assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour. Proof of Carnal Knowledge

79. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding two years, with or without hard labour.

The answer to this is of importance as it would dictate whether the offences detailed in these sections are captured under the savings law clause as per Chapter 13 (12) of the Constitution?

[53] Section 76 of the OAPA speaks to the offences of buggery and bestiality which is defined in the side note of the Section as unnatural offences. As an aside, I note that the wording of Section 76 seemed have been derived from the Bible, more specifically Leviticus 20 verse 13.

[54] **The English And Empire Digest with Complete Annotations Vol 15 Criminal Law (pp 689 -1262) Butterworth & Co.** gives some guidance on this issue as it differentiates offences against decency and morality from sexual offences. Part XVI of the said Digest labelled offences deemed to be against The Government and the Public in Section 14 as offences against decency and morality. The offences included under this heading are:-

Sub-section. 1. In General

Sub-section. 2. Indecent Exposure

Sub-section. 3. Indecent Exhibitions

Sub-section 4. Indecent Publications

Sub-section 5. Indecent Language

Sub-section 5. Unnatural Offences

Sodomy and Bestially

Indecent Assault on Males Persons

Gross Indecency

Section 12 of the said Digest defined offences against women and girls as sexual offences. These offences included rape and carnal abuse and defilement of girls.

[55] A similar approach was adopted in **Russel and Crimes**, eight edition, Vol 1 Chapter X where the offences listed under Section 76, 77 and 79 of OAPA were listed as crimes against decency and morality whilst sexual offences were defined as offences against women and girls. Support can be garnered also from the common law that defined sexual intercourse as the insertion of the penis into the vagina, or otherwise associated with procreative activity. This definition of sexual intercourse is one element that must be proven in crimes against women such as rape and carnal abuse.

[56] Counsel for the claimant had argued in his submission that Section 76 offences are to be considered to be crimes against decency and morality. Counsel also raised the issue as to whether buggery can be considered to a sexual offence as there is no consideration as to the element of consent.

[57] I find that sexual offences extend beyond the mere definition of crimes that involves unlawful sexual intercourse or other sexual offences against women and young girls. Archbold has given some clarity to the issue when it categorised sexual offences to include offences against women, young girls, young boys as well as unnatural offences. Osborn's Concise Law Dictionary also seeks to define sexual offences to include buggery, although this is from the English perspective where there is no discrimination against homosexual acts. Sexual offences encompass a wide range of offences in relation to women, whether it is inappropriate sexual touching, grooming, indecent assault, rape, or sexual

intercourse with a person under sixteen years. Some of these offences include the element of consent, whilst some, for instance sexual intercourse with a person under sixteen where consent is not an element that is required to be proven by the prosecution. Counsel for the claimant was stringent in his submissions concerning whether sexual contact between consenting adult males ought to be considered a sexual offence, however the law is quite clear on this issue. Buggery cannot be defined as sexual intercourse based on the common law definition of it, however, it does involve sexual interactions between two males. Parliament has criminalised this conduct and this Section has not been repealed.

[58] Although the wording for Section 76 may have originated from the Bible and was first viewed as a crime against decency and morality, I find that buggery and bestiality are sexual offences. These offences involve sexual activities with two men as well as sexual activities between men and animals. I find that offences under this section can be defined as sexual offences and as such will be covered under the savings laws clause.

[59] Section 77 of the OAPA speaks to not only attempts in relation to buggery and bestiality ie abominable crime, but also includes offences of assault with intent to commit the same crime, as well as indecent assault against a male person. The same reasoning that applies to the substantive offence would also apply to attempts to commit those offences. Section 77 includes the offence of indecent assault which is an offence that involves sexual touching without consent. The fact that this offence is included in Section 77 would defeat the submission made by Counsel for the claimant that these offences do not speak to the issue of lack of consent. I find that offences listed under Section 77 of the OAPA can be defined as sexual offences.

[60] The final section to be considered is Section 79 of the OAPA which refers to gross indecency, attempts to commit gross indecency as well as procurement to commit the said offence. These are offences that had been originally listed as offences against morality and decency. It can be argued that proof with regards to these

offences fall into the category of strict liability where a Court need not take into consideration whether the parties are consenting. Once the act takes place between two men then the offence would have been committed. I find that the offences in Section 79, just as with Sections 76 and 77 are sexual offences and as such the savings law clauses apply.

[61] Mr Wilkinson had argued that the offences detailed under Sections 76,77 and 79 are not sexual offences and if Parliament had wanted that to be saved under Section 13(12) of the Charter, they should have specifically done so. I am aware saving laws clause are to be narrowly interpreted, and there may have been an argument to be made that if Parliament wanted to include these offences under the savings law clause, then they should have specifically listed them. I am also aware of the dicta in the case of **R v Secretary of State for the Home Department, ex p Simms** [2000] 2 AC 115 at 130 which states that :-

> *Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."*

[62] I find however, that Sections 76, 77 and 79 can be defined on a strict construction of the objective linguistic meaning this was the intent of Parliament in the words used in Section 13 (12) of the Charter.

[63] I have read the section of the judgment of Pettigrew-Collins J on the issue of whether Sections 76, 77 and 79 has been modified and I have nothing more to add.

BATTS J.

> "*What our deliberative, pluralistic democracy does demand is that the religiously motivated translate their concerns into universal, rather than religion-specific, values. It requires that their proposals must be subject to argument and amenable to reason".*
>
> Barack Obama, "The Audacity of Hope", page 219.

[64] It may be thought that, in the 21st century, the state and its agents ought not to involve itself with sexual activities behind closed doors between consenting adults. This is because it is not easy to discern any public interest served, by involvement of the state, in matters of so personal a nature. That interest was easier to contemplate at a time when the church and state were virtually indistinguishable which is, of course, no longer the case. By opposing this claim the state, and all interested parties to this litigation, seek to enable that sort of intervention. However, the questions whether such intervention is right or wrong or, whether sexual acts between consenting adults of the same sex is good or bad, are not before us today.

[65] This court is called upon to interpret a certain provision of the Constitution of Jamaica, called a savings law clause, and to say whether that clause bars judicial enquiry into the constitutionality of certain provisions of the **Offences Against the**

Person Act. The limited scope of this enquiry is in consequence of an order of the Court of Appeal made on the 31st day of March 2023. That order provides:

> *"A separate trial is to be held to determine the preliminary issue of whether the constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act can be enquired into in the light of the savings law clause in section 13(12) of the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica."*

[66] Notwithstanding, the narrow confines of our remit, it is useful to place the enquiry in context. The Claimant is a homosexual, nowadays popularly referred to as "gay", man. He is married to another man. Their marriage took place in Canada. He is Jamaican and visits Jamaica frequently with his spouse. The Claimant is concerned that sections 76, 77 and 79 of the **Offences Against the Person Act**, if applicable to sexual activity between consenting adults, will have the effect of criminalising love making between himself and his spouse. He brought this claim on the basis that those sections offend his rights to liberty, freedom of the person, security of the person, freedom of expression, equality before the law, freedom from discrimination on the ground of being male or female, to respect for and protection of private and family life and privacy of the home and, the right to protection from inhuman or degrading punishment or other treatment. These rights are all guaranteed by the Constitution of Jamaica. The Defendant, and the interested parties, contend otherwise. They argue that this court has no jurisdiction to embark on that enquiry because of a "*savings law clause*".

[67] Litigation of and concerning the effect of the provision in a constitution, referred to as a savings law clause, is not new. Indeed, since our island gained independence from colonial rule, the clause has featured prominently in several cases at the highest level of our judicial system. Counsel for the respective parties made extensive written and oral submissions which relied on these and other decisions. However, for reasons which will become apparent, save for a few observations I do not find it necessary to venture into too deep an analysis of those authorities. This is so because, I agree with Mr Ransford Braham KC that, we must focus on

the words of the saving law clause under consideration. Furthermore, a constitution cannot be divorced from its time and context; see ***Minister of Home Affairs v Fisher [1980] AC 319**, **Attorney General of Guyana v Cedric Richardson [2018] CCJ 17*** *and* ***DPP v Mollison [2003] UKPC 6*** **(decided 22nd January 2003)** per Lord Bingham of Cornhill at paragraph 16. The authorities cited to us mostly relate to savings law provisions similarly worded to the one enacted in the Jamaican Constitution of 1962. That clause was designed to protect all pre-independence laws from review by the courts. This, "*general*" savings law clause, moved one court to suggest that there was therefore a presumption that the fundamental rights had already been secured to Jamaicans by the law in existence prior to 1962; see **DPP v Nasralla [1967] 2 AC 238.** That, and I say so respectfully, rather unfortunate perspective was ameliorated somewhat in **Lambert Watson v R [2004] UKPC 34 (delivered 7th July 2004)** per Lord Hope of Craighead at paragraph 42.

[68] In the year 2011 the general savings law clause was, mercifully, repealed. Parliament at that time enacted for the people of Jamaica a new Bill of Rights, the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act,** 2011 and entrenched it in the Constitution. In doing so, Parliament, 50 years after independence, also enacted a new and more restricted version of the savings clause. It is a "*limited*" not a "*general*" savings clause and purports to protect only specific laws from the court's enquiry into constitutionality. This new saving provision, on which those who oppose this claim rely, is found in section 13(12) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act**. It provides:

> *"(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to-*
>
> *(a) sexual offences;*
>
> *(b) obscene publications; or*

> *(c) offences regarding the life of the unborn,*
>
> *shall be held to be inconsistent with or in contravention of the provisions of this Chapter."*

The Chapter referred to is Chapter III and is entitled *"Charter of Fundamental Rights and Freedoms".*

[69] The provisions of the **Offences Against the Person Act** which the Claimant impugns, and which the Defendant contends are protected from review, are as follows:

> *"76. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned & kept to hard labour for a term not exceeding ten years."*
>
> *"77. Whosoever shall attempt to commit the said abominable crime or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour."*
>
> *…*
>
> *"79. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding two years, with or without hard labour."*

[70] The Constitution is our highest law and is the law against which all other law is judged. It must be accorded the greatest respect. As judges, it is our sworn duty to uphold the Constitution. This means that we are to give full effect to its provisions. It is manifest that section 13(12) immunises from constitutional challenge, on the ground that it offends any human right, any law "*relating to sexual offences"*. The first question therefore is whether sections 76, 77 and 79 relate to sexual offences. That question was not addressed in any submission by any party before us. The submissions filed all appear to assume that the sections did so

relate. This court asked the parties to provide written submissions on that issue and they did so.

[71] The first question essentially is whether that which the statue describes as *"buggery*" and "*gross indecency*" are sexual offences within the meaning of section 13(12) of the Constitution. If they are, then one must go on to consider whether the limited savings law clause is to be given effect. I have reviewed all the submissions, whether filed before, during or, after the hearing of this matter, as well as the authorities cited. The fact that, in this judgment, I do not restate their entire content reflects only my desire to be concise and nothing else.

[72] The Defendant, in written submissions filed on the 19th September 2023, urged upon us that the Claimant is bound by his pleadings and ought not to be allowed to resile from his statements of case, the "pith and substance" of which indicated that the offences under consideration were sexual offences. I do not agree. In the first place, this court identified that question as an issue and requested submissions. Secondly, and more to the point, in this arena of constitutional redress, the court must always have regard to the public interest. Judicial interpretation of the Constitution does not concern only the parties before the court. It concerns all Jamaicans both living and yet unborn. This is why the issues, in claims for constitutional relief, are not always narrowly confined by pleadings as it would be in ordinary civil litigation. This court is therefore not compelled to accept the parties' erroneous interpretation of the Constitution. In the case at bar, for example, is this court expected to pronounce on the meaning of "*sexual offences*" in accordance only with what the parties say it means even if the court's view is otherwise? Similarly, when granting declaratory relief or interpreting statutory provisions, a court ought not to enter a judgment by consent unless it has satisfied itself that there is a legal basis. Furthermore, just as in the case where an illegality comes to its attention, a court cannot turn a blind eye to constitutional infringement. I stand by the majority position, taken in the matter of **Julian J Robinson v The Attorney General of Jamaica [2019] JMFC FULL 04**, per Batts J at paragraph 371:

> *"….. It is, and has always been, my view that where a constitutional breach is brought to the attention of the court it ought not to be ignored. The Defendant if caught by surprise, may request time to respond. However, the door to constitutional relief is not to be shut on technical rules of procedure or pleading or because of the absence of rules, see* ***Jaundoo v Attorney General of Guyana (1971) 16 WIR 141****."*

[73] In 2009, Parliament enacted the **Sexual Offences Act**. It was not brought into force until the year 2011 the same year as the new **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act,** 2011. The purpose of the **Sexual Offences Act** is stated therein as:

> *"An Act to Repeal the Incest (Punishment) Act and certain provisions of the Offences Against the Person Act; to make new provision for the prosecution of rape and other sexual offences; to provide for the establishment of a Sex Offender Registry; and for connected matters".*

[74] Sexual offence is not defined either in the statute or in the Constitution. However, "*sexual intercourse*" is defined, in the **Sexual Offences Act**, as "*the penetration of the vagina of one person by the penis of another person".* On the other hand, in section 4, it is stated that a person commits the offence of "*grievous sexual assault*" where among other things the offender *"penetrates the vagina or anus*" of a victim; see section 4(1)(a), (b) and (e) of the **Sexual Offences Act**. Section 24 of that statute provides:

> *"24. It is hereby declared that subject to section 63 of the Child Care and Protection Act, the common law presumption that a boy under the age of fourteen years is incapable of committing rape or any other offence involving vaginal or anal intercourse is abolished."*

[75] Section 39 of the Act establishes a "*Sex Offender Register and a Sex Offender Registry"*. The Commissioner of Corrections is required to keep a register of every conviction for specified offences. A specified offence is one specified in the First

Schedule to the Act to which reporting obligations apply; see section 2 of the **Sexual Offences Act**. The First Schedule lists among the Specified Offences "*sections 76, 77 and 79 of the Offences Against the Person Act*". Persons convicted of such offences are referenced as *"sexual offenders*"; see sections 29 to 35 of the **Sexual Offences Act** (which deal with the Sex Offenders Register and Registry).

[76] Parliament also deleted certain provisions of the **Offences Against the Person Act** and re-enacted them in the **Sexual Offences Act**. In this way, Parliament signalled an intent to have sexual offences dealt with in one comprehensive way, so that rape, for example, was deleted from the **Offences Against the Person Act** and placed in the **Sexual Offences Act**. It is interesting that buggery, bestiality, and gross indecency by any male, were not dealt with under the **Sexual Offences Act** but were instead allowed to remain in the **Offences Against the Person Act** alongside assault, wounding and other non-sexual offences.

[77] Although Parliament chose not to install the offences mentioned in sections 76, 77 and 79 in the **Sexual Offences Act**, as was done with rape and other sexual offences, it seems clear that "*sexual offence*" is treated as having a wider meaning than intercourse between male and female and/or penetration of the vagina by the penis. This is so, although "*sexual intercourse*" is defined strictly as penetration of the vagina by a penis. The reason for that, it seems to me, is that "*intercourse"* is regarded by Parliament as occurring only between a male and female. However, offences of a sexual nature are not intended to be so limited. These distinctions are interestingly supported by the **Oxford English Dictionary**, 3rd edition, revised (2008):

> *"sexual" adjective – (1) Relating to sex or to physical attraction or intimate contact between people or animals (2) Relating to the two sexes or to gender (3) (of reproduction) involving the fusion of male and female cells"; "sexual intercourse" noun - sexual contact in which a man puts his*

erect penis into a woman's vagina"; "sexual orientation" noun- a person's sexual identity in terms of the gender to which they are attracted; the fact of being heterosexual, homosexual, or bisexual".

[78] The suggestion may be made that, in culling certain offences from the **Offences Against the Person Act** and placing them in the **Sexual Offences Act**, Parliament indicated that the offences which remained in the former statue were not sexual offences. This is however outweighed by the treatment by Parliament, in the **Sexual Offences Act**, of certain offences which were allowed to remain in the **Offences Against the Person Act**. It also runs counter to the use by Parliament of the words "*sexual offence*" to include conduct extending beyond penetration of the vagina by the penis.

[79] I am therefore driven to conclude that in the year 2011, when both the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act** and the **Sexual Offences Act** came into effect, the words *"sexual offences*" had a meaning which was broader in scope than penetration of the vagina by the penis and/or of sexual activity between male and female. It follows that the use of that phrase in the limited savings law clause contained in section 13(12) was intended to reference a wide cross-section of conduct deemed to be of a sexual nature.

[80] I am well aware that in our duty to judicially protect all rights guaranteed by the Constitution, a broad and purposive approach to its interpretation is required. In that regard any effort to limit constitutional rights is to be resisted and an approach to construction adopted which protects as far as possible those rights. However, judges do not make policy. We should not, by ignoring the clear words used by the people's elected representatives, seek to rewrite, remake or, refashion the Constitution or legislation. The policy of the executive arm is given effect to by the legislature. It is the duty of this court to give effect to the law so passed once its meaning has been ascertained. We must do so no matter how distasteful we may find such a law. This applies even more so to the interpretation and application of

the highest law being of course the Constitution of Jamaica. It is not for this Court to give a strained or unusual interpretation to achieve an end desired by us. The principle of separation of powers applies both ways. The court must be restrained insofar as issues of policy are concerned. Where the intent of Parliament is clear from the words used the court has a duty to give effect to that intent; see generally **Julian J. Robinson v The Attorney General of Jamaica** (supra) at paragraphs 203 and 374.

[81] The Claimant's counsel urged us to treat with the savings clause of 2011 in the same way our highest court treated with the savings clause of 1962. That is, in a very restrictive way. In particular, by holding that any amendment to an existing law automatically removes protections afforded by the savings law clause from review; see generally **Matthew v State of Trinidad and Tobago [2004] UKPC 33** and **Lambert Watson v R** (supra). Those cases, as we have seen, considered a general, not a specific savings law clause. Furthermore, in the context of a newly independent state, the approach was understandable. That is apparent from the rationale gleaned from the judgment of Lord Hope of Craighead in **Lambert Watson v R** (supra):

> *"42. …Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognized and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in s 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to. Section 26(8) read with s 26(9) limits that protection. So it must be given a narrow rather than a broad construction. This means that careful attention must be paid to the precise meaning of the words used in s 26(9). If this amounts to what has been described as 'tabulated legalism', it is perfectly in order in this context."*

And,

> *"[46] The narrowness of the wording of s 26(9) is no accident. It is entirely in keeping with the philosophy which requires a generous interpretation to be given to the principles which are enshrined in Chapter III of the Constitution. True it is that the laws which were in force immediately before the appointed day are to be taken to have given full effect to the fundamental rights and freedoms that are set out in s 13. This is what s 26(8) provides. It was a reasonable working assumption, in the interests of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy. So long as these laws remained untouched, they did not have to be scrutinised. But as soon as they were changed, adapted or modified in any respect, except in the circumstances referred to in paras (a) and (b) of s 26(9), they had to comply with the requirements of Chapter III. This was because there was no longer any need to apply the presumption on which s 26(8) proceeds. The opportunity to ensure that the law as changed, adapted or modified gave effect to all the fundamental rights and freedoms of the individual was now available, and it was up to Parliament to grasp that opportunity. Its power to make laws for the peace, order and good government of Jamaica is expressly made subject to the provisions of the Constitution by s 48(1)."*

[82] That rationale, as articulated by Lord Hope of Craighead, is not easily applied in the context of an amendment made fifty years after independence to the human rights provisions of the Constitution. The Parliament of independent Jamaica repealed the old savings clause. It has re-enacted and expanded the Bill of Rights. It also, at the same time, inserted a limited savings clause. That clause specifically exempts from review by the courts, among other things, anything done under the authority of any law in force immediately before the commencement of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** relating to sexual offences. The **Offences Against the Person Act** is a law that was in force before 2011. It would be odd indeed if an amendment to the statute, a few months later in 2011, had the effect of removing the impact of the specific savings clause. The presumptions of Lord Hope, if applicable at all, are to the opposite effect in this case. Therefore, as sexual offences are treated with in sections 76, 77 and 79, as I have said above, it means that review for unconstitutionally is barred by section 13(12) of the Constitution.

[83] This conclusion makes it unnecessary to consider the several other arguments advanced. However, in the event another court takes a different view of the meaning of the word "*sexual offences*" or, that the meaning is dispositive of this case, I will briefly address them. I am satisfied that the obligations imposed by the **Sexual Offences Act**, mandating registration by a sex offender, constitute punishment. It therefore has increased the penalty for persons convicted under the **Offences Against the Person Act**. The authority from the United States of America, **Brian Hope et al v Commissioner of Indiana No**. **19-2523 U**.**S Court of Appeal of the South Circuit**, **16th August 2021,** is not particularly helpful. The registry there established was expressly described by the statue as a civil registry. The "*clearest"* proof was required that the statutory scheme was punitive in purpose or effect; see page 24 of that judgment. The court understandably decided that the regulatory scheme was not so punitive in effect as to override its non-punitive intent. In the case at bar, on the other hand, the requirement for registration is contained in a criminal statute. Therefore, had it been necessary for my decision, I would have found the effect punitive.

[84] The Claimant's counsel relied on **Ramirez et al v Attorney General of Barbados [2023] No**. **CV 0044 of 2020**, a very recent decision of the Honourable Justice Michele I. L. Weekes, a judge of the High Court of Barbados. In that case, constitutional relief was sought which alleged that sections 9 and 12 of the Sexual Offences Act, which criminalise certain sexual acts between consenting adults, contravene the human rights provisions of the Constitution. The learned judge applied **McEwan and others v The Attorney General of Guyana** [**2018] CCJ 30,** a decision of the Caribbean Court of Justice, and stated,

> *"64. An analysis of the CCJ's advice from McEwan reveals that savings law clauses are to be interpreted narrowly, especially regarding Pre-Independence statutes which are amended post-Independence. Or to be more specific, savings law clauses are to be interpreted with such narrowness as to pave the way for an existing law to be stripped of its status as such whenever it is challenged on a constitutional basis.*

> *65. This Island became independent on 30 November 1966. Since then, much like Guyana's cross dressing law Barbados' buggery law has not remained in its pristine form from colonial times."*

The learned judge concluded that the sections were not precluded from review:

> *"68. A side-by-side comparison of **Section 62** of **the Offences Against the Person Act 1868** and **Section 9** of the **SOA** reveals that the latter no longer resembles the former. I therefore find that **Section 9** of the **SOA** is not an existing law given its post-Independence amendments, including the abrogation of a minimum term of imprisonment on the ground of unconstitutionality, and the widening of judicial discretion vis-á-vis sentencing for buggery."*

[85] The same analysis is not applicable here. Certainly, the **Offences Against the Person Act,** as it existed in 2011, remained the same thereafter. The removal of certain offences has not made it different, nor indeed has the addition of a requirement to register. This requirement is found in the **Sexual Offences Act** and does not change the offence created. I do not think it makes for a reasonable construction to say that a Parliament, which brought into effect the **Sexual Offences Act** in the same year it enacted the new and limited savings law clause, thereby removed protection from the challenge.

[86] The "intellectual rigour" (paragraph 118 of the Claimant's submissions) of the Caribbean Court of Justice was commended for our emulation. This was displayed in **Nervais v The Queen and Severin v The Queen [2018] CCJ 19**. In that case the court, on an appeal from Barbados, decided that the savings law clause did not protect a pre-existing law from review and, in any event, that the pre-existing law ought to be construed to make it conform to the rights granted. Sir Dennis Byron at paragraph 59 stated:

> *"59. It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the*

> *Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent."*

[87] The reasoning by the Lord President of the Caribbean Court of Justice is not applicable to a limited savings clause enacted 50 years after Jamaica has had independent status. There is nothing incongruous about what they have attempted to do even if it does offend one's sense of justice. The reality is that in seeking to immunise sexual offences from constitutional challenge, the Jamaican Parliament is having regard to a sentiment which is popular in Jamaica. This is largely reflected in religious circles as is evident by the organisations which appeared as interested parties in this matter. The correctness, morally or normatively, is not for this court to determine. The question, and the only question, is whether in legislating the specific savings law clause, Parliament has been successful in its endeavour.

[88] It is appropriate to note that a nine-member panel of the Judicial Committee of the Privy Council, on an appeal from Trinidad, disagreed with the Caribbean Court of Justice's approach; see **Chandler v State of Trinidad and Tobago [2022] UKPC 19**. In that case, the Judicial Committee emphasised the importance of stare decisis and the respect which must be paid to binding precedent for otherwise certainty in the law may be undermined. The court therefore declined to overrule its own earlier decision in **Matthew v The State of Trinidad and Tobago** (supra). In the latter case five judges of a nine-man panel voted to give effect to a general savings law clause. Importantly, the court in **Chandler v State of Trinidad and Tobago** (supra) had regard to the fact that the independent Parliament of Trinidad and Tobago had in 1976 re-enacted the savings clause in the new Constitution of that year, per Lord Hodge at paragraph 69 (f):

> *"As the Board has mentioned, Parliament had the option of dispensing with a savings clause at that time and deliberately chose not to do so. By making that choice the legislature*

> *reserved to itself the responsibility for updating the laws of Trinidad and Tobago to reflect developing appreciation of fundamental rights and freedoms and changes in social values."*

[89] The decision of the Judicial Committee in **Chandler v State of Trinidad and Tobago** (supra) binds this court. It is also applicable to the facts of this case insofar as we are also considering a savings law passed many years after independence by the independent Parliament. I also make bold to say that their lordships' explanation of the separation of powers, the role of the judiciary vis a vis that of Parliament, and the prohibition against elevating desirable principles of law above the clear words of the Constitution, are all well made.

[90] I will now briefly reference the submissions and authorities brought to my attention since the close of oral arguments on the 27th June 2023. Having perused them all I am satisfied that they do not directly impact the issues for determination by this court. In particular the authority of **Navtej Singh Johar & Ors v The Secretary, Ministry of Law and Justice, Petition Criminal No.76 of 2016 which,** concerned a very differently worded savings law clause and, did not consider the meaning of "*sexual offence*". I have read in draft the judgment of my sister Justice Pettigrew-Collins and adopt entirely her detailed analysis and conclusions with respect to these several authorities.

[91] In the final analysis, the words enacted in section 13(12) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act,** 2011 are clear. Parliament intended to protect laws related to sexual offences from review for unconstitutionality. This was done in the same year changes were made to the pre-existing **Offences Against the Person Act**. There is consequently no warrant for a suggestion that the amendments either, change the nature of the law or, prevent the savings law clause having effect. I would, for all the reasons stated, uphold the preliminary point in favour of the Defendants and dismiss the claim. I am prepared to hear submissions on costs.

PETTIGREW COLLINS J

INTRODUCTION

[92] This claimant brought a claim by way of Fixed Date Claim Form filed on November 27, 2015, seeking redress under section 19(1) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act,** 2011. The claimant seeks to have the Court declare that sections 76, 77, and 79 of the **Offences Against the Person Act** contravene one or more of several provisions under the Charter, to the extent that consensual sexual activities between persons aged 16 or older, including persons of the same sex, are prohibited, and penalized under the sections.

[93] The claimant asserts that one or more of the following provisions of the Charter has been contravened by sections 76, 77, and 79 of the **Offences Against the Person Act**:

> *"(a) The rights to liberty and to freedom of the person, guaranteed by sections 13(3)(a), (13(3)(p) and 14;*
>
> *(b) The right to security of the person, guaranteed by section 13(3)(a);*
>
> *(c) The right to freedom of expression, guaranteed by section 13(3)(c);*
>
> *(d) The right to equality before the law, guaranteed by section 13(3)(g);*
>
> *(e) In the case of OAPA section 79, the right to freedom from discrimination on the ground of being male or female, guaranteed by section 13(3)(i)(i);*
>
> *(f) The right to respect for and protection of private and family life, and of privacy of the home, guaranteed by section 13(3)(j)(ii); and*
>
> *(g) The right to protection from inhuman or degrading punishment or other treatment, guaranteed by sections 13(3)(o) and 13(6);"*

[94] The claimant invokes section 19(1) of the Constitution on the basis that he is a homosexual male who is married and is concerned that sexual relations between himself and his husband are criminalized in Jamaica. He alleges that the passing of the **Sexual Offences Act**, 2009 and the **Sexual Offences (Registration of Sex Offenders) Regulations**, 2012 have the effect of *changing, adapting or modifying* sections 76,77 and 79 of the **Offences Against the Person Act,** 1864 **(OAPA),** thus making these sections not protected by the savings law clause.

[95] The matter presently before the court is not concerned with whether any of those rights have been contravened by the impugned provisions of the **Offences Against the Person Act**. Based on case law decided under the Strasbourg jurisprudence as well as cases from various jurisdictions in the common law world, such provisions would offend at least some of the rights allegedly breached. This court is tasked only to decide a single question.

[96] The question arose because the defendant had sought an order for a separate trial of the issue of whether the constitutionality of the impugned provisions of the **Offences Against the Person Act** could be enquired into based on the savings law clause found in section 13(12) of the **Charter of Fundamental Rights and Freedoms.** The judge of the Supreme Court declined to grant that order and the defendant appealed. The Court of Appeal on March 31, 2023, determined that the preliminary issue should be separately tried.

SAVINGS LAW CLAUSE

[97] It is useful at this juncture to understand what the savings law clause is. This clause must be understood against the background of section 2 of the Constitution of Jamaica which provides that:

> *2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.*

[98] A savings law clause is a provision present in many Commonwealth Caribbean Constitutions, which have the effect of preserving and/or protecting laws in existence before the adoption of the constitution. These clauses were embedded in the Constitutions of Commonwealth Caribbean countries, for example, in Jamaica's immediate post-independence Constitution, with a view to protecting colonial laws that existed before independence, hence before the Constitution existed. Such clauses are also found in more recent constitutional provisions, for example in the Constitution of the Republic of Trinidad and Tobago, and in the more recent **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act,** 2011, Jamaica**.** In this instance, we are not concerned with a savings law clause designed to protect pre-independence laws generally, (although the laws in question are in fact colonial laws some applicable in Jamaica by the process of reception of law) but with a savings law clause of very limited application. This savings law clause was intended to protect a very restricted set of laws which existed prior to the promulgation of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act,** 2011.

[99] The savings law clause, found in the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act,** 2011, section 13(12) states that:

> *"(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to –*
>
> *(a) sexual offences;*
>
> *(b) obscene publications; or*
>
> *(c) offences regarding the life of the unborn,*
>
> *shall be held to be inconsistent with or in contravention of the provisions of this Chapter."*

[100] Unfortunately, savings law clauses can operate to protect laws that might otherwise be determined to be unconstitutional because of human rights violations. The effect and operation of savings law clauses have been considered in a number of cases emanating from the Judicial Committee of the Privy Council, such as **Director of Public Prosecutions v Patrick Nasralla [1967] 2 AC 238**, **Watson (Lambert) v The Queen (Attorney General for Jamaica intervening) [2004] 3 WLR 841**, **Boyce and Another v The Queen [2005] 1 AC 400**, **Chandler v The State of Trinidad and Tobago [2022] UKPC 19** and **Lester Pitman v State of Trinidad and Tobago [2017] UKPC 6**.

[101] In **Lambert Watson v The Queen** (supra), at paragraph 46, the Board stated that as long as the laws remained untouched, they did not have to be scrutinised. *"But as soon as the laws were* ***changed, adopted or modified in any respect****…they had to comply with the requirements of Chapter III.*" Lord Hope of Craighead also explained the rationale behind a savings law clause at paragraph 46 of **Lambert Watson v The Queen** (supra). He proffered that that it operates as:

> *"a reasonable working assumption, in the interests of legal certainty and* [was designed] *to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy".*

I will discuss this case at length at a more convenient juncture.

[102] In **DPP v Nasralla** (supra), at page 247, the Board stated in relation to the savings law clause which was then to be found in the immediate post-independence Constitution of Jamaica that:

> *"Whereas the general rule, as is to be expected in a Constitution and as is here embodied in section 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Chapter III. This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which*

it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.

[103] In **Boyce** (supra), at paragraph 31, the majority held with reference to the Constitution of Barbados that by virtue of the savings law clause declaring an exception to the general proposition that the Constitution is the supreme law and that any law inconsistent with its provisions is to that extent void, existing laws are immunised from constitutional challenge on that ground. *"If they cannot be held void, it follows that they must be accepted as valid*." The Board further went on to state at paragraph 33 that:

> *"It is however unnecessary to devote too much time to speculating about the thought-processes of the framers of the Constitution because, whatever may have been their reasons, they made themselves perfectly clear. Existing laws were not to be held inconsistent with sections 12 to 23 and therefore could not be void for inconsistency with the Constitution…"*

INTERPRETING CONSTITUTIONAL PROVISIONS

[104] It is important to recognise that even though we are not here concerned with the question of whether the impugned provisions breach the claimant's rights, we are concerned with the interpretation of provisions which exist in the Constitution which have direct implications for whether the court can embark upon that examination, thus the principle that a generous interpretation is to be accorded to Constitutional provisions is still applicable.

[105] In **Matthew (Charles) v The State of Trinidad and Tobago [2004] UKPC 33**, the following was said in relation to how constitutional provisions should be interpreted:

> *"42. The correct approach to interpretation of a Constitution such as that of Trinidad and Tobago is well established by authority of high standing. In Edwards v Attorney-General of Canada* [1930] AC 124*, Lord Sankey LC, giving the opinion of the Board, classically described the Constitution established by the British North America Act 1867 as a 'living tree capable of growth and expansion within its natural limits'. The provisions of the Act were not to be cut down 'by a narrow and technical construction', but called for 'a large and liberal interpretation'. Lord Wilberforce spoke in similar vein in Minister of Home Affairs v Fisher* (1979) 44 WIR and 113*, when he pointed to the need for a 'generous interpretation', 'suitable to give to individuals the full measure of the fundamental rights and freedoms referred to' in the Constitution and 'guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences'. The same approach was commended by Dickson J, giving the judgment of the Supreme Court of Canada in Hunter v Southam Ince* [1984] 2 SCR 145 at 155*:*
>
> > *'The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of*

> *growth and* ***development over time to meet new social, political, and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Prof Paul Freund expressed this aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".***

THE ARGUMENTS

[106] I do not intend to set out all the arguments made by the parties in relation to the question to be determined. I shall only set out the portions I find to be necessary in explaining my decision.

[107] Ms White for the defendant has argued that the last amendment to the relevant portions of the **Offences Against the Person Act** (sections 76, 77 and 79) was made in 1969 and thus those provisions are preserved by the savings law clause in the 2011 **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act.** Therefore, it was argued**,** the passing of the **Sexual Offences Act**, did not in any way affect sections 76, 77, and 79.

[108] Miss White has also argued that in Jamaica, there is a specific formulation right across the board in all legislation where a penalty is prescribed in an act. She cited for example section 10 of the **Child Care and Protection Act**, and section 4 of the **Trafficking in Persons Act**. That formulation is to the effect that "any person who commits an offence is liable upon conviction…." She referenced the **Dangerous Drugs Act** in an effort to demonstrate that there are statutes which provide for a distinct and separate regime in relation to post conviction activities (in that instance for forfeiture of a vessel used as a conveyance), which may be penal in nature, but cannot be said to amend the statute creating the offence, and proffered that the regime making provision for the forfeiture is not part of the punishment.

[109] The defendant as well as the second and third interested parties have argued that the **Sexual Offences (Registration of Sex Offenders) Regulations**, 2012 constitute a separate and discrete regime and therefore, any added obligations and requirements to be fulfilled by a sex offender do not constitute additional penalty.

[110] Although Miss White accepted that there has been amendment by deletion to the **Offences Against the Persons Act,** she also argued that an amendment to legislation necessarily means a change in the legal meaning of the provision. She maintained that the legal meaning of the relevant provisions of the **Offences Against the Person Act** has not been changed. She cited the rule in **Attorney General v Lamplough (1878) 3 Ex D 214**. That rule is that where an Act is amended (whether by repeal of part of its provision or otherwise), unless the contrary intention appears from the amending Act, the repeal or other amendment of part of an Act does not affect the construction of the remainder. The question in relation to any amended Act, is whether the amending enactment intended to alter the legal meaning of the remainder of the Act.

[111] Mr. Wilkinson K.C. for the claimant placed heavy reliance on the use of the words "changed, adapted or modified in any respect" as was expressed in paragraph 46 of **Lambert Watson v The Queen** (supra). He argued that the **Offences Against the Person Act,** to include sections 76, 77 and 79, has been modified, adapted or changed by the provisions of the **Sexual Offences Act** and the **Sexual Offences (Registration of Sex Offenders) Regulations**.

[112] He argued that **Lambert Watson v The Queen** makes it clear that a statute can be changed without amendment to the text of the relevant legislation. He urged that as a result of the changes by addition introduced by the **Sexual Offences Act and Regulations**, in addition to the penalty stipulated in the **Offences Against the Person Act** for each of the three offences, there is now the requirement to register as a sex offender, report, and carry a sex offender registration card. Further, the sex offender now has to report change of residence, he has to notify

the authorities of his absence from his main residence, he has to carry on his person the certificate of registration of sex offender and there is the added penalty if he is found to be in breach of the Regulations of a fine of up to $1,000,000.00 and imprisonment for 12 months.

[113] Mr Wilkinson submitted that the defendant's argument that because there is no direct change to the wording of the impugned provisions the provisions were not amended, is a misunderstanding of how legislative change can be effected. Further, that a "change" to legislation can come about by deletion, by addition, or by replacement. In the instant matter, the claimant acknowledges that the language of the impugned provisions has not been deleted or replaced but argues that the language of the said impugned sections has definitely been changed by addition.

[114] He also submitted that the **Sexual Offences Act** and **Sexual Offences (Registration of Sex Offenders) Regulations** jointly and individually, explicitly single out the offences of buggery and gross indecency for a significant enhancement of legal consequences. This manifests by increasing the possible penalties upon conviction and creating the potential for additional penalties under the Regulations due to the wide powers of the relevant Minister under section 38 of the **Sexual Offences Act**.

[115] The claimant relied on sections 32, 56(2) and 58 of the **Interpretation Act** to say that the **Regulations** have the force of law and that where one Act amends another, the amending Act and the amended Act are to be construed as one.

[116] Section 32 of the **Interpretation Act** provides that:

> *"An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of, or under the authority of, an Act if it is done under or by virtue of or in pursuance of any regulation made or issued under any power contained in such Act."*

[117] Section 56(2) of the **Interpretation Act** provides that:

> *"Every Schedule or Table to any Act, or part of any Act, shall, together with any notes thereto, be construed and have effect as part of the Act."*

[118] Section 58 of the **Interpretation Act** provides in effect that where one Act amends another, as long as there is no inconsistency, and there is no contrary intention, both are to be read as one Act.

[119] It was also Mr Wilkinson's submission that this court ought to bring to its determination of the pertinent issues in this application, the learning from the Caribbean Court of Justice in the cases of **Nervais v The Queen and Severin v The Queen [2018] CCJ 19**.

[120] The further argument of the defendant is that the Regulations are neither part of the prosecutorial process nor the sentencing process of a properly constituted court. Neither is the regime under the Regulations part of the court proceedings where there is a trial of any offence. Therefore, the administration of the Registry and Register must be seen as separate from dealing with the substantive offences prescribed under the **Offences Against the Person Act** or any other offence enumerated in Schedule 1 of the **Sexual Offences Act**.

[121] Mr Braham K.C. on behalf of the second interested party argued that Parliament, in its wisdom, has chosen to expressly retain as protected by the new savings law clause, the impugned provisions of the **Offences Against the Person Act**. He proffers therefore, that the present savings law clause does not have the same import as the immediate post-independence savings law clause.

[122] The core of the third interested party's argument is that delegated legislation made under the power granted in an Act cannot amend another Act unless the Act under which the delegated legislation is made gives such power. Since, there is no power granted by the **Sexual Offences Act** for amendments to be made by the **Sexual Offences (Registration of Sex Offenders) Regulations, 2012** to sections 76, 77, 79, or any part of the **Offences Against the Person Act**, it cannot be said that the **Offences Against the Person Act** and in particular, sections, 76, 77, or 79 has

been amended by any provisions of the **Sexual Offences Regulations** and thus the relevant sections of the **Offences Against the Person Act** are saved from constitutional challenge on the ground of being in contravention of the Charter.

[123] Mr Wilkins for the third interested party relied on the dicta of Phillips JA in the case of **Dian Watson v Camille Feanny [2021] JMCA Civ**. **21**. Phillips JA considered whether certain provisions in the **Civil Procedure Rules**, **2002 (CPR)** were part of the rules of court which may, per provisions in the **Legal Profession Act (LPA)** "be made repealing varying or adding" to provisions of the **LPA**. She concluded that she would have expected rules to be specifically promulgated under the **LPA** indicating the application of the particular provisions of the **CPR** and that the provisions were too vague to have the effect of repealing primary legislation requiring taxation of an attorney's bill of costs.

TO AMEND, MODIFY, ADAPT OR CHANGE

[124] The defendant and the third interested party have placed much focus on what it means to amend legislation. This position is premised on the claimant's argument that if a law in existence prior to the promulgation of the 2011 savings law clause has been adapted, modified or changed, in effect, it can no longer be considered an existing law, and so would be amenable to an enquiry as to whether such law contravenes any of the provisions of the **Charter of Fundamental Rights and Freedoms.**

[125] It may not strictly speaking be necessary to undertake a detailed examination of some of these arguments but since much focus was placed on the question of whether there has been an amendment, adaptation, modification or change to the impugned provisions, I will address them.

[126] In **Halsbury Laws of England**, **Volume 44(1), 4th Edition** at paragraphs 1289 and 1290 (pages 768-769) the following extract appears: -

> *"**1289. 'Meaning of amendment'**. To amend an Act or enactment is to alter its legal meaning whether expressly or by implication. Express*

amendment may be either textual, where the actual wording is altered, or indirect. Amendment may take the form of, or include, repeal.

1290. 'Implied amendment'*. Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them."*

[127] In **Bennion, Bailey and Norbury on Statutory Interpretation,** 8th Edition at section 8.1, the following is explained:

*"**Types of amendment***

An amendment may be 'textual', 'non-textual' or 'implied'.

(1) A 'textual amendment' adds, removes or replaces words in a way that is intended to make it possible to produce a version of the text as amended (see Code s 8.2).

(2) 'Non-textual amendments' expressly alter the meaning of legislation without changing the text (see Code s 8.3).

(3) Implied amendments come about where two Acts are inconsistent: a later Act by implication amends the earlier so far as necessary to resolve any inconsistency between them (see Code s 8.4)."

[128] According to **Black's Law Dictionary**, 9th Edition, 'modification' is defined as "A change to something; an alteration…a qualification or limitation of something…"

[129] According to the **Concise Oxford English Dictionary**, 12th Edition, 'adapt' is defined as to "make suitable for a new use or purpose" or to "become adjusted to new conditions", 'modify' means to "make partial changes to" and "change" is defined as to "make or become different ... become new".

[130] Based on the definitions given, it is clear that to ‘modify’ a statute would mean to partially change or alter it in any way, or to qualify or limit its operation or scope. To ‘change’, on the other hand, means to act so as to make a thing become different from what it previously was known to be. The word ‘adapt’ connotes making something suitable for a use or purpose that it did not previously have.

[131] On a reading of an excerpt from **Halsbury’s Laws of England**, **Statutes and Legislative Process (Volume 96 (2018)) 5th Edition**, it was garnered that as a general rule, primary legislation amends other primary legislation but leaves subordinate legislation to amend itself and subordinate legislation frequently amends other subordinate legislation, but mostly does not amend primary legislation. Subordinate, subsidiary or delegated legislation may amend primary legislation. An Act may confer power for the amendment of itself or another Act by subsidiary legislation. An Amendment made by such power is as effective as if made directly by an Act. Furthermore, where there is any doubt as to the scope of the power of subsidiary legislation to amend primary legislation, the courts must apply a restrictive interpretation, by construing the statute narrowly and strictly.

[132] The third schedule to the **Sexual Offences Act** sets out the various provisions of several different pieces of legislations which have been amended by the **Sexual Offences Act**. It is not necessary to list them. It is sufficient to note that neither the **Offences Against the Person Act** nor any portion of it is listed as having been consequentially amended.

[133] To the extent that Mr. Wilkinson seems to be arguing that any amendment to the **Offences Against the Person Act** is sufficient, he is mistaken. That contention would result in absurdity of monumental proportions.

[134] Even though the repealing of various sections of the **Offences Against the Person Act** may be regarded as amendments to that Act, to the extent that the **Offences Against the Person Act** no longer contains the repealed provisions, the removal of certain provisions now forming part of the **Sexual Offences Act** cannot be regarded as amending sections 76, 77 and 79, of the **Offences Against the**

Person Act. It is accepted, as the defendant and the third interested party submitted, that there is no provision in the **Sexual Offences Act** or **Sexual Offences (Registration of Sex Offenders) Regulations** which could be construed as giving power for the amendment of the **Offences Against the Person Act**.

[135] This court clearly recognizes that there is no need for change to the textual contents of the particular sections (76, 77 and 79) which it is not at all suggested has happened. What seems clear enough, having regard to the meaning of the word amendment, is that there has not been any textual amendment to the relevant provisions. Neither can it be said that there is implied or consequential amendment. However, for reasons that will be explained, I agree that there is added punishment for offences penalized by, or falling under sections 76, 77 and 79 of the **Offences Against the Person Act**, as a consequence of the promulgation of the Sexual Offences Act and the Regulations even if that consequence was never intended. This does not mean that the provisions have been amended.

SEXUAL OFFENCES, THE SEXUAL OFFENCES ACT AND SEXUAL OFFENCES REGULATIONS

[136] It is important to observe that the First Schedule to the **Sexual Offences Act** contains the specified offences in respect of which there is an obligation for an offender to register unless he is exempted by the provisions of section 30(3) of the **Act**. Sections 76, 77 and 79 of the **Offences Against the Person Act** are included in the First Schedule, which makes offences falling under those sections among the offences in respect of which there is an obligation to register and report.

[137] The question arose as to whether sections 76, 77 and 79 of the **Offences Against the Person Act** relate to sexual offences and are therefore included in that

category of offences mentioned in our present savings law clause. I fully adopt the reasoning and conclusion of Batts J on this point.

[138] I shall now consider the provisions of the **Sexual Offences Act** and the **Sexual Offences (Registration of Sex Offenders) Regulations** cited by counsel for the claimant as well as other provisions which may be relevant and consider whether those provisions result in added punishment for persons found to have committed offences under sections 76, 77 and 79 of the **Offences Against the Person Act**.

[139] The specific provisions of the **Sexual Offences Act** referred to by the claimant in his submissions are contained in sections 29 to 35 of the Act, which deal with the Sex Offender Register and Sex Offender Registry.

[140] Section 2 of the Sexual Offences Act contains the following:

> *"Register" means the Sex Offender Register maintained under section 29;*
>
> *"Registry" means the Sex Offender Registry established by section 29;*
>
> *"Sex offender" means a person who has been convicted of a specified offence and whose particulars are entered or required to be entered in the Register, and who is required to make regular reports pursuant to this Act;*
>
> *"specified offence" means an offence specified in the First Schedule, to which reporting obligations under Part VII apply.*

[141] Section 29(1) of the **Sexual Offences Act** creates the Sex Offender Registry. Section 29(4) allows the relevant Minister to make regulations establishing the Sex Offender Registry and Registration Centres. Section 30(1) provides that the particulars of every conviction for an offence committed after the coming into being of that provision of the Act shall be furnished to the sex offenders registry.

[142] Section 30(1) (a), (b) and (c) go on to stipulate that the information is to be furnished where the conviction took place in the Supreme Court, in a Circuit Court or in the Court of Appeal. Section 30(3) provides that a Judge of the Supreme

Court may direct that a person convicted of an offence be exempted from any or all of the registration and reporting requirements. Section 30(3) (a), (b), (c) and (d) go on to stipulate the circumstances in which the convicted person may be exempt.

[143] Section 30(4) provides that on receipt of the particulars of conviction mentioned in (1), the Commissioner of Corrections shall enter the offender's name and particulars of conviction in the Register.

[144] Section 30(5) stipulates that after the expiration of 10 years of the imposition of registration requirements a sex offender is eligible for termination of the registration and reporting requirements.

[145] Section 31 provides that the Superintendent of every correctional institution shall notify the Sex Offender Registry and the police of the release from correctional services of a person convicted of a specified offence.

[146] Sections 32 provides that every person convicted of a specified offence, found guilty but insane, so as to not be legally responsible for his actions at time of commission of act, or released from custody pending an appeal relating to a specified offence, shall within three days make a first report and said report shall be made in the Sex Offender Registry

[147] Section 33 provides that every sex offender has a continuing obligation to report a change in residence or name within fourteen (14) days such change and any time between 11 months and a year since he/she last reported to a registration centre.

[148] Section 34 stipulates that every sex offender shall notify the Sex Offender Registration Centre of any plans to travel away from his main residence including dates of departure and return.

[149] Section 35 provides that a sex offender who contravenes the reporting or notification requirements commits an offence and is liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding one million dollars or to

imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.

[150] Section 38 of the **Sexual Offences Act** empowers the relevant minister to make regulations, and on October 12, 2012, pursuant to the act, **The Sexual Offences (Registration of Sex Offenders) Regulations, 2012** was passed. The regulations took effect on December 12, 2012.

[151] The specific provisions of the **Sexual Offences (Registration of Sex Offenders) Regulations** referred to by the claimant in his submissions are contained in Regulations 11, 16, 17, 18 and 21.

[152] Regulation 11 provides that Tier 1 information concerning a sex offender shall be provided to members of the Jamaica Constabulary Force, professional counsellors of sex offenders, prospective employers and employees, persons managing educational institutions in which the sex offender is or is seeking to be enrolled, persons managing facilities where the sex offender is a patient, employee or volunteer, persons acquiring information for statistical purposes as approved by the Minister and a person the Registrar considers as having a legitimate interest in the Tier 1 information concerning a sex offender sufficient to justify the information being provided to him.

[153] Regulation 16 provides the procedure by which a report is to be made to the Registry, how the report is to be marked, entered into the Register and receipt of said report given to the individual who is reporting. Further, that the particulars of every conviction for a specified offence that is required to be furnished to the Registry be set out as in Form 2 in the Second Schedule and that notice required to be furnished by the Superintendent in charge of a correctional institution once a sex offender is released from that institution be set out in Form 3 in the Second Schedule. Lastly, where a sex offender is required to report to a Registration Centre within 3 days of sentencing or release, the registration officer shall obtain, collect information from the sex offender, issue to him a certificate of registration

as a sex offender and advise the sex offender of his reporting duty and obligations as a sex offender.

[154] Regulation 17 provides that where a sex offender reports his intentions to travel outside Jamaica, the Registrar shall notify Jamaican immigration authorities of the sex offender's intention to travel outside the country before the intended date of travel. Further, that a sex offender shall notify the Registrar at the registration centre closest to his main or secondary residence of his intentions to travel and that all notifications shall be made by the sex offender in person.

[155] Regulation 18 provides that a registered sex offender must have a Certificate of Registration of Sex Offender on his person at all times, while he is away from his main residence.

[156] Regulation 21 stipulates that the penalty for any sex offender who fails to comply with any of the obligations imposed by the Regulations, where no penalty is provided for such a breach, shall be a fine not exceeding one million dollars and/or to imprisonment for a term not exceeding twelve months.

THE AMERICAN CASES RELIED ON BY THE CLAIMANT

[157] The claimant has argued in extenso as to why he says that there is additional punishment imposed by virtue of the provisions in the legislation.

[158] Mr Wilkinson placed reliance on two American cases; **Brian Hope v Commissioner of Indiana Department of Correction (2019) U.S**. **Dist**., **judgement delivered August 16, 2021**, and **Prynne v Settle 848 Fed Appx. 93.** In **Brian Hope v Commissioner of Indiana Department of Correction** (supra), a divided panel of the United States Court of Appeal for the Seventh Circuit appellate court affirmed the District Court's decision which was that the retroactive application of Indiana's Sex Offender Registration Act (SORA) among other effects, violated the constitutional prohibition against retroactive punishment and so the registration requirements as applied to the plaintiff could not stand.

[159] In the first judgment of the Court of Appeal, the provisions of the SORA were set out. Among the provisions was a long list of requirements and restrictions. A person required to register under SORA had to report in person at least once annually to the local sheriff's office in the county of residence. If the registrant was employed or attended school in a different county, he or she was required to report to the sheriff's office in each of those counties as well. Sexual offenders who committed one of nine specified offences were considered to be "sexually violent predators" and had to report to the local sheriff's office every ninety days. A person who was homeless or lived in transitional or temporary housing had to appear in person at least once every seven days.

[160] Registration required more than just appearing at the sheriff's office, as the individual had to be photographed and was required to provide information including name, date of birth, race, height, weight, hair colour, eye colour, identifying features such as scars and tattoos, social security number, driver's license or state identification card number, vehicle description and license plate number of any vehicle the registrant might operate regularly, principal address, name and address of any employer or educational institution, any electronic mail addresses, any instant messaging user names, any social networking website user name and any other information required by the Department of Corrections. Most of that information was published on the public registry, although some information such as an individual's e-mail address was not available to the public.

[161] If any of the information provided changed, the registrant had to go in person to the sheriff's office, within seventy-two hours, to report that change of information. For example, if a registrant obtained a Pinterest account, he was required to report the new account, in person, at the local sheriff's office, within seventy-two hours. Convicted sex offenders were required to maintain a valid driver's license or state identification card and were prohibited from seeking a name change.

[162] Further, if one was designated a sexually violent predator, then he or she had to inform law enforcement of any absences away from home that were longer than seventy-two hours. Anyone designated an offender against children, was not permitted to work, volunteer, or reside within 1,000 feet of a school, a youth program centre, or a public park. Further, a person who was designated a serious sex offender could not enter school property. To verify addresses, a local law enforcement officer had to visit a registrant's home at least once per year, and at least once every ninety days if the offender was a sexually violent predator**.**

[163] Because the court concluded that the State's application of SORA to the plaintiffs impermissibly interfered with their right to travel, the Court did not reach the district court's alternative finding that it also violates their rights under the ex post facto clause of the United States Constitution.

[164] One of the criteria which required an offender to register under SORA was the substantial equivalency requirement- that the offence became a registrable offence under SORA. Offenders who resided in Indiana before the enactment of SORA's other jurisdiction requirement enjoyed the full protection of Indiana's ex post facto clause.

[165] On what basis did the court determine that the SORA requirements amounted to punishment? SORA'S ex post facto clause precluded application of the substantial equivalency requirement as a basis for demanding that the plaintiffs register as sex offenders. The Court referred to the Indiana Supreme Court's ruling in **Wallace v State**, 905 N.E. 2d 371, 379 (Ind. 2009), where the Supreme Court concluded that "*the Act imposes significant affirmative obligations and a severe stigma on every person to whom it applies… [and the] duties imposed on offenders are significant and intrusive."* The Supreme Court in **Wallace v State** (supra) concluded that the Act had the effect of imposing additional punishment beyond that which could have been imposed when the crime was committed and to impose the said requirements on anyone whose offence predated the enactment of that statute would violate the ex post facto clause of the Indiana Constitution.

[166] The dissenting view was that the reporting and registration requirements did not amount to punishment. In his judgment, St. Eves J opined that the question under SORA and Indiana's Ex Post Facto Clause was whether the marginal effect of SORA is punitive. He went on to say that extending, maintaining, or modifying a duty under SORA generally was not punitive, but that imposing a new duty was. He also said that it was immaterial to the analysis whether the law in Indiana was maintaining, extending, or modifying its own duties and it is also immaterial where or when the conviction occurred, as long as some state imposed a lawful registration obligation on the offender and SORA does not so significantly alter that obligation to result in added punishment.

[167] In the **Brian Hope v Commissioner of Indiana Department of Correction** judgment delivered August 21, 2021, the same United States Court of Appeal for the Seventh Circuit, this time hearing the case en banc, reversed the earlier decision, and held that, in applying **Smith v Doe**, **538 U**.**S**. **84 (2003),** SORA was not so punitive either in purpose or effect to surmount Indiana's non-punitive intent for the law.

[168] The Court stated, affirming the dissenting judgment of St. Eve, that: *"To summarize, the question under Indiana's Ex Post Facto Clause is whether SORA's marginal effect is punitive. Maintaining, extending, or modifying a duty under SORA generally is not punitive, but imposing a new duty is. It is immaterial to the analysis whether Indiana law is maintaining, extending, or modifying its own duties or those of another state. Likewise, it is irrelevant where or when the conviction occurred, as long as another state imposed a lawful registration obligation on the offender and SORA does not so significantly alter that obligation to result in added punishment."*

[169] In **Prynne v Settle** (supra), a decision of the United States Court of Appeal (4th Circuit) Virginia, the plaintiff appealed from a district court order dismissing her claim that the Virginia Sex Offender and Crimes Against Minors Registry (VSOR) violated the ex post facto clause of the Constitution and the due process clause of the Fourteenth Amendment.

[170] Upon initial registration offenders were required to provide personal information such as name, address, photograph, work or school address, vehicle registration, email addresses, other internet aliases, fingerprints, and a DNA sample as well as to appear in person to update and verify registry data.

[171] They were also to report to a sex offender investigative officer who is permanently assigned to offender's case. The assigned officer was responsible for verifying the offender's registry information and was permitted to visit the residence without notice.

[172] A sex offender was prohibited from entering school grounds, school buses or day care facilities during school related or school sponsored activities and also prohibited from adopting a child and from working in fields such as childcare and in other vocations not specifically involving dealing with children.

[173] Regarding travelling restrictions, the offender was to notify the Virginia State Police ten days before moving residence outside of Virginia and when travelling internationally, was to notify federal and international law enforcement agencies and could be barred from entering other countries altogether. The offender's travel to other states may also trigger a requirement for her to register on those states' sex offender registries, possibly even for relatively short stays.

[174] A majority of the United States Court of Appeals for the Fourth Circuit reversed the dismissal of Prynne's claim that the VSOR violates the ex post facto clause. The Court held that the district court properly found that VSOR was not enacted with the intent of imposing punishment, but of creating a civil regulatory regime. It further found that to state a valid ex post facto claim, the plaintiff was required to plausibly allege that the statute had a punitive effect that negated that intent.

[175] The court observed that the Supreme Court espoused a two-pronged test for determining whether a statute imposes punishment. First, a court must determine if the intention of the legislature was to impose punishment. If the court so finds, the court moves to the second prong of the inquiry, and examines whether the

statute is *"so punitive either in purpose or effect as to negate the State's intention' to deem it civil"*. In this instance, the court found that the legislature intended to impose a civil regulatory scheme.

[176] The majority held that the plaintiff plausibly alleged that:

1. The statute's requirements resemble traditional forms of punishment, specifically 'shaming, banishment, probation/parole, and others'. The plaintiff argued that the VSOR defines and classifies each registrant as a Tier I, II or III offender and in addition to a host of reporting requirements, many of which must be done in person, a specific police officer is permanently assigned to the plaintiff's case and must verify the plaintiff's registration information twice a year by visiting her work and home addresses, without notice. The court held that the plaintiff had plausibly alleged these requirements' resemblance to traditional forms of punishment.
2. The VSOR imposes affirmative disabilities and restraints, as besides requiring in-person reporting, the VSOR affirmatively prohibits Prynne from entering certain properties such as schools and day-cares, without prior permission
3. That the VSOR promotes traditional aims of punishment, specifically general deterrence and retribution A person contemplating committing an offense which requires registration under VSOR may be discouraged from doing so by the negative consequences that the registry imposes on an offender, thus satisfying the deterrent objective. Requiring only persons who commit a crime to register and that the registry imposes harsher requirements for more malicious crimes reflects a retributive scheme. The Court referred to Smith and said these objectives may be equally consistent with the regulatory objective and that for this argument to be given significant weight, Prynne will have to establish more than the mere presence of a deterrent or retributive effect.

4. The registry affects her in an excessively punitive way despite its intended non-punitive purpose.

[177] If one were to critically undertake the analysis based on the criteria set in **Prynne v Settle** (supra), that is, to first consider the intention of the legislature whether it was to impose punishment, and then move on to consider whether the statute is "*so punitive either in purpose or effect as to negate the State's intention' to deem it civil,"* the first observation is that it was never specifically stated that the intent of our legislation was to establish a civil regime**.** In **Prynne v Settle** (supra)**,** the provisions were distinctly stated to be within the context of a civil regulatory regime and thus, the plaintiff was required to plausibly allege that the statute had a punitive effect that negated that intent. There is no such dynamic at work in the present case, therefore one must look only to whether the effect of the regulation is punitive. It seems clear enough that the **Sexual Offences Act** and **Sexual Offences (Registration of Sex Offenders) Regulations** impose affirmative disabilities and restraints on a convicted sex offender and those disabilities and restraints bear some resemblance to traditional forms of punishment.

[178] The argument may properly be made that the duties of registering and reporting imposed by virtue of the provisions of the **Sexual Offences (Registration of Sex Offenders) Regulations** on an offender are significant and intrusive and therefore constitute additional punishment. The dissenting view in **Brian Hope v Commissioner of Indiana Department of Correction** (supra) which was affirmed, was that extending, maintaining or modifying a duty under the SORA generally was not punitive, but that imposing a new duty was. In the Jamaican scenario, it is very clearly an entirely new duty that has been imposed. Prior to the promulgation of the **Sexual Offences (Registration of Sex Offenders) Regulations,** there had been no registration or reporting requirements whatsoever for sex offenders.

[179] The obligations and prohibitions that the plaintiffs were required to undergo in both the **Prynne v Settle** (supra) and **Brian Hope v Commissioner of Indiana**

Department of Correction (supra) cases may be described as onerous. In that regard, they are comparable with the obligations laid down in the Jamaican Regulations. While the requirements in those cases are similar to those in the Jamaican context, the Jamaican regulations appear to be less restrictive in that they do not provide for matters such as the prohibition on entering school grounds, school buses and daycares or adopting children, the type of industry in which a registered offender may seek employment and the frequent visits of law enforcement officers to the registered sex offender's residence and/or place of work or study. An added requirement that exists in the Jamaican regulations which does not appear to be present in the Virginia and Indiana regulations, is the requirement for registered sex offenders to always carry a Certificate of Registration of Sex Offender on their person when not at home. The provisions in the Jamaican legislation conceivably constitute further punishment.

DOES IT MATTER IF THE PROVISIONS OF THE SEXUAL OFFENCES ACT AND REGULATIONS ARE PUNITIVE AND/OR HAVE IN ANY WAY MODIFIED CHANGED OR ADAPTED THE PROVISIONS OF SECTIONS 76, 77 OR 79?

[180] But does the answer to this case really lie in whether the effect of the operation of the **Sexual Offences Act** and **Sexual Offences (Registration of Sex Offenders) Regulations** impose additional punishment that did not exist prior to 2012 on sex offenders or in whether those provisions have in any way modified, changed or adapted the relevant provisions of the **Offences Against the Person Act**?

[181] Mr Braham's observation that Parliament has chosen to retain the impugned provisions of the **Offences Against the Person Act** under the protection of the new savings law clause was countered by Mr Wilkinson's observation that the intent or the purpose for so doing has behind it a political agenda.

[182] That observation may well be correct. That agenda is readily recognized as supporting the anti-gay stance that many Jamaicans generally hold, just as the express retention of the law prohibiting abortion as a provision protected by the savings law clause may also be seen as supporting a pro-life stance.

[183] Even if Parliament's motive or reasons are not in keeping with present day rational thinking or cannot be supported by international standards of the right to privacy, freedom of thought and conscience, freedom of expression and the right to equality before the law as interpreted in cases from various jurisdictions across the globe, that in and of itself cannot mean that the provisions are unconstitutional, in a Jamaican context, given our present savings law clause. I will only cite as examples four cases from different jurisdictions which demonstrate that our present position is not in keeping with the current thinking.

[184] In **The National Coalition for Gay and Lesbian Equality and The South African Human Rights Commission v The Minister of Justice and others (1998) 6 BHRC 127**, the Constitutional Court of South Africa held that the common law offence of sodomy and the inclusion of the offence in schedules of the Criminal Procedure Act 1977 and the Security Officers Act 1987 were unconstitutional, to the extent that the criminalisation of sodomy in private between consenting males severely limited homosexuals' right to equality in relation to their sexual orientation and infringed their rights to privacy, dignity and freedom. Further, that section 20A of the 1957 Sexual Offences Act, which made it an offence for two men to commit an act at a party calculated to give sexual gratification, was absurdly discriminatory and presumed to be unfair and unjustified since the basis of the discrimination was sexual orientation, thus declaring it to be unconstitutional.

[185] In **Jason Jones v Attorney General of Trinidad and Tobago and The Equal Opportunity Commission and The Trinidad and Tobago Council of Evangelical Churches and The Sanatan Dharma Maha Sabha of Trinidad and Tobago [2018] 3 LRC 651**, the High Court of Trinidad and Tobago declared sections 13 and 16 of the Sexual Offences Act, to the extent that they criminalised any acts constituting consensual sexual conduct between adults, unconstitutional, illegal, null, void, invalid and of no effect, as the impugned provisions infringed the rights to liberty and security of the person, right to equality before the law and protection of the law, right to respect for his private and family life and right of freedom of thought and expression

[186] In **Nadan and Another v State (Attorney General and Another intervening) [2006] 3 LRC 166**, a case arising out of Fiji, the Court of Appeal held that the statutory provisions which prohibited consensual sexual activity between men had to be struck down either wholly or in part in order to make the provisions consistent with the Constitution, as they breached the constitutionally guaranteed rights to privacy and equality, including a prohibition on discrimination on the basis of sexual orientation. Winter J at page 178 stated, "…*while members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law…*"

[187] In **Lawrence and another v Texas (2003) 15 BHRC 111**, the United States Supreme Court held that the 'Texas "homosexual conduct" law' which criminalised certain intimate sexual conduct by same sex couples but not identical behaviour by different sex couples- of deviate sexual intercourse, violated the due process clause, which states that no citizen of the State shall be deprived of life, liberty, property, privileges or immunities or in any manner disenfranchised, except by due course of the law of the land. Further, that the fact that the governing majority in a state had traditionally viewed a particular practice as immoral was not a sufficient reason for upholding a law prohibiting that practice.

[188] Mr Braham's submission in my view bears much weight. The decision in **Lambert Watson v The Queen** (supra) must be considered against the background of our pre-independence savings law clause. The original Constitution containing the savings law clause which was applicable at the time of the decision in **Lambert Watson v The Queen** (supra) was a schedule to the **Jamaica (Constitution) Order in Council,** 1962 which was promulgated at Buckingham Palace by the Queen on the advice of her Privy Council. Whether one accepts the rationale expounded in **DPP v Nasralla** (supra) or the more reasonable and rational basis as put forward in **Lambert Watson v The Queen** (supra), (which is explained below) for the existence of the original savings law clause which protected all laws in existence at the time of independence, it cannot be viewed in the same way as a post-independence saving law clause.

[189] The relevant context within which this examination must be undertaken is the existence of a savings law clause which was promulgated in 2011 by a state which by that time, had enjoyed some 49 years as an independent and democratic nation which had forged a path of self-determination throughout the entire period. Such savings law clause cannot attract as restrictive an interpretation as was proposed in **Lambert Watson v The Queen** (supra).

[190] I think it is necessary that the case of **Lambert Watson v The Queen** (supra) and the context in which it arose be addressed at this juncture. In that case, the appellant was convicted of two counts of murder and sentenced to death. The relevant provision of the Offences Against the Person Act at the time of the convictions which dictated that the sentence must be one of death was section 3(1A) of the Act. That section provided that a person convicted of a non-capital murder shall be sentenced to death if before that conviction he had been convicted of another murder done on the same occasion. The 1864 Offences Against the Person Act was amended in 1958.

[191] Section 2 of the original Act provided that whosoever shall be convicted of murder shall suffer death as a felon. That provision remained after the 1958 amendment. Prior to the 1958 amendment, section 3(1) of the Act provided that "*upon every conviction for murder, the court shall pronounce sentence of death, and the same may be carried into execution as here before has been the practice; and every person so convicted, shall, after sentence, be confined in some safe place within the prison apart from all the other prisoners"*. In 1958, section 3(1) was amended by adding at the end of that provision words stipulating that the form of the death sentence was that the individual shall "suffer death in the manner authorized by law."

[192] In 1992, the **Offences Against the Person (Amendment) Act** repealed section 2 of the Act and substituted new provisions which classified murder into capital and non-capital murder. Section 3 was amended to provide for a new sentencing regime. The death penalty was retained for persons convicted of capital murder

as well as for those convicted of a murder where before that conviction, he had been convicted of another murder done on the same occasion.

[193] The central issue before the court was whether the mandatory sentence of death by virtue of section 3(1A) was unconstitutional. One can only understand the issue in the context of the then existing constitutional provision. Section 2 of the Constitution of Jamaica as stated earlier, provides that subject to the provisions of sections 49 and 50 of the Constitution, any law which is inconsistent with the constitution, such law is to the extent of that inconsistency, void.

[194] Section 49 and 50 gave power to Parliament to amend the Constitution as allowed by those provisions. Chapter III of the Constitution set out the fundamental rights and freedoms which included the right to life. Sections 2 and 49 stood then as they are today and reference to section 50 remains in section 2, although section 50 was repealed by section 3 of Act 12 of 2011.

[195] Section 14(1) then provided that no person should be intentionally deprived of life except in pursuance of the sentence of a court for a criminal offence for which he has been convicted.

[196] Section 17(1) then provided that no one should be subjected to torture or to inhuman or degrading punishment or other treatment and section 17(2) provided that "nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

[197] Section 26(8) and 26(9), the then savings law provisions in the Jamaican Constitution stated as follows:

> *'(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.*

'(9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such law by reason only of –

(a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council 1962, or

(b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision.'

[198] One of the questions to be resolved was whether the law requiring the sentence of death to be passed on the appellant was a law in force immediately before the appointed day within the meaning of section 26(8) with the result that nothing contained in it or done under its authority could be held to be inconsistent with section 17(1).

[199] The law in force immediately before the appointed day (August 6, 1962) was section 2 of the 1864 Act which was repealed by the 1992 Act. The new Act created two separate categories of murder, capital and non-capital. Section 3 of the Act which stipulated death as the penalty for murder was amended and the death sentence was only now to be imposed on persons convicted of capital murder or of more than one non-capital murder, pursuant to section 3(1A).

[200] The court reasoned that the law which was in force prior to the appointed day was no longer in force at the time of the convictions of the appellant. At paragraphs 42 and 44 of the judgment delivered by Lord Hope of Craighead, the Board explained that:

"[42] These observations would plainly have had much force in this case if it were plain that the law under which the appellant was sentenced to death was a law which was in force immediately before the appointed day. But the issue in this case is whether the law under which he was sentenced falls within that description, when the provisions of s 26(8) are read together with those in s 26(9). Guidance as to how this issue should be approached is not

to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in s 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to. Section 26(8) read with s 26(9) limits that protection. So it must be given a narrow rather than a broad construction. This means that careful attention must be paid to the precise meaning of the words used in s 26(9). If this amounts to what has been described as 'tabulated legalism', it is perfectly in order in this context.

…

[44] Section 26(9) provides that, for the purposes of s 26(8), a law in force immediately before the appointed day 'shall be deemed not to have ceased to be such law by reason only' of the circumstances referred to in paras (a) and (b) of the subsection. The circumstance referred to in para (a) plainly does not apply. The amendments to the 1864 Act were made by Parliament. They were not made by or under s 4 of the Jamaica (Constitution) Order in Council 1962. Nor can the circumstance referred to in para (b) be applied here either. The amendments made by the 1992 Act went far beyond what that provision contemplates. It did not seek merely to consolidate or to revise the existing laws. Its purpose was to amend the 1864 Act, not to confine itself only to such adaptations or modifications of the existing laws as were necessary to effect a consolidation or revision of them."

[201] At paragraphs 46 and 47, it was further explained that:

"[46] The narrowness of the wording of s 26(9) is no accident. It is entirely in keeping with the philosophy which requires a generous interpretation to be given to the principles which are enshrined in Chapter III of the Constitution. True it is that the laws which were in force immediately before the appointed day are to be taken to have given full effect to the fundamental rights and freedoms that are set out in s 13. This is what s 26(8) provides. It was a reasonable working assumption, in the interests of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy. So long as these laws remained untouched, they did not have to be scrutinised. But as soon as they were changed, adapted or modified in any respect, except in the circumstances referred to in paras (a) and (b) of s 26(9), they had to comply with the requirements of Chapter III. This was because there was no longer any need to apply the presumption on which s 26(8) proceeds. The opportunity to ensure that the law as changed, adapted or modified gave effect to all the fundamental rights and freedoms of the individual was now available, and it was up to Parliament to grasp that opportunity. Its power to make laws for the peace, order and good government of Jamaica is expressly made subject to the provisions of the Constitution by s 48(1).

[47] It must be concluded therefore that the law as to the mandatory death penalty which was in force immediately before the appointed day ceased to be such law for the purposes of s 26(8) as from 13 October 1992 when it was amended by the 1992 Act. So the protection for existing laws in s 26(8) does not apply to the amendments which the 1992 Act sets out. The power to legislate which Parliament was exercising when it was enacting the 1992 Act was subject to the provisions of Chapter III which, as s 13 declares, have effect for the purpose of protecting the rights and freedoms of

the individual. Their lordships have already concluded that the mandatory death sentence in s 3(1A) is an inhuman punishment within the meaning of s 17(1) of the Constitution, and it is accepted that the fact that this description of punishment was made mandatory by that subsection is not saved by s 17(2). So the law which required the judge to impose this sentence on the appellant must be held to be unconstitutional."

[202] It was held that based on section 2 of the **Jamaica (Constitution) Order in Council 1962**, section 3(1A) of the 1864 Act, as amended by the 1992 Act, was inconsistent with section 17(1) and hence void to the extent that it requires, rather than merely authorises, the imposition of the death sentence.

[203] It is of critical importance to note that the contents of section 26(8) and 26(9) in the pre-Charter provisions are no longer part of our Constitutional provisions. Any reference to adaptation or modification is absent. The new savings law clause under section 13(12) of the **Charter of Fundamental Rights and Freedoms** does not immunize from scrutiny all laws in force immediately before the commencement of the **Charter of Fundamental Rights and Freedoms** (April 8, 2011) but only laws relating to three different subject matters, namely: sexual offences, obscene publications, and offences regarding the life of the unborn. Whereas the old savings law clause made allowance for laws existing before August 6, 1962 which have been adapted or modified in accordance with section 4 of the **Jamaica (Constitution) Order in Council** or if they have been reproduced in identical form with only necessary adaptations and modifications in the revision or consolidation of laws, the new savings law clause does not make any similar provision for those laws existing before April 8, 2011.

[204] Even if it is that in the post April 2011 period the critical yardstick remained modification, adaptation or change in any respect , as Miss White pointed out, it would be absurd to say that **Lambert Watson v The Queen** (supra) is authority for the proposition that any amendment to the **Offences Against the Person Act**,

irrespective of the section considered amended, would be sufficient to remove the protection afforded by the savings law clause. She pointed out that such an interpretation would necessarily mean that if, for example, there was some amendment to the law relating to wounding, that by extension would mean an amendment to another section dealing with an offence quite unrelated to wounding. As will be demonstrated later in **Lester Pitman v State of Trinidad and Tobago** (supra), reference to modify, adapt or change in any respect must mean modification, adaptation or change to the relevant provisions.

[205] This point brings me to Mr Wilkinson's submission that this court ought to apply to its determination of the pertinent issues in this application, the learning from the Caribbean Court of Justice in the cases of **Nervais v The Queen and Severin v The Queen** (supra). Kings Counsel highlighted the following portion from the judgment of Sir Dennis Byron:

> *"It is incongruous that the same constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses; colonial laws and punishment are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principle that the Constitution is the supreme law and that the judiciary is independent."*

[206] It is quite easy to dispose of this point if it is borne in mind, as highlighted before, that we are here concerned with a very limited savings law clause which was purposely and deliberately circumscribed to immunize three distinct areas of law of all the laws that existed prior to the coming into being of the **Charter of Fundamental Rights and Freedoms**, and not a general savings law clause that

was imposed upon Jamaica by the colonial power, and thus the basis for the immunity from judicial scrutiny cannot be *"purely because the deprivation had existed prior to the adoption of the Constitution".*

[207] Whether it is fully appreciated or not, the present savings law clause was specifically and clearly deliberately designed to exclude from judicial examination the question of whether there has been any breach of certain rights even in circumstances that would otherwise be obvious instances of breach, and must therefore be appreciated for what it is: a limit on certain guaranteed rights, in the present instance, as far as homosexuals are concerned. It is of course not the only limiting provision but perhaps the only one that may, from a secular standpoint, be regarded by many as having no proper and justifiable rationale.

[208] Mr Wilkinson asked the court to consider the four "broad and interlocking approaches" postulated in the CCJ case of **Quincy McEwan et al v Attorney General of Guyana [2018] CCJ 30 (AJ)** that the court ought to embark on with a view to ameliorating the harsh consequences of a savings law clause. These include applying a narrow and restrictive interpretation and application of the savings law clause. That factor has in essence already been discussed. The second approach is to recognize that the clause only saves laws that infringe the individual human rights stipulated in the clause itself. That, to my mind, is self-evident and does not require discussion, since in this instance, the rights allegedly breached are contained in sections 13 and 14 of the said Chapter III which embodies the savings law clause.

[209] The third approach is to consider the consequences on a country's international or treaty obligations. Mr Wilkinson's submission therefore, is that the court should bear in mind that the impugned provisions in the **Offences Against the Person Act** violate international law and or international treaties and thus the court ought to take into account this consideration. The short answer is that the role of the judge is to interpret and apply law; if the law as laid down in a statute or the

Constitution is incongruous with international law and obligations, the matter must be addressed by Parliament.

[210] In the case of ***Chandler v State of Trinidad and Tobago*** (supra), decided by the Judicial Committee of the Privy Council, the appellant was convicted of murder and sentenced to death by hanging under section 4 of the Trinidad and Tobago Offences Against the Person Act 1925. The appellant appealed to the Privy Council challenging the constitutionality of the mandatory death sentence. While the Trinidad and Tobago Constitution recognised fundamental rights and prohibited cruel and unusual treatment, there was a savings law clause that preserved the validity of existing laws in force on the date that the Constitution came into effect. At paragraph 98, the Board said:

> *"**Laws, which predate the creation of the 1976 Constitution and, but for the savings clause, would be exposed to constitutional challenge for breach of the fundamental rights and protections in s 4 or s 5 of the Constitution, will continue to exist only so long as Parliament chooses to retain them.** It is striking that there remains on the statute book a provision which, as the government accepts, is a cruel and unusual punishment because it mandates the death penalty without regard to the degree of culpability. **Nonetheless, such a provision is not unconstitutional. The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws**." [emphasis added]*

[211] The claimant's attorney-at-law acknowledges that section 4(1) of the **Jamaica (Constitution) Order in Council 1962** cannot avail him. The fourth approach commended by the Caribbean Court of Justice in **Quincy McEwan et al v Attorney General of Guyana** (supra) is to attempt to modify the pre-independence law before applying the savings law clause. The Caribbean Court of Justice had earlier in 2018 applied the same reasoning in **Nervais v The Queen and Severin v The Queen** (supra) where it was held essentially that the

modification provision in the 1966 Barbados Independence Order prevailed over the savings law clause.

[212] Counsel for the appellant in ***Matthew (Charles) v The State of Trinidad and Tobago*** (supra) in essence had argued that the court was required by virtue of the provisions similar to section 4(1) of the **Jamaica (Constitution) Order in Council 1962**, to modify the existing law to bring it in conformity with the provisions guaranteeing the right of an individual to life and that which prohibited the imposition of cruel and unusual treatment or punishment (that is, sections 4 and 5 of the Trinidad and Tobago Constitution). The Board rejected that argument, holding that it was inconsistent with the supremacy of the Constitution, irrational in its consequences and contrary to the language and purpose of Section 5(11).

[213] Similar provisions were considered by the Judicial Committee of the Privy Council (JCPC) in ***Boyce*** (supra) as well as ***Chandler v State of Trinidad and Tobago*** (supra)**,** and the arguments put forward rejected. The end result is that the JCPC has rejected the position that a law which is not a part of the Constitution itself can prevail over any provision found within the Constitution.

[214] In ***Lester Pitman v State of Trinidad and Tobago*** (supra) the Offences Against the Person Act provided for a mandatory death sentence for the offence of murder under section 4 of the Offences Against the Person Act as was the case in ***Chandler v State of Trinidad and Tobago*** (supra). Section 4 had been amended in 1979, but as the JCPC observed, it was amended "without altering its sense" (paragraph 32 of the judgment). Lord Hughes giving the judgment on behalf of the Board went on to observe that subsequent to 1979, the Act was amended on a number of occasions without touching the rule relative to the mandatory death penalty.

[215] One particular amendment made in 1985 was referenced. This was to add the partial defences of diminished responsibility and provocation by inserting sections 4A and 4B. Those amendments had the effect of reducing cases of murder to

manslaughter for which the sentence now prescribed was not death nor any mandatory sentence, but was a maximum of life imprisonment.

[216] The court held at paragraphs 42 and 47 that:

> *"42. The mandatory death sentence for murder, now found in section 4 OAPA has been modified in its language since it was enacted in 1925 (and indeed in the 1842 Ordinance) but only in order to accommodate the removal of the old categorisation of offences into felonies and misdemeanours. It is, accordingly, an existing law to which the prohibition upon Parliamentary authorisation of cruel and unusual punishments in section 5(2) does not apply. The Board so held in the cases of Matthew v State of Trinidad and Tobago [2005] 1 AC 433 and Boyce v The Queen [2005] 1 AC 400, decided on the same day. As the Board held at para 12 of Matthew, a mandatory death penalty is indeed a cruel and unusual punishment but insofar as it is an existing law, it is immune from constitutional challenge on that ground.*
>
> *…*
>
> *47. It is necessary to begin with the proposition that a mandatory death penalty is a cruel and unusual punishment (Matthew para 12). Section 4 OAPA is saved from constitutional challenge insofar as it is an existing law. The sentence for murder has not changed. But the operation of that existing law has been significantly modified by the enactment of section 4A to cater for those whose mental responsibility is substantially impaired. In order properly to give effect to the combination of this change in the substantive law and the imperative of section 5(2)(b) of the Constitution, it is necessary that the court should be in a position to moderate the mandatory effect of section 4 not only for those who advance diminished responsibility at trial but also for those*

whose condition meets that statutory concept but who did not, for sufficient reason, then advance the partial defence.”

[217] At paragraph 44 the Board set out the additions that were inserted in the Act:

> “44*. There has, however, been an important change to the law of murder since the 1925 Act was enacted and after the Constitution was adopted in 1962. Parliament in Trinidad has given consideration to the position of mentally impaired persons who face charges of murder. It did so by adopting, by chapter 19 of 1985, amendments to OAPA to create the concept of diminished responsibility. Section 4A of OAPA, thus inserted, reads:*
>
> > “4A. (1) *Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.*
> >
> > (2*) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.”*

[218] A few observations may be made from a reading of **Lester Pitman v State of Trinidad and Tobago** (supra). What is clear is that there was amendment to the statute. This was not an implied or consequential amendment, but a textual amendment which is obvious and indisputable. Does this mean in essence that there has been some departure from the decision in **Lambert Watson v The Queen** (supra)? I am not of that view, as the court was interpreting the relevant

provisions as they existed in each instance. In any event, it is not every amendment to a section that will be held to have modified or changed the law.

[219] In that case, the focus was on whether the applicable part of the section, in this instance that stipulating the penalty for murder, had been modified or changed. The court found that it had not been changed notwithstanding the addition to the existing law. The Board specifically stated that the operation of the existing law had been significantly modified by the enactment of section 4A to cater for those whose mental responsibility is substantially impaired. The court also referred in **Lester Pitman v State of Trinidad and Tobago** (supra) to changes to other sections of the Offences Against the Person Act as at the date when the case arose.

[220] But it must be borne in mind that the wording of the then Trinidad and Tobago's savings law clause differs from that of Jamaica. (The clause was changed in 2016, but the 2016 adjustment was not relevant to **Lester Pitman v State of Trinidad and Tobago** (supra)) There is nothing in the then savings law provisions of Trinidad and Tobago that prohibits modifications, as long as such modifications did not result in the law derogating from any fundamental right in a way that the existing law did not so derogate.

[221] Having regard to the plain provisions of the present savings law clause, it cannot be envisaged that the promulgation of the **Sexual Offences Act** and **Sexual Offences (Registration of Sex Offenders) Regulations** could in a very oblique manner have the impact of overriding the very clear and unmistakeable constitutional provision specifically preserving the law relating to sexual offences in force prior to the commencement of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011** and immunizing it from constitutional challenge on the ground that such law infringes a constitutional right.

[222] No generous interpretation where there is potential breach of a constitutional right or no restrictive interpretation to a savings law clause could afford such result as contended for by the claimant.

[223] I conclude by making the observation that it is disquieting that the state would be so driven by what must clearly be an agenda so as to preserve from scrutiny by way of a savings law clause laws which would otherwise infringe rights guaranteed by the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011,** but it is, sadly, for Parliament and not the courts to provide the remedy so that the laws can be open to scrutiny.

ADDENDUM

[224] In this addendum, I address a matter which arose subsequent to preparing my judgment.

The further submissions of the claimant relating to the defendant's further submissions on sexual offences.

[225] The claimant, on October 2, 2023, filed further submissions in response to the defendant's further submissions and authorities regarding sexual offences. The claimant asserts that the defendant did not have the permission of the court to file further submissions. The claimant also noted that the defendant did not respond to the claimant's arguments on the question of whether the impugned sections of the **Offences Against the Persons Act** create (more accurately, penalize) sexual offences but that the defendant sought to say that the claimant ought not to be permitted to make the argument that sections 76, 77 and 79 did not create sexual offences, since the defendant may be prejudiced by any such assertions. The basis for the defendant assuming that posture according to the defendant's submissions is that the case had proceeded on the understanding that the offences were sexual offences.

[226] It must be borne in mind that it was the Court that raised the question whether the impugned sections of the **Offences Against the Persons Act** refer to sexual offences, and thereafter directed the parties to make submissions on the matter. I do not therefore find it necessary to further address the concerns raised by the claimant.

The Indian case

[227] **Navtej Singh Johar & Ors. V Union of India and the Secretary Ministry of Law and Justice, Writ Petition Criminal No.76 of 2016** is a landmark decision of the Supreme Court of India unearthed by the efforts of The Honourable Mrs Justice Shelly Williams SPJ (Ag). The effect of the decision was to decriminalise all consensual sexual intercourse between adults, including sexual activities between homosexuals. This case may be added to the cases previously referred to in my judgment as an instance where it was declared that laws criminalizing sexual activities between homosexuals are unconstitutional. Miss White's distillation of the case is quite accurate and is sufficient to demonstrate that it is of little relevance to the questions to be answered in the instant case. I will nevertheless make a few observations about the case.

[228] The court was tasked with determining the constitutionality of section 377 of the Indian Penal Code (IPC), which criminalised carnal intercourse against the order of nature with any man, woman, or animal.

[229] The petitioners alleged that the impugned section violated Articles 14, 15, 19 and 21 of the Indian Constitution. Article 14 guarantees the right to equality before the law. Article 15 prohibits the State from discriminating on grounds only of religion, race, caste, sex, place of birth, or any of them. Article 19 guarantees the right to freedom and refers specifically to the right to freedom of speech and expression. Article 21 of the Constitution concerns the right to protection of life and personal liberty. The court extended the rights guaranteed by Article 21 to include the right to privacy and the right to choice of the citizenry and the right to one's sexual orientation. The court unanimously concluded that the rights alleged to have been breached were in fact breached.

[230] One major contention on the part of the petitioners was that section 377 IPC discriminated on the basis of sex, thereby violating Articles 15, in that discrimination on the ground of sexual orientation is discrimination on the ground of sex only, and therefore violated the guarantee of non-discrimination in Article

15(1). The issue which emerged was whether the act of consensual carnal intercourse between adults could be treated as a criminal offence if it violated the specified articles of the Indian Constitution.

[231] The Court adverted to the definition of 'sexual intercourse' in Black's Law Dictionary as "a contact between a male and a female's organ." As it relates to 'unnatural offences', section 377 IPC referred specifically to anyone having carnal intercourse against the order of nature. 'Carnal' it was noted, based on the definition in Black's Law Dictionary, means of the body, relating to the body, fleshy, or sexual. The court referenced a case where it was held that mouth contact with the male genital amounted to carnal intercourse against the order of nature.

[232] We are not in the matter at hand concerned with the definition of sexual intercourse, but rather with what is a sexual offence as referred to in the savings law clause in section 13 of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011**. Throughout the entire case, no definition of 'sexual offences' has been given.

[233] It may be observed that in the judgment of Dipak Misra CJI and AM Kanwilkar J, reference was made to sex being performed differently as per the choice of consenting adults. What is evident from that reference, is that the court there assumed that acts other than penal penetration of the vagina are sexual acts. A logical extension of that position would be that such other acts (sex performed differently) committed in contravention of statutory provisions criminalizing any such conduct, would be sexual offences. That position arose in India as a consequence of an amendment by the Criminal Law (Amendment) Act, 2013 which expanded the definition of rape to include penetration of the penis into the anus, the mouth and other parts of the body and even the penetration of other objects or parts of the body into the mouth, anus or other parts of the body. That position although the result of statute, tends to support the conclusion that an act such as that which in our law constitutes buggery, and which for our purposes has been criminalized, is a sexual offence.

[234] There is also mention in the judgment of Nariman J at paragraph 49 to the decision in **National Legal Services Authority v. Union of India and others** 1 **(2014) 5 SCC 43**. In dealing with section 377 IPC, reference was made in the latter case to criminalizing all penile non vaginal sexual acts, including anal sex and vaginal sexual acts between persons. This is confirmation that in the Indian context, it is not considered that sexual offences are confined to vaginal intercourse. Further, neither are they confined to offences in which absence of consent or the inability to consent is an essential ingredient. There is no real basis why sexual offences should be so confined in our Jamaican context.

The approach to constitutional interpretation in the Indian case

[235] In **Navtej Singh Johar & Ors. Versus Union of India and the Secretary Ministry of Law and Justice** (supra) the approved approach to the treatment of a savings law clause where pre constitution law is in conflict with human rights provisions in the constitution is not one that is available to this court. That court was definitive, for example, at paragraph 145 of the judgment of Dr Dhananjaya Y Chandrachud, J that "*after the enactment of the Constitution, every individual assertion of rights is to be governed by the principles of the Constitution, by its text and spirit"*. This point was made without reference to the existence of any savings law clause and the impact of such clause where the pre-Constitution law is in conflict with saved law.

[236] To the extent that the above pronouncement was made, though not necessarily applied in the case because of the absence of any savings law clause relating to sexual offences, it represents an approach somewhat similar to one of the approaches taken by the Caribbean Court of Justice in **Quincy Mc Ewan et al v Attorney General of Guyana (**supra). It will be remembered that in **Quincy Mc Ewan et al v Attorney General of Guyana (**supra)**,** the CCJ determined that the power of judicial review was not to be impeded by the pre-independence savings law clause, and so the pre-independence law was not immunized from being found to be in contravention of human rights provisions in the Constitution. The basis

was on the theory that the savings law clause had the limited purpose of securing an orderly transition into independence and could not operate to limit constitutional review of colonial law at this stage of Guyana's political evolution. Further, that if the savings law clause operates to shield colonial laws from constitutional review, then the concept of constitutional supremacy would be redundant.

[237] At paragraph 44 of the judgment of R.F. Nariman, J, pertinent observation was made on the approach to the savings law clause with reference to the constitutional validity of section 30 of the Punjab Excise Act, a pre-Constitution enactment. This was addressed in the case of ***Anuj Garg and Ors. v. Hotel Association of India and Ors***. (2008) 3 SCC 1, where the following was said:

> *"7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid."*

[238] As happened in ***Quincy Mc Ewan et al v Attorney General of Guyana*** (supra), the court in ***Navtej Singh Johar & Ors. Versus Union of India and the Secretary Ministry of Law and Justice (***supra) also adverted to India's constitutional duty to honour internationally recognized rules and principles and by extension, the country's legal obligations to adhere to those rules and principles in the light of the existence of treaty arrangements. I will only say that Jamaica has an obligation to ensure that the laws of Jamaica allow for adherence to international obligations relating to protection of human rights, but if and when the laws are at variance with the ability to in all respects honour obligations those obligations, it is for Parliament

to act and not for the courts to seek to ensure that adherence, where to do so would require a strained interpretation of existing constitutional provisions.

The Mauritian case

[239] Mr Wilkinson directed the court's attention to the case of **Abdool Ridwan Firaas Ah Seek v State of Mauritius and Collectif-Arc-en-Ciel (Interested Party).** This case in my view bears no relevance to the issue in the matter to be decided. It is however, yet another case in which it has been declared that a law criminalizing sexual activities between homosexuals is unconstitutional. The plaintiff in **Abdool Ridwan Firaas Ah Seek v State of Mauritius and Collectif-Arc-en-Ciel (Interested Party) Record No**. **119259,** was a gay man, who contended that section 250 of the Criminal Code, which provides for the offence of sodomy and criminalizes anal sex between consenting male adults in private, is unconstitutional in so far as it breaches his rights under section 16 of the Constitution, which provides for protection from discrimination. "Discriminatory" was defined in section 16(3) as:

> *"affording different treatment to different persons attributable wholly or mainly to their respective descriptions by **sex**, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description"* (emphasis added)

[240] The plaintiff argued that 'sex' under section 16 should be read as including 'sexual orientation'. The Court determined that the argument that "sex" under section 16 of the Constitution includes "sexual orientation" was "powerful and persuasive" (page 17 to 18 of ***Abdool*** (supra) judgment) and found accordingly in favour of the plaintiff.

Further submissions of the parties

[241] I have read the further submissions filed by the parties in relation to the case of ***Navtej Singh Johar & Ors. Versus Union of India and the Secretary Ministry of Law and Justice*** (supra). I do not find it necessary to reproduce any aspect of any of those submissions here, since nothing was advanced that has caused me to have a change of position from that which I have stated.

Shelly-Williams Snr. PJ Ag.

It is therefore the order of the court that;

(1) *The constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act cannot be enquired into in the light of the savings law clause in section 13(12) of the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica.*

(2) The Claim in consequence stands dismissed

(3) Question of costs reserved for further submissions

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Shelly-Williams Snr. PJ Ag.

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David Batts, J

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Pettigrew-Collins, J.