Privy Council Appeal No 59 of 2004

The State *Appellant*

v.

Abdool Rachid Khoyratty *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 22nd March 2006

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Present at the hearing:-

Lord Rodger of Earlsferry
Lord Steyn
Lord Carswell
Lord Mance
Sir Swinton Thomas

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*[Delivered by **Lord Steyn**]*

Bail in Mauritius.

1. The institution of bail in Mauritius, and the principles which should guide the courts in exercising their discretion to grant or withhold bail, have been explained in earlier cases. In *Hurnam v The State* [2005] UKPC 49, Lord Bingham of Cornhill summarized the tensions and countervailing arguments which can arise in such cases.

He stated [para 1]:

> "In Mauritius, as else where, the courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions, pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences."

Historically, in Mauritius, granting or withholding of bail was treated as a classic judicial power and duty. This is demonstrated by the functions and processes of the courts of law.

<u>An attempt to curtail bail.</u>

1. In 1986 by ordinary legislation Parliament passed the Dangerous Drugs Act (Act No 32 of 1986) which contained a prohibition on the grant of bail in respect of specific offences. *In Nordally v Attorney General* [1986] MR 204 the Supreme Court held that this statute was inconsistent with the Constitution. The court observed that the trial of persons charged with criminal offences and all incidental or preliminary matters pertaining thereto are to be dealt with by an independent judiciary. Addressing the matter of bail, the court concluded (at p 208) that it was not in accord with the letter or spirit of the Constitution, *as it then stood*, to legislate so as to enable the executive to overstep or bypass the judiciary in its essential roles. This judgement left open the possibility of removing from the courts the jurisdiction to withhold bail by constitutional amendment in specific classes of cases. It is a possibility which was not overlooked.

Restricting bail by constitutional amendment.

1. Subsequently an attempt was made to curtail the jurisdiction of the court to grant or withhold bail. It was sought to be accomplished by a two-fold legislative method viz an amendment to the Constitution made in 1994 and a re-anactment of the Dangerous Drugs Act in 2000.

1. The constitutional amendment was contained in section 5(3A) of the Constitution, as inserted by section 2 of the Constitution of Mauritius (Amendment) Act 1994 (Act No 26 of 1994). The setting of section 5(3A) was the existing section 5(3) which reads:

> "(3) Any person who is arrested or detained
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> (a) for the purpose of bringing him before a court in execution of the order of a court;
>
> (b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence; or
>
> (c) upon reasonable suspicion of his being likely to commit breaches of the peace,
>
> and who is not released, shall be afforded reasonable facilities to consult a legal representative of his own choice and shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including, in particular, such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial; and if any person arrested or detained as mentioned in paragraph (c) is not brought before a court within a reasonable time in order that the court may decide whether to order him to give security for his good behaviour, then, without prejudice to any further

proceedings that may be brought against him, he shall be released unconditionally."

The new section 5(3A)(a) and (b) as amended by section 2 of the Constitution of Mauritius (Amendment) Act 2002 (Act No 4 of 2002) reads:

"(3A)(a) Notwithstanding subsection (3), where a person is arrested or detained for an offence related to terrorism or a drug offence, he shall not, in relation to such offences related to terrorism or drug offences as may be prescribed by an Act of Parliament, be admitted to bail until the final determination of the proceedings brought against him, where-

(i) he has already been convicted of an offence related to terrorism or a drug offence; or

(ii) he is arrested or detained for an offence relating to terrorism or a drug offence during the period that he has been released on bail after he has been charged with having committed an offence relating to terrorism or a drug offence.

(b) A Bill for an Act of Parliament to prescribe the offences relating to terrorism or drug offences under paragraph (a) or to amend or repeal such an Act shall not be passed by the Assembly unless it is supported at the final voting in the Assembly by the votes of not less than three quarters of all the members of the Assembly."

1. Section 32 of the Dangerous Drugs Act 2000 (Act No 41 of 2000) contains a restriction of bail in certain classes of cases. It provides:

"(1) Notwithstanding any other enactment, where a person is arrested or detained for an offence under sections 30, 33, 35, 36 or 39 of this Act, he shall not be admitted to bail until the final determination of the proceedings brought against him where-

(a) he has already been convicted of any drug offence; or

(b) he is arrested or detained whilst on bail in relation to a drug offence.

(2) For the purposes of this section, 'drug offences' includes an offence under the Dangerous Drugs Act."

The offences incorporated by reference are as follows: section 30 (drug dealing offences), section 33 (offences regarding production), section 35 (offering or selling for personal consumption), section 36 (facilitating or permitting drug offences), section 38 (inciting to drugs offences or unlawful use) and section 39 (money laundering).

The attempted enforcement of the new regime.

1. On 27 October 2003 a provisional information was lodged against the respondent charging him with possession of 3 grams of heroin for the purpose of selling, contrary to sections 30(1)(f)(ii), 45(1) and 47(5) of the Dangerous Drugs Act 2000 as amended by the Dangerous Drugs Act (Amendment) Act 2003 (Act No 29 of 2003). On the same day, a motion for bail was lodged with the District Court. The police objected to bail on the ground that under the new dispensation the court had no power to grant bail. It was common ground that the respondent was caught by the relevant restrictions on bail if they were constitutionally valid. A District Magistrate in October, November and December 2003 took the view that questions of constitutional interpretation under section 84 of the Constitution had been raised and he therefore referred the following questions to the Supreme Court on 5 January 2004:

"(a) whether by amending section 5 of the Constitution through the addition of the new sub-section 5(3A) Parliament in its constituent capacity has not altered the fundamental tenet of the Constitution; the Separation of Powers, to wit: the check and balance aspect?

(b) by what majority can Parliament in its constituent capacity alter the separation of powers; the argument being

> that if a Constitutional (Amendment) Act is not supported at the final voting by the prescribed majority of votes, then it cannot be read as one with the Constitution; the alteration it purports to make cannot become part of the Supreme Law and that Act is void to all intents and purposes;
>
> (c) is it constitutional to allow the Executive to detain a citizen indefinitely on a provisional charge of 'drug dealing' for instance without the judiciary being in a position to control the Executive and afford protection to the citizen as regards his personal liberty and his fundamental human right of being protected from inhuman or degrading or other such treatment as prohibited by section 7 of the Constitution?"

The principal questions posed were whether the new regime was consistent with section 1 and section 7 of the Constitution.

1. Section 1 provides:

> "Mauritius shall be a sovereign democratic State which shall be known as the Republic of Mauritius."

Since 1991 section 1 has been deeply entrenched in the sense that it could only be amended in accordance with section 47(3) of the Constitution (see para 16 below). Section 7(1) provides:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

Section 47(2) provides that section 7 may not be altered by less than three quarters of the members of the Assembly.

1. After a careful review the Supreme Court (Y K J Yeung Sik Yuen SPJ and P Lam Shang Leen J) came to the following conclusions:

> "In the particular context of our Constitution, more specially in the light of our notion of democracy as is contained in section 1, we are of the opinion that section 5(3A), although it is compliant with section 47(2), [having

> admittedly been voted with three-quarters majority] is in breach of section 1 since the imperative prohibition imposed on the judiciary to refuse bail in the circumstances outlined therein amounts to interference by the legislature into functions which are intrinsically within the domain of the judiciary. In *Dlamini v The State* [2000] 2 LRC 239, at para 74, the Constitutional Court very aptly observed:
>
> 'what is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.'
>
> There is also an added reason why section 5(3A) in relation to its provisions dealing with drug offences should be struck down. This is in relation to section 7 of the Constitution which, as we have seen, provides for a fundamental human right to be protected from inhuman or degrading or other such treatment…
>
> Again the exercise of granting bail is a judicial one which is duly recognized by section 5(3) of the Constitution. It is a judicial act in the same way as passing sentence and must be left to the judiciary to adjudicate when and in what circumstances it must be granted or refused. If there is any need to recomfort the legislature, we may aptly state that the higher judiciary in Mauritius has the necessary mechanism to check any unreasonable decision of any errant Magistrate when bail is either refused or granted where it should not have been. . .
>
> Proportionality is therefore relevant equally to the issue of refusal to grant bail as well as that of sentencing."

The court made the following order:

> "We declare that section 32 of the DDA and section 5(3A) of the Constitution, insofar as regards drug offences, are void since they infringe sections 1 and 7 of the Constitution.

Our answers to the questions posed are as follows:

(a) yes;

(b) the majority set out in section 47(3) of the Constitution

(c) no."

The State now challenges the decision of the Supreme Court.

The Issues.

1. The shape of the case can be stated shortly. The Privy Council must consider whether section 5(3A) of the Constitution and section 32 of the Dangerous Drugs Act 2000 are consistent with sections 1 and/or 7 of the Constitution. The Board designedly uses the inelegant expression "and/or". The reason is that it must not be assumed in advance of analysis, that the two questions can be treated entirely separately. In addition counsel for the respondent relied on other provisions of the Constitution. The Board proposes in the first place to examine the impact of section 1 of the Constitution, interpreted in context.

The State's argument on section 1.

1. In a powerful argument Mr Ian Burnett QC, on behalf of the State, submitted that a measure such as section 5(3A) which amends the Constitution cannot be condemned as undemocratic, because the Constitution itself allows that amendment and provides the democratic mechanism by which it may be achieved. The separation of powers doctrine must be applied subject to the specific principles of the constitution, which allows power between branches of government to be redistributed. Accordingly, so the argument runs, the Supreme Court erred in its expansive interpretation of section 1. This argument must be carefully considered.

The context.

1. Before the issue can be directly addressed it is necessary to set out the constitutional background in more detail. That can conveniently be done

by citing a passage from the decision of the Privy Council in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 302-303, where the Board observed:

> "The structure of the Constitution of Mauritius 1968 is important. Chapter I provides that Mauritius shall be a sovereign democratic state: section 1. Mauritius is a parliamentary democracy on the Westminster model: *Hinds v The Queen* [1977] AC 195, 212B-H; *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157. The Constitution is the supreme law of Mauritius: any law inconsistent with the Constitution is invalid: section 2. Chapter II spells out various provisions for the protection of fundamental rights and freedoms of the individual. Sections 5 and 12 to which their Lordships have referred are part of this chapter. Chapter V deals with Parliament. Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Mauritius: section 45(1). Parliament may only amend the Constitution in accordance with the manner and form prescribed: section 47. Subject to the Constitution, the sole legislative power vests in Parliament. Having dealt with the special position of the Governor-General in Chapter IV, the Constitution makes general provision for the powers of the executive in Chapter VI. This chapter provides for the exercise of executive authority. Under the Constitution Chapter VI is the exclusive foundation of executive authority. Chapter VII deals with the third department of the government – the judicature. The Constitution entrusts the Supreme Court with unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law: section 76. It provides the Supreme Court with a supervisory jurisdiction over all inferior courts for the purpose of ensuring that justice is duly administered by any interpretation of the Constitution and the enforcement of fundamental rights including the right to the protection of the law: sections 3, 17, 83 and 84. It provides for a power of constitutional and judicial review over all persons and authorities exercising functions under the Constitution: section 119. The independence of the court is protected by

> provisions relating to the appointment and tenure of the judges: sections 76 to 78. In addition, the court is given appellate jurisdiction from subordinate courts where there is no other mode of appeal: section 82(2). The Courts of Civil and Criminal Appeal are made divisions of the Supreme Court: section 80.
>
> From these provisions the following propositions can be deduced. First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary.'

While the judgment in *Ahnee* does not afford the answer to the question under consideration it is relevant in emphasising (a) that Mauritius is a democratic state based on the rule of law; (b) that the principle of separation of powers is entrenched; and (c) that one branch of government may not trespass on the province of any other in conflict with the principle of separation of power.

Analysis.

1. The Board proposes to analyse the question in a number of steps.
The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

1. In Director *of Public Prosecutions of Jamaica v Mollinson* [2003] 2 AC 411 Lord Bingham of Cornhill examined the separation of powers under a Westminster constitution, viz the Jamaican Constitution. In a

unanimous judgement of the Board Lord Bingham observed [at para 13]:

> "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as 'a characteristic feature of democracies': *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891, para 50."

The observation cited from *Anderson* was expanded in my judgement in that decision. I observed [at para 50]:

> "In *R v Trade Practices Tribunal, Ex p Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 Windeyer J explained the difficulty of defining the judicial function as follows:
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> 'The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law.'
>
> Nevertheless it has long been settled in Australia that the power to determine responsibility for a crime, and punishment for its commission, is a function which belongs exclusively to the courts: G F K Santow, 'Mandatory Sentencing: A Matter For The High Court?' (2000) 74 ALJ 298, 300 and footnotes 17 and 18. It has been said that 'the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive': *Deaton v Attorney General and Revenue Comrs* [1963] IR 170, 183: see also *In re Tracey; Ex p Ryan* (1989) 166 CLR 518, 580; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27; *Nicholas v The Queen* (1998) 193 CLR 173, 186-187, per Brennan CJ. The

> underlying idea, based on the rule of law, is a characteristic feature of democracies."

Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Scott of Foscote and Lord Rodger of Earlsferry expressly agreed with this judgement. It may well be that Lord Hutton and Lord Hobhouse of Woodborough did not take a different view on this point. In any event, it can be treated as settled law in the United Kingdom. The third case on the general approach to be adopted is even more important. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham gave the leading judgement. He stated at para 42:

> ". . . It is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

While not conclusive of the issue presently before the Board, these decisions give important colour to the words of section 1 of the Constitution, viz that Mauritius *shall* be a democratic state.

1. There is another aspect to take into account. The Supreme Court observed that decisions on bail are intrinsically within the domain of the judiciary. At the very least that means that historically decisions on bail were regarded as judicial. The importance of the historical perspective was emphasised in the Australian jurisprudence cited in *Anderson*. This factor too gives colour to the words of section 1.

1. These factors are however, transcended in importance by two special features. First, section 1 of the Constitution is not a mere preamble. It is not simply a guide to interpretation. In this respect it is to be distinguished from many other constitutional provisions. It is of the first importance that the provision that Mauritius "shall be . . . a democratic State" is an operative and binding provision. Its very subject matter and place at the very beginning of the Constitution underlies its importance. And the

Constitution provides that any law inconsistent with the Constitution is *pro tanto* void: section 2.

1. Secondly, as already pointed out, in 1991 section 47(3) of the Constitution was amended (by Act No 48 of 1991) to make provision for a deep entrenchment of sections 1 and 57(2). It reads as follows:

> "A Bill for an Act of Parliament to alter the provisions of section 1 or 57(2) shall not be passed by the Assembly unless-
>
> "(a) the proposed Bill has before its introduction in the Assembly been submitted, by referendum, to the electorate of Mauritius and has been approved by the votes of not less than three quarters of the electorate;
>
> (b) it is supported at the final voting in the Assembly by the votes of all the members of the Assembly."

These are two of the most fundamental provisions of the Constitution, respectively making provision that Mauritius shall be a democratic state and for quinquennial Parliaments. This is an exceptional degree of entrenchment. By its clear intendment it militates against a right to bail, qualified as it is, being abolished by ordinary legislation or by a constitutional provision which does not comply with the requirement of deep entrenchment of section 1.

1. It may also be permissible to have regard to the mischief to which the deeply entrenched section 1 was directed. The overriding purpose was made crystal clear in the Parliamentary debates as reported in *Hansard* on 9 December 1991. The Prime Minister, Sir Anerood Jugnauth stated [Col 1363]:

> "Mr Speaker, Sir, the opportunity has also been taken to make some other amendments to the Constitution. Members of the House will recall that a number of legislative measures have been introduced over the past twelve months in order to consolidate the democratic foundations of our society. Today, we are taking that exercise a little further. . . the present Government also

> wants to establish firmly the democratic basis of our Constitution by making it practically impossible to amend Section 1 of the Constitution. Let it not therefore be said that this Government does not cherish democratic principles."

In the same debates the Attorney General and Minister of Justice, Mr Alan Ganoo stated [Cols 1487-1488]:

> "Mr Speaker, Sir, I will now come to a last point of my intervention. It concerns the first section of the Constitution, Sir. If the prospect of acceding to the status of Republic arouses, as I just said, a feeling of pride and dignity in all of us today. I think the thought of amending section 1 of our Constitution to render this clause practically unamendable should rejoice all of us who are true democrats in this House. On a philosophical level, Sir, and globally, if you look at all the proposed amendments, you will see that the common feature, the thread which ties most of those principal amendments to our Constitution today is the consolidation of the democratic foundation of our country.
>
> . . .
>
> Now, as regards section 1 of our Constitution, Sir, it will mean that to amend that section, it will necessitate a referendum and it will mean that there should be no dissentient voice in the Assembly. I should perhaps congratulate the Prime Minister for that very bold decision, Sir. I think that there are very few countries in the Third World with a written Constitution like ours which have achieved what we are achieving, Sir. We are deciding that to amend the democratic nature of the State, you will need a referendum and you will need the approval of all the Members of the House. I do not know of any other country which has done this!"

If necessary the objective mischief as spelt out in the debates reinforces the fundamental nature of the entrenchment of section 1.

1. Cumulatively, all these factors compel the conclusion that the Constitution could only have been amended in the manner provided by section 47(3). The failure to comply with this deeply entrenched provision renders section 5(3A) and section 32 of the Dangerous Drugs Act void.

The outcome.

1. The Board has been impressed with the analysis of the decision of the Supreme Court on section 1 in the instant case as well as in the earlier decision of the Supreme Court in *Vallet v Ramgoolam* [1973] MR 29, at 39-41, and respectfully agree with these decisions. The Board respectfully endorses the decision of the Supreme Court on section 1 in the present case.

1. In these circumstances it is unnecessary to examine the arguments based on section 7 and other provisions of the Constitution.

Disposal.

1. The Privy Council dismisses the appeal.

Lord Rodger of Earlsferry

1. Lord Steyn has given the judgment of the Board. Because of the importance of the constitutional issue, however, I wish to spell out the reasoning which has led me to the same conclusion.

1. On 12 March 1968 Mauritius became an independent constitutional monarchy. The independence Constitution, which was on the familiar Westminster-style model, was set out in the Schedule to the Mauritius Independence Order 1968. At that time section 1 of the Constitution provided that "Mauritius shall be a sovereign democratic State." Section 3 recognised and declared certain fundamental rights and freedoms, including the right of the individual to life, liberty and security of the person and to the protection of the law. Section 5(3) was in the form set out in Lord Steyn's judgment. Section 47 prescribed the way in which provisions of the Constitution could be amended. In 1982 Parliament passed, in due form, the Constitution of Mauritius (Amendment) Act 1982, section 3 of which amended section 47 in several respects. These included

the insertion of a new subsection (3) which provided that an Act of Parliament for the amendment of section 57(2) (providing for quinquennial Parliaments) was not to be passed unless the proposed Bill had first been approved by three-quarters of the electorate in a referendum and had then been supported at the final voting in the Assembly by all the members of the Assembly. In terms of subsection (4) of section 47 as then amended, section 1 of the Constitution could be altered by a vote of two-thirds of the members of the Assembly but, by virtue of section 47(2)(c), amendment of section 5 required a vote of not less than three-quarters of all the members of the Assembly.

1. In 1991 the Assembly passed the Constitution of Mauritius (Amendment No 3) Act 1991 ("the 1991 Act") which made extensive changes to the Constitution. There is no challenge to the validity of any of these changes which took effect from 12 March 1992. Prominent among them was the change from a constitutional monarchy to a republic. In consequence, section 1 was altered. As amended by section 3 of the 1991 Act, section 1 of the Constitution now provides:

> "The State of Mauritius shall be a sovereign democratic State which shall be known as the Republic of Mauritius."

At the same time, by section 9 of the 1991 Act, the Assembly amended section 47(3) of the Constitution by inserting a reference to section 1. Thus amended, section 47(3) now provides that section 1 can be amended only if the proposed Bill has first been approved by three-quarters of the electorate in a referendum and has been supported at the final voting in the Assembly by all the members of the Assembly. The effect is to entrench section 1 very deeply indeed.

1. Historically, the grant or withholding of bail has been a matter for the judges of Mauritius, but from 1986 onwards the legislature has sought to exclude the grant of bail in relation to certain offences. The first attempt, in section 46(2) of the Dangerous Drugs Act 1986, failed when the Supreme Court held that the provision was void because it was inconsistent with section 5(3) of the Constitution: *Nordally v Attorney General* [1986] MR 204. The legislature sought to meet this objection by passing the Constitution of Mauritius (Amendment) Act 1994 ("the 1994 Act"). Section 2 purported to amend section 5 of the Constitution by inserting a new subsection (3A) in the terms quoted by Lord Steyn. The

effect is to provide that certain people charged with particular drugs offences prescribed by an Act of Parliament, which has been passed by a three-quarters majority, shall not be admitted to bail until the final determination of the proceedings against them. It is common ground that the 1994 Act was passed by a vote of at least three-quarters of all the members of the Assembly, which would be sufficient for an amendment to any section of the Constitution except sections 1 and 57(2). Section 2 of the Constitution of Mauritius (Amendment) Act 2002 purported to extend section 5(3A) to cover offences related to terrorism, but nothing turns on that for present purposes.

1. After the 1994 Act was passed, no immediate steps were taken to pass an Act of Parliament prescribing drugs offences in relation to which bail would be excluded, as had been envisaged in the new section 5(3A). In 2000, however, the Assembly unanimously enacted the Dangerous Drugs Act 2000. Section 32 does indeed specify a number of offences where bail is to be excluded. The respondent was charged with one of those offences.

1. The respondent has raised a constitutional challenge. In the written and oral submissions before the Board, both sides addressed an argument to the effect that section 5(3A) of the Constitution was itself unconstitutional. In my view, however, more precisely, the issue is whether section 2 of the 1994 Act, which purported to insert subsection (3A) into section 5 of the Constitution, was constitutional. If that provision was constitutional, then subsection (3A) was duly inserted into the Constitution and so came to form part of the Constitution. If, on the contrary, section 2 of the 1994 Act was unconstitutional, then the Constitution remains unamended and subsection (3A) of section 5 forms no part of it. In that event also, section 32 of the Dangerous Drugs Act 2000 would be inconsistent with section 5(3) of the Constitution and, accordingly, void to that extent.

1. When the respective submissions are teased out, the critical question is whether, by purporting to insert section 5(3A) into the Constitution, section 2 of the 1994 Act had in substance sought not only to amend section 5, as counsel for the State contended, but also to alter the form of democratic state guaranteed by section 1 of the Constitution. Admittedly, the 1994 Act had been passed in a manner which would allow the amendment of section 5. But section 1 can be amended only after the proposed Bill has been approved by three-quarters of the voters in a referendum and supported by a unanimous vote of the members of the

Assembly. The case for the respondent was that, by removing from the judges the power and duty to decide on matters of bail in relation to offences prescribed by an Act of Parliament, section 2 of the 1994 Act really purported to amend section 1 of the Constitution. More particularly, it was designed to alter one of the well-understood components of a democratic state as envisaged in section 1, viz the separation of executive and judicial powers. Since, however, section 2 of the 1994 Act had not been passed by the necessary special mechanism, the guarantee in section 1 stood unamended. Section 2 of the 1994 Act sought to introduce a provision which was inconsistent with the concept of a democratic society as guaranteed in section 1 of the Constitution. Section 2 was accordingly void, by reason of section 2 of the Constitution, and so section 5 of the Constitution also remained unamended.

1. Giving content to the term "democratic state" in section 1 is part of the task of judges who are called upon to interpret the Constitution. Garrioch SPJ, giving the judgment of the Supreme Court recognised this, for instance, in *Vallet v Ramgoolam* [1973] MR 29, 40. Having regard, in particular, to the specially entrenched status of section 1, in my view it would be wrong to say that the concept of the democratic state to be found there means nothing more than the sum of the provisions in the rest of the Constitution, whatever they may be at any given moment. Rather, section 1 contains a separate, substantial, guarantee. On the other hand, what matters is the content of the concept of a democratic state as that term as used in section 1 and not just generally. That said, the Constitution is not to be interpreted in a vacuum, without any regard to thinking in other countries sharing similar values. Equally, experience in Mauritius is likely to prove of value to courts elsewhere. Therefore, the decisions cited by Lord Steyn do indeed "help to give important colour" to the guarantee that Mauritius is to be a democratic state. In particular, it is a hallmark of the modern idea of a democratic state that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary, on the other.

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

particular case might be. By contrast, a provision, for example, that persons of the type envisaged in the subsection should not be admitted to bail unless in exceptional circumstances would not create the same problems because the judges would still have a significant, even if more restricted, role in deciding questions of bail and of the freedom of the individual. Unfortunately, however, as Mr Guthrie QC stressed on behalf of the respondent, precisely because it is absolute in form and effect, subsection 5(3A) is liable to operate arbitrarily and so, it may well be, to create potential difficulties in relation to section 3(a) of the Constitution. Moreover, there is a risk that, by choosing to charge an offence which falls within section 32 of the Dangerous Drugs Act, the relevant agent of the executive, rather than a judge, would really be deciding that a suspect should be deprived of his liberty pending the final determination of the proceedings. In these respects, the executive would be trespassing upon the province of the judiciary: *Ahnee v DPP* [1999] 2 AC 294, 303. In my view a state whose constitution permitted accused persons to be locked up until the termination of the proceedings against them without any right to apply to the court for bail would be, in this essential respect, different from the kind of democratic state which section 1 declares that Mauritius is to be. To that extent, section 2 of the 1994 Act purported to water down the guarantee in section 1.

1. Of course, it is open to the people and legislature of Mauritius to change the nature of the democratic state which is to prevail in Mauritius. But under the Constitution that can be done only by legislation passed in accordance with the (intentionally) ultra-strict requirements of section 47(3), involving a referendum and a unanimous vote of all the members of the Assembly. Section 2 of the 1994 Act was not enacted in accordance with those requirements. Therefore, section 1 of the Constitution and the idea of a democratic state which it contains remain unamended. Section 2 of the 1994 purported to introduce a provision for bypassing the courts which violated the separation of powers guarantee that is one of the hallmarks of that concept of a democratic state. To that extent section 2 of the 1994 Act was inconsistent with section 1 of the Constitution and, accordingly, void. It follows that section 5 of the Constitution remains unamended. Section 32 of the Dangerous Drugs Act 2000 is inconsistent with section 5(3) of the Constitution. There being no section 5(3A) to save it, section 32 is also therefore void.

1. For these reasons, which supplement those given by Lord Steyn, I too

would dismiss the appeal.

Lord Mance

1. I agree with the judgment of the Board prepared by Lord Steyn and with Lord Rodger of Earlsferry's supplementary observations. It is apparent from the full record of the remarks of the Attorney General and Minister of Justice in the debate on 9th December 2001, from which Lord Steyn has already quoted part, that the deep entrenchment of article 1 of the Constitution achieved by the amendment in 1994 of section 47(3) was introduced with circumstances in mind in which basic democratic principles were put in issue. The present issue concerns the nature of such principles and the extent of the inroad which must occur to infringe the entrenched provision that Mauritius shall be a "democratic" State.

1. On the one hand, the Attorney General and Minister of Justice made clear that chapter 2 (sections 3 to 19) of the Constitution was not in the same situation as chapter 1 (articles 1 and 2). This is evident from the confined nature of the entrenchment achieved by section 47(3). So, many amendments of the "fundamental rights and freedoms" of the individual spelled out in detail in chapter 2 of the Constitution are possible with a two-thirds majority of the Assembly. On the other hand, the Attorney General and Minister of Justice also made clear that article 1 was not envisaged as an empty general statement, but as a real bastion to "protect and perpetuate" among other things "the rule of law" and "the existence of an independent judiciary", that is independent of the executive and legislature.

1. These are basic principles themselves not expressly spelled out elsewhere in the Constitution, for reasons explained by Lord Diplock in *Hinds v. The Queen* [1977] AC 195 (a decision followed in *Director of Public Prosecutions of Jamaica v. Mollison* [2003] 1 AC 41 to which Lord Steyn has referred). Lord Diplock giving the majority judgment said that new constitutions on the Westminster model were, particularly in the case of unitary states, evolutionary not revolutionary and that:

> "Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that

> the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. …. Nonetheless, it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively."

1. These basic principles were in my opinion infringed, even though only in a limited sphere, by the purported constitutional amendment in 1994 of section 5 to insert subsection (3A)(a). The effect of the amendment was to remove from the judiciary any responsibility for and power in respect of the liberty of any individual, prior to any trial for a prescribed drug offence upon reasonable suspicion of which the prosecuting authorities might arrest and detain him. The scheme of section 5 prior to such amendment permitted a person to be arrested upon reasonable suspicion, and then required him or her to be brought without delay before a court, for remand in custody or on bail pending trial as the court determined. To remove the court's role - and in the process to prescribe automatic detention in custody pending trial whenever prosecuting authorities have reasonable grounds to arrest for a prescribed drug offence - is not merely to amend section 5, it would be to introduce an entirely different scheme. The new scheme would contradict the basic democratic principles of the rule of law and the separation of judicial and executive powers which serve as a primary protection of individual liberty and are entrenched by the combination of sections 1 and 47(3).