



LAW REFORM COMMISSION

Review Paper

The Criminal Justice System and the Constitutional Rights of an Accused Person

[September 2008]

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Introductory Note

1. Human rights, as afforded protection by the Constitution and various international instruments, have a bearing on the criminal process.¹ Criminal evidential or procedural rules are meant to give effect to those rights and their adequacy, whether they are satisfactory or lacking, have to be analyzed in the light of those rights.² An item of evidence obtained in breach of a constitutional guarantee may be held by the courts to be inadmissible.³
2. This Paper deals with the constitutional rights of an accused person, and is meant to develop awareness as to the implication of those rights at trial stage. It is a logical continuation to the Discussion Paper released last April on “The Law and Practice relating to Criminal

¹ The following fundamental rights and freedoms impact on the criminal process: right to life; protection against torture, inhuman or degrading treatment or punishment; right to privacy and to enjoyment of possessions; right to liberty and freedom of movement; right to justice.

²The validity of any rule of evidence or criminal procedure is to be assessed in the light of recognized constitutional rights; no procedure can be adopted which infringes a constitutional right. For instance that the hearing would not be fair if those called upon to deliver judgment have not heard all the evidence.

The constitutional provisions affording protection to the rights of a suspect or of an accused party may also indicate the procedure to be adopted in particular circumstances. For instance that a suspect must be informed of his right to consult a legal representative of his own choice, if the guaranteed right to be afforded reasonable facilities to consult a legal representative of his own choice is to be meaningful.

³ In *State v. Coowar* (1998) MR 10 [SCJ 64] Lam Shang Leen J. held that in the absence in our Constitution of a provision giving the court the discretion to admit evidence obtained in breach of fundamental right, evidence so obtained would per se be inadmissible; a court has no discretion in the matter.

However, in *Wahud v State* (1999) MR 270 [SCJ 187], the Full Bench of the Supreme Court approved what the Judicial Committee of the Privy Council had to say in *Mohamed (Allie) v. State* (The Times, Dec 10, 1998), namely that in deciding whether a particular item of evidence would be admissible or not one “should bear in mind the nature of [the] particular constitutional guarantee and the nature of [the] particular constitutional breach”. The Supreme Court endorsed the view taken by the Judicial Committee in *Mohamed (Allie)* that – (1) a breach of an [accused person’s] right to a fair trial would inevitably result in the conviction being quashed, but that by contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, was a somewhat lesser right and potential breaches could vary greatly in gravity; (2) in such case not every breach would result in a confession being excluded, the fact that there has been a breach of a constitutional right was a cogent factor militating in favour of the exclusion of the confession; the judge had to perform a balancing exercise in the context of the circumstances of the case [The Judicial Committee observed that the judge had to weigh the interest of the community in securing relevant evidence bearing on the commission of a serious crime so that justice could be done, with the interests of the individual who had been exposed to an illegal invasion of his rights.]; (3) it would generally not be right to admit a confession where the police had deliberately frustrated a suspect’s constitutional rights.

Investigation, Arrest and Bail”, in which some of the fundamental human rights which must be guaranteed at the stage of criminal investigations were highlighted.

3. The right to equality before the Courts and to a fair trial is guaranteed by the international human rights instruments. The major legal provisions on fair trial are to be found in article 14 of the International Covenant on Civil and Political Rights, article 7 of the African Charter on Human and Peoples’ Rights, and article 6 of the European Convention on Human Rights. These provisions are reproduced as Annex 1 to this Paper.
4. The UN Human Rights Committee last year released a General Comment on that right. We invite stakeholders to examine this general comment, attached as Annex 2 to this Paper, as the observations made therein are likely to generate further reflection on the subject-matter under review.

We are also reproducing as Annexes 3 to 7 codes of practice, guidelines and principles, evolved at international and domestic level, to secure the independence, impartiality and integrity of the judiciary, lawyers and prosecutors, core values which are vital for the effectiveness of the right to a fair trial.

5. By virtue of section 10 of the Constitution, every person charged with a criminal offence is recognized the following rights:
 - Right to be afforded a fair hearing within a reasonable time by an independent and impartial tribunal;
 - Right to be informed of the nature of the offence preferred against him;
 - Right to freedom from retroactive/retrospective criminal legislation;
 - Right to be presumed innocent;

- Right to be given adequate time and facilities for the preparation of his defence;
- Right to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative at the public expense;
- Right to be tried in his presence;
- Right to cross-examine witnesses of the prosecution and to call witnesses on his behalf;
- Right to remain silent;
- Right to the assistance of an interpreter if he does not understand the language used at the trial of an offence;
- Right to freedom from double jeopardy;
- Right not to be tried if granted pardon;
- Right to be tried in open court;
- Right to a copy of his judgment.

6. Our Constitution [section 3 taken together with section 10] also provides for equality before the Courts⁴ and for the right of an accused party to appeal against his conviction or sentence to a higher court according to law.

(A) Right of a person charged with a criminal offence to be afforded a fair and public hearing, within a reasonable time, by an independent and impartial court established by law

- (1) Right of a person charged with a criminal offence to a Fair Hearing within a reasonable time [Section 10(1) of the Constitution]

Meaning of ‘Fair Hearing’

7. In *Mamode v. R* (1991) MR 223, it was pointed out that the right to a fair trial guaranteed by section 10 of the Constitution implies fair and impartial inquiries by the police into the allegations of accused parties.

But in *R v. Amasimbi* (1991) SCJ 210, the trial judge was of the opinion that

"An unfair enquiry may be followed by an unfair trial and a fair enquiry may in its turn lead to an unfair trial. The two notions are different and distinct and it would be a wrong proposition in law to say that there cannot be a fair trial without a fair enquiry. If this were to be otherwise, all cases of entrapment would not be brought to court or at least could not lead to a conviction."

⁴ *Union of Campement Sites Owners & Lessees & ors. v. Govt. of Mauritius & ors.* [1984] MR 100.

8. The question has arisen whether an accused party is denied of his right to a fair trial if during the proceedings the Magistrate(s) are replaced, and the magistrate(s) who deliver the judgment had not heard the evidence or only part of it.

In *Syea V.R. (1968) M.R 100*, of the three magistrates who finally gave the judgment, only one had actually heard and seen the witnesses. In *Ecumoir v. R. (1984) SCJ 310*, the judgment was delivered by two magistrates neither of whom had heard the case. In both cases, the Supreme Court, as appellate Court, held that as the court was legally constituted, there was technically no irregularity in the judgment being thus delivered as the magistrates had power (under the courts act) to take, follow up and determine a case.

However, in *Sip Heng Wong Ng & Ng Ping Man v. Queen (1987) 1 WLR 1356 [(1985) MR 142: Privy Council Appeal No. 32 of 1985]*, the judicial Committee of the Privy Council reversed the judgment of the Supreme Court [(1985) SCJ 186]. In that case, of the two magistrates who convicted the defendants one had heard none of the evidence and none of the submissions of counsel. Furthermore, one of the magistrates who was party to the interlocutory judgment holding that there was a case to answer had likewise heard none of the evidence nor any of the submissions on that issue. The appeal was allowed and convictions quashed.

The Judicial committee of the Privy Council had this to say:

“In a criminal trial, whether before a jury or before magistrates, it is a fundamental requirement of Justice that those called upon to deliver the verdict must have heard all the evidence. The evaluation of oral evidence depends not only upon what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of the witnesses who give oral evidence, and it is upon this assessment that their verdict will ultimately depend. If they have not had the opportunity to carry out this vital part of their function as judges of the facts, they are disqualified from returning a verdict, and any verdict they purport to return must be quashed”.

Concerning the power of magistrates to “take, follow up and determine” a case begun before other magistrates, the Judicial Committee of the Privy Council made the following observations:

“If, after part of the evidence has been heard in a trial in which the accused pleads not guilty, it becomes necessary to replace a magistrate, there is no alternative but to recommence the trial and recall the evidence so that all the magistrates hear all the evidence and the submissions made on behalf of the accused. *Syea v. The Queen* (1968) M.R. 100 was wrongly decided and should not be followed”.⁵

9. In *Police v. Poonoosamy* (1986) MR 134, the Court considered that

”The concept of a ‘fair trial’ enshrined in section 10 (1) of the Constitution cannot, in our view, be so interpreted as to require that the mode of proving conclusively a particular fact, though that fact may be a constituent element of an offence, must invariably take the form of oral evidence which the defence must be allowed to test by cross-examination.”⁶

⁵ Vide also *Meghu v State* (1993) MR 349, where the statement of the accused was ruled admissible by a differently constituted Bench to that delivering judgment and it was observed that it is not possible to accept the proposition that, notwithstanding the judgment of the Judicial Committee of the Privy Council in *Ng Wong v R* [1987] 1 WLR 1356, that of the Privy Council in *Curpen v R* in (1990), the case of the appellant could be split into 2 different hearings judged by a differently constituted Bench.

⁶ The Court made the following observations:

“Our law of evidence derives partly from English law and partly from our own statutory provisions (section 162 of the Courts Act). In accordance with both sources of our law, evidence on a number of matters may be given by modes of proof other than witnesses. Thus section 170 of the Courts Act provides as follows:

170. *Copies of public documents admissible.*

(1) *At any trial, the contents of any record, book, deed, map, plan or other document in the official custody of the Supreme Court, of the Conservator of Mortgages, of any Government department, of any Intermediate Court, of any District Court, or of any notary may be proved by means of a copy or extract certified under the hand of the Registrar, the Conservator of Mortgages, the chief clerk or head of such department, the Head Clerk of the Intermediate Court, the District Clerk, or such notary as the case may be, to be a true copy or extract.*

(2) *The copy shall be admissible in evidence at any trial to the same extent and in the same manner as the original would but for this Act be admissible.*

10. In *State v Bacha* (1996), counsel questioned the propriety of empanelling a jury in view of the pre-trial publicity which, it was submitted, had created such a risk of prejudice against the accused that no individual juror could be fairly and safely empanelled. The Court observed that, whilst the instances of pre-trial publicity were many and of a seriously prejudicial type, those happened 18 months ago. Experience has shown that the human recollection is short and the drama of a trial almost always has the effect of excluding from recollection that which went before. A newspaper article can prejudice a fair trial only if jurors see it, believe it, remember it, and act on it in preference to the evidence they receive in Court, despite a judicial direction to the contrary.

In *State v Koonjul & anor* (2007) MR 232, there had been widespread publicity in the media surrounding the case and it was argued that the pre-trial publicity had created such a real risk of irreparable prejudice against the accused that he cannot be tried fairly. The Court considered the impact on the trial of the publicity and was of the view that, in the absence of

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- (3) *Certificates that such copies or extracts are true and purporting to be signed by the Registrar or other person under subsection (1) shall, in the absence of proof to the contrary, be held to have been so signed.*

Indeed, it would otherwise be impossible to receive in evidence, for example, birth certificates, notarial deeds or other public or official documents when the subscribers are no longer of this world. Section 181 of the Courts Act also enables the certificates of certain public officers (Chief Government Analyst, Principal Forensic Science Officer and others) receivable in evidence without proof of the handwriting of the officer unless the Court decides that the attendance of the officer is necessary.

The question remains whether such records or documents constitute merely sufficient evidence of matters stated therein or else conclusive proof of those matters. The answer is provided by the law of evidence either derived from common law sources or else from specific statutes (vide generally Phipson on Evidence 9th Edition Chapters 31 and 33 in so far as English law is concerned and which largely applies in Mauritius with regard to matters where we have no specific statutory provisions). In a number of instances in England, statutes do provide examples of certificates being conclusive as to their contents e.g. certificates from Ministers of Pensions, Labour, Food, Shipping, National Service and of the President of the Air Board and President of the Air Council under, respectively, section 6 of the Ministry of Pensions Act 1916, section 11 of the New Ministries and Secretaries Act 1916, section 2 of the Ministry of National Service Act 1917 and section 10 of the Air Force (Constitution) Act 1917. Section 8 of our own Companies Act provides a good example of certificates from an officer charged with public duties, that is to say, the Registrar of Companies, being statutorily admissible as evidence of the truth of their contents. In *pari materia* section 15 of the English Companies Act of 1948 provides that the Registrar's certificate is *conclusive* evidence that all requisitions in respect of registration or matters precedent or incidental thereto have been complied with and that the association is a company authorized to be registered and is duly registered under the Act."

proof that the jurors were biased and having regard to the safeguards available in the criminal justice system, it could not be said that because of pre-trial publicity, there would never be a fair trial.

11. In *Dosoruth v State* (2004) MR 230, appellant claimed that he had been denied a fair hearing of his appeal and sought redress under sections 1 and 3 of the Constitution on the ground that he had been denied the protection of the law. He argued that his Counsel had been prevented from introducing new evidence on appeal. The Court held that, where an appellant sought to enter additional evidence on appeal, it had to be shown that such evidence was relevant to the issue which was before the trial Court and that, if steps had been taken to lead the evidence at that stage, it would have been admissible. The appellate court also had to be satisfied that the additional evidence should be taken into account at the stage of the appeal. In this case, the new evidence sought to be adduced on appeal had been available at the time of the trial and appellant's Counsel had not been able to explain why it had not been introduced at that time.

In *Jhoolun v State* (2005) MR 67, appellant was found guilty of making use of a forged document under sections 112 and 121 of the Criminal Code. On appeal, his Counsel made a preliminary request to adduce additional evidence. The question for determination was whether Appellant had the right to adduce fresh evidence on appeal and, if so, under what conditions. The Court held that section 96 (1) of the District and Intermediate Courts (Criminal Jurisdiction) Act, which purports to prohibit the Supreme Court from receiving fresh evidence on appeal is inconsistent with the generality of the power conferred by section 82 of the Constitution and the provisions of the Constitution which ensure equal protection of the law and equal rights to a fair trial. The proper test is whether it is in the interests of justice to receive fresh evidence and the availability of the evidence at the trial stage, considered in light of the existence or not of a reasonable explanation for not adducing it, is only a consideration, albeit an important one, to be weighed in the balance. The fresh evidence, if adduced at the trial, could have influenced the court's decision. The matter was remitted back

to the District Court for a fresh hearing, thus entitling the Appellant to adduce the additional evidence.

In *Hurnam v State & ors* (2007) MR 116 and 125, the applicant sought to reopen the criminal case, which had been heard and determined on the basis of the availability of fresh evidence. On the facts before it, the Court considered there was no new relevant and credible evidence which would cast a doubt on the propriety of his conviction.

The Requirement of a ‘Fair Hearing’ within a reasonable time

12. In *Darmalingum v. State* (1999) MR 186, the Judicial Committee made the following comments regarding section 10(1) of the Constitution:

“It will be observed that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law. Hence, if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time. And, even if his guilt is manifest, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable time. Moreover, the independence of the ‘reasonable time’ guarantee is relevant to its reach. It may, of course, be applicable where by reason of inordinate delay a defendant is prejudiced in the deployment of his defence. But its reach is wider. It may be applicable in any case where the delay has been inordinate and oppressive. Furthermore, the position must be distinguished from cases where there is no such constitutional guarantee but the question arises whether under the ordinary law a prosecution should be stayed on the grounds of inordinate delay. It is a matter of fundamental importance that the rights contained in section 10(1) were considered important enough by the people of Mauritius, through their representatives, to be enshrined in their constitution. The stamp of constitutionality is an indication of the higher normative force which is attached to the relevant rights ...

The normal remedy for a failure of this particular guarantee, viz. the reasonable time guarantee, would be to quash the conviction. That is, of course, the remedy for a breach of the two other requirements of section 10(1), viz. (1) a fair hearing and (2) a trial before an independent and impartial court.”

13. The view was taken in *Police v. Labat* (1970) M.R. 214 that since section 10(1) of the Constitution casts a duty on the court to give the case of a person charged with an offence a fair hearing within a reasonable time, it is obvious that the court cannot discharge that duty unless the person is charged with a criminal offence before it, and it is only then that the court has this duty, so that the words “charged with an offence” in section 10(1) should be taken to mean “arraigned before a court of law by which the accused is to be tried.” But note that in *Darmalingum v. State* (1999) MR 186, the Judicial Committee held, following *Deweere v. Belgium* [1980] 2 E.H.R.R. 439, that the relevant period commences with the arrest of an accused.
14. As there is no time limit for the prosecution of offences, the question has arisen whether a court can dismiss an information on the sole ground that owing to unreasonable delay in instituting criminal proceedings, it may not be possible for the court to give the case a fair hearing.⁷ In *Labat*, the views of the court were not unanimous. Latour-Adrien C.J. and Garrioch S.P.J. were of the opinion that undue delay in the institution of proceedings against an accused party may be a factor, viewed in the context of the particular circumstances of each case, which a court of trial is entitled to take into account when considering whether the delay has not had for effect to prevent the accused from having a fair trial, a result which it is incumbent on the court of trial to ensure. They considered that:

“If, therefore, a court of trial comes to the conclusion that the delay in preferring a charge against a person has made it impossible for him to be fairly tried, the court of trial, it seems to us, would be entitled to dismiss the information. If such a point ever came before a subordinate court that Court would have, in deciding it, to apply such general principles as may have been formulated by the Court having jurisdiction to interpret the constitution as to the real meaning of what a fair hearing should be”.

⁷Our law like the law in England does not set, as a general rule, any time limit for a criminal prosecution to be started. This is incidentally not the case in France where except for certain crimes which are statutorily provided (e.g. les crimes contre l’humanité) criminal prosecution is barred by prescription viz. 10 years for a crime, 3 years for a misdemeanour and one year for a contravention. As was pointed out in *Duval v. District Magistrate of Flacq & anor* (1989) MR 166, “our general rule against a prescription in criminal matters sets well with our system of criminal law where an inquiry is put in motion only when a complaint is made to the Police.”

Justice Ramphul, on the other hand, held that:

“As far as the second question is concerned (viz. how far, if at all, would the Court be warranted to enquire into and adjudicate upon the reasonableness or otherwise of any delay in the preferment of the information), I shall simply say that S 10(1) of the Constitution does not provide that an information must be preferred within a reasonable time; it provides that the case of a person charged with a criminal offence must be afforded a fair hearing within a reasonable time.... Delay in the prosecution of offences, even when unreasonable, is not, by itself, repugnant to the concept of “fair hearing” in the context of our Constitution The delay in the prosecution of an offence may, in an appropriate case, affect the value of the testimony, it cannot affect the fairness of the hearing, which the Court is required to give to the case. Delay, by itself, will not make the hearing unfair; the hearing must be fair, having regard to the delay”.

15. In *Duval v. District Magistrate of Flacq* (1989) MR 166, the question cropped up whether a prosecution which is initiated 18 years after the alleged commission of a crime must, by reason of the time-lag and all its natural consequences of probable loss of memory and the possibility of certain witnesses no longer being available, be struck down if the accused party takes the point that his right to a fair hearing under S 10(1) of the Constitution is being, or likely to be infringed. The Supreme Court had this to say:

“A study of case law in certain Commonwealth countries which have constitutional provisions similar to ours for a fair hearing within a reasonable time shows that the time factor does not start with the date of the commission of the offence.

In *DPP v Michael Feurtado*, Supreme Court of Jamaica, Court of Civil Appeal No. 59/79 it was held that the reasonable time contemplated under S 20(1) of the Constitution of Jamaica [which is identical to our S 10(1)] relates to the period between the date of arrest and the date of trial.

In *Bell v DPP* (1986) LRC 392, a decision of the Privy Council heard on appeal from Jamaica, the length of time again was reckoned from the time the appellant was arrested until his retrial was ordered.

The right, if any, for a person not to be charged with an offence after an unreasonable lapse of time must be balanced with the right of Society to seek justice. If the legislator deliberately chose not to restrain criminal prosecution by limiting it to any

prescriptive period it would be wrong for the Court to impose any fixed time after which a prosecution would according to it be untimely. The Court should not inordinately curtail the reach of the long arms of the law. We respectfully agree with Ramphul J's opinion that a long delay to prosecute is not 'per se' unfair and that a trial should be fair having regard to the long delay. If the legislator has not deemed it proper to amend the law to provide specific prescriptive periods for criminal offences [as, for example, the legislator has done in France] we should tread with care and refuse to introduce arbitrary and perhaps fluctuating periods of prescription."

16. In *Mungroo v. Queen* [1991] 1 WLR 1351 (P.C. Appeal No. 22 of 1990) [(1990) MR 1], the appellant complained that he had a serious criminal charge hanging over his head for four years and that he was deprived of his right to a fair trial within a reasonable time. The Judicial Committee of the Privy Council observed that the right to a trial "within a reasonable time", as provided by section 10(1) of the Constitution, secures, first, that the accused is not prejudiced in his defence by delay and, secondly, that the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minimum. The Judicial Committee stressed that in *Bell's case* [*Bell v. D.P.P.* [1985] A.C. 937], at page 951, the Board had adopted the approach of the Supreme Court in the United States in *Barker v. Wingo* (1972) 407 U.S. 514, both with regard to the difficulty of applying the concept of a "reasonable time" to any particular case and with regard to the factors relevant to any decision. The Judicial Committee had this to say about factors to be taken into account when delay amounting to an infringement of a constitutional right is alleged:

"The courts must have regard to the reasons for the delay and to the consequences of the delay. In *Bell's case*, at page 953, the Board expressed the view that the delay must also be considered in the context of the prevailing system of legal administration and in the prevailing economic, social and cultural conditions to be found in the country concerned. In some cases, lack of resources, shortage of skilled staff and pressure of work cause delays which are not avoidable in practice and could only be avoided in theory by vast expenditure on sophisticated facilities and equipment and by an instant improvement in the number and quality of skilled professionals and administrators. In one country investigations may be made and decisions taken at a level, in a manner, and within a time scale which could not be achieved elsewhere. Problems which are considered to be complex in one administration may be dealt with more expeditiously and with greater certainty and understanding in another. At the same time the constitutional rights of the individual must not be placed at the mercy of inefficiency. The expressed constitutional right contained in section 10 to a hearing of a criminal case within a reasonable time injects the need for urgency and

efficiency into the prosecution of offenders and demands the provision of adequate resources for the administration of justice but, in determining whether the constitutional rights of an individual have been infringed, the courts must have regard to the constraints imposed by harsh economic reality and local conditions.

In the present case the local courts have concluded that the delay resulted from the complexity of the affairs of the MMA which required all their allegations to be investigated, the complexity of the facts of the present case, the complexity of the law as applied to those facts and the complexity of the affairs of the MMA which required all their allegations to be investigated, the complexity of the facts of the present case, the complexity of the law as applied to those facts and the complexity of the manner of proof. To prove their case, the prosecution was obliged to call thirteen witnesses. The trial spanned nine sittings and involved the production and analysis of commercial documents. There is no material before the Board to contradict the view of the local courts that the complexity of the problems with which the prosecution authorities were faced accounts for the substantial delays which occurred.

Their Lordships consider that, in any future case in which excessive delay is alleged, the prosecution should place before the court an affidavit which sets out the history of the case and the reasons (if any) for the relevant periods of delay. In the present case Inspector Basset was prevented by the defence from giving relevant evidence on this point and his evidence of complexity was not challenged in detail or at all. Ironically enough, the appellant who now complains of delay before the trial began was himself responsible for considerable delay in the time taken by the trial itself. The prosecution witnesses were subjected to lengthy, hostile and unsuccessful cross-examination although the defence then called no relevant witnesses and the appellant himself did not give evidence. Owing to the clear and thorough manner in which the prosecution case was presented it became abundantly plain that the appellant was guilty of a serious, deliberate and ingenious fraud. Their Lordships have reached the conclusion, with some hesitation, that in the circumstances of the present case the lapse of four years is not sufficient in itself to justify the Board in rejecting the views of the Supreme Court and the magistrate. The appellant suffered no specific prejudice from the delay and it is right that he should serve a sentence which he rightly deserved.”⁸

⁸ In *Mohur v. R* (1990) MR 138, it was said that the four factors which, in Lord Templeman’s view in *Bell v. D.P.P.* (1985) A.C. 937, a Court should consider to assess in determining whether a particular defendant has been deprived of his right to a speedy trial, are namely:

- (i) the length of delay;
- (ii) the reasons given by the prosecution to justify the delay;
- (iii) the responsibility of the accused for asserting his rights and
- (iv) prejudice to the accused.

The Court in *Mohur* went on to say that it is now settled that in U.K., a judge of a superior court has an inherent power to decline to allow a prosecution to proceed if he is satisfied that it is oppressive and vexatious

and an abuse of the process of the Court. The Court added that, by virtue of section 17 of the Courts Act the Judges of the Supreme Court have the same inherent powers as the Judges of the High Court in England and that by section 72(3) of the Constitution, conferring power to the Director of Public Prosecutions to institute and undertake criminal proceedings before any court of law where he considers it desirable so to do, cannot in any way divest this Court of its inherent power to decline to allow a prosecution to proceed where it is satisfied that it is oppressive and vexatious and amounts to an abuse of its process.

Reference was made to *D.P.P. v. Humpheys* (1976) 2 ALL.E.R. 497, where at page 535 Lord Edmund Davies had the following to say –

“While Judges should pause long before staying proceedings which on their face are perfectly regular, it would indeed be bad for justice if in such fortunately rare cases as R. v. Riebold their hands were tied and they were obliged to allow the further trial to proceed. In my judgment Connelly established that they are vested with the power to do what the justice of the case clearly demands, and in R. v. Thomson Holidays Ltd. (1974) 1 ALL.E.R 823 the Court of Appeal proceeded on that basis...”

In the same case, at page 527, Lord Hailsham of St. Marylebone said the following –

“... I entirely agree with everything said by my noble and learned friends, Lords Devlin and Pearce—in Connelly’s case, affirming that it is an important part of the court’s duty and to protect their process from abuse and those who are brought before them from oppression...”

My noble and learned friend, Viscount Dilhorne, has dissented from the passages in the speeches of my noble and learned friends Lords Devlin and Pearce, to which I have referred. He also dissents from a similar passage in Mills v. Cooper (1964) 2 ALL.E.R at 442, 447 and 448 in which Lord Parker C.J. said –

... every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.

My noble and learned friend, Viscount Dilhorne, considers that there is no authority for that proposition. I should have thought that the opinions of Lords Devlin, Pearce and Parker C.J. in themselves constitute powerful authority. But these are by no means the only authorities. In Metropolitan Bank Ltd. v. Pooley (1885) 10 App. Cases 210 at 220, 221 Lord Blackburn said –

‘But from early times... the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse...’

and Lord Selborne L.C. said: ‘The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure.’ I have no more doubt than had my noble and learned friends Lord Devlin and Pearce, that Lord Selborne L.C and Lord Blackburn would have considered their words to be applicable to criminal as to civil proceedings.

I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a Judge has not and should not appear to have any responsibility for the institution of prosecution; nor has he any power to refuse to allow a prosecution to proceed because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that

17. In *Dahall v. State* (1993) MR 220, the appellant, who had just returned to Mauritius in 1991 after an eight year absence, was arrested and charged in relation to a crime allegedly committed in 1983. The case was heard in 1992 and the appellant sought a stay of proceedings on the ground that he had not received a fair trial since he had not been tried within a reasonable time. The trial court found that the appellant had left the country and was therefore partly responsible for the delay. The appellant was convicted and appealed. On appeal, the Supreme Court considered that the principles governing such matters had been laid down in *Attorney General of Hong Kong v. Wai-bun* (1993) 2 A.E.R. 510:–

“That test does not materially differ from that laid down by Lord Lane CJ in *A-G’s Reference (No 1 of 1990)* [1992] 3 All ER 171 at 176, which was approved by their Lordships’ Board in *Tan v. Cameron* [1992] 3 WLR 249. Lord Lane stated that ‘no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer prejudice to the extent that no fair trial can be held.’

The approval of the Board in the *Tan* case of that statement of Lord Lane was made subject to one exception, which the Board identified, namely as to whether it was appropriate in certain circumstances to presume that the delay has caused prejudice. As to this Lord Mustill in his judgment said: ‘Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered

the judge has the power to intervene. Fortunately such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved.”

Reference was also made to *Bell v D.P.P* (Supra), at page 950, where lord Templeman said the following –

*“Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that in a proper case without positive proof of prejudice, the Courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary, dismissing the charges for want of prosecution. Again, in a proper case, the Court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the Court. In *Connelly v.D.P.P.* (1964) A.C 1254, 1347, Lord Devlin rejected the argument that an English Court had no power to stay a second indictment if it considered that a second trial would be prejudicial”.*

in the round, and nothing is gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not unfair? ...

Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay ...

In relation to conduct which will be an issue at the trial the correct approach is for the judge to bear in mind the nature of the prosecution's case as part of the factual background against which the alleged delay has to be considered ...”

The Supreme Court held that the Magistrates had not addressed properly the issue of likelihood of prejudice and had misdirected themselves on two counts: firstly by not referring to the appellant's failing memory or to the unavailability of witnesses on his behalf, and secondly by incorrectly assuming that the appellant was in any way responsible for the delay by running away. It was of the opinion that the Magistrates should, in this particular case, have granted a stay of proceedings.⁹

18. The Judicial Committee of the Privy Council considered in *Darmalingum v. State* (1999) MR 186 [PC Appeal No. 42 of 1999]¹⁰ that a delay of 6 years and nine months between the arrest of the appellant and the ruling of the Intermediate Court, on a motion of stay of information for delay, was an “inordinately long delay, taking into account the nature of the charges, the documentary records available, what the prosecution described as comprehensive confessions on all counts, and the duration of the eventual trial” and that “this delay was caused by the

⁹ In *Gheenah v. State* (1998) MR 109 [SCJ 427], it was considered that the principles applicable for a stay of proceedings on the ground of prejudice are mainly the following:-

- (1) There must be exceptional circumstances for a stay to be granted.
- (2) Even where there is an unjustified delay a stay should be the exception and not the rule.
- (3) A stay should be more exceptionable in the absence of fault on the part of the prosecution.
- (4) Delay due to complexity of the case or contributed to by the accused should not be the basis for a stay.
- (5) There should be no stay unless the accused can show on the balance of probabilities that owing to the delay he has suffered serious prejudice to the extent that no fair trial can be held.

¹⁰ The majority judgment in *Darmalingum v. State* (1997) MR 186 [SCJ 295] was reversed. See dissenting judgment (1997) SCJ 294.

inaction of the Police and the DPP’s office”. In *Darmalingum*, their Lordships also held that the guarantee in section 10(1) extends to appellate proceedings¹¹, and that there had been a flagrant breach of section 10(1) as the appellant has had the shadow of the proceedings hanging over him for about 15 years.

(2) Right of a person charged with a criminal offence to be tried by an Independent and Impartial Court established by law [Section 10(1) of the Constitution]

19. It is essential that justice be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiased. As pointed out in *Victoire v. R* (1950) MR 23, “a long line of cases shows that it is not merely of some importance but is of fundamental importance, that justice should not only be done but should manifestly and undoubtedly be seen to be done”¹², and there are several cases which show very clearly that where there is any danger of a substantial bias likely, even unconsciously, to influence a Magistrate, he ought not to sit¹³.
20. The question arose in *Auchraje v. State* (1992) MR 235 whether a judge on contract – appointed by the President of the Republic under section 113 of the Constitution – afforded the guarantee of independence. The Court had this to say on the issue:

“The Judge concerned is not an officer “on contract” as this term is commonly understood in relation to persons who are recruited to the public service or reemployed after retirement on terms which are not those prescribed for officers

¹¹ In their Lordships’ view, section 10(1) of the Constitution of Mauritius must be construed like Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. The European Court of Human Rights has unambiguously ruled that Article 6(1) extends to appellate proceedings: *Wemhoff v. Federal Republic of Germany* [1968] 1 E.H.R.R.; *Eckle v. Federal Republic of Germany* [1982] 5 E.H.R.R. 1.

¹² Lord Hewart, C.J. in *Rex vs. Sussex Justices Ex Parte: McCarthy*, 1924 1 K.B. 256

¹³ *Reg. vs. Henley* (1892) 1 Q.B.D. 504; *Reg vs. Gaisford*, (1892) 1 Q.B.D. 381.

generally but negotiated between the person and the Government. Section 113 of the Constitution provides that, in relation to a number of constitutional offices which must be filled, and filled by suitable persons, the appropriate authority may appoint any qualified person to those offices for a term not exceeding four years irrespective of his age. Persons so appointed are fully fledged appointees who are at par with their colleagues who hold similar offices ...

The framers of our Constitution, which includes section 10 whereby trials are to be held before independent and impartial courts, had deliberately included therein, not only section 113 but also section 78. The latter section, which incidentally could have been resorted to by the Judicial and Legal Service Commission since the Judge concerned was still in office when the applicant's appeal was heard, enables Judges to be allowed to continue in office for the purpose of finishing any business started before them. Section 113 does not purport to deal only with the continuing in office of officers who reach normal retiring age, but enables any qualified person to be appointed to an office at any age. All those who have, since the coming into operation of the Constitution, held any of the offices listed in section 113, have always operated under the possibility that their services might be retained pursuant to section 113. So that learned counsel's view, as put to us, is tantamount to saying not only that the framers of the Constitution knowingly included in that document provisions which plainly offended another part of it but also that this Court has for years now been unable to claim to be an independent Court."

21. In *Poongavanam v. DPP* (1989) MR 298¹⁴, it was argued by the appellant that section 10(1) requires that, where a trial takes the form of a trial by jury, for the court to constitute an impartial court within the section it is not enough that the court should be free of actual bias or even an appearance of bias; it must also be a jury which is drawn from a list which provides the accused with a fair possibility of obtaining a jury which constitutes a representative cross-section of the community. The appellant relied on case law in the United States, where a principle is well recognized that the jury must be drawn from a list which is representative of society; this was expressed in the opinion of the Supreme Court in *Thiel v. Southern Pacific Co.* 328 U.S. 217 (1946), in which it was said (at page 220):-

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community ... This does not mean, of course, that every jury must

¹⁴ Privy Council decision, Judgment delivered on 6 April 1992.

contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."¹⁵

As to whether any such broad principle can be derived from section 10(1) of the Constitution, the Judicial Committee of the Privy Council had this to say:

“Whether any such broad principle can be derived from section 10(1) of the Constitution of Mauritius depends upon the construction to be placed upon the word "impartial" in that section. On the natural meaning of the words of the section, the provision is directed towards the actual tribunal before which the case is heard, and the hearing before that tribunal; and the introduction of the word "impartial" is designed to ensure that the members of that tribunal are not only free from actual bias towards the accused but also, as the European jurisprudence shows, manifestly so in the eyes of the accused. The American principle however transcends such requirements. It is directed not to impartiality in the ordinary meaning of that word, but to the representative character of the list from which the jury is to be drawn. The

¹⁵ Where there has been a breach of that principle, convictions have been quashed on the motion of appellants who have invoked the Sixth and the Fourteenth Amendments to the Constitution of the United States. Furthermore, in the years since the 1939-45 war, it has become established that the exclusion of women from jury lists will mean that the lists are not representative in this sense. This development appears to have culminated in the decision of the Supreme Court in *Taylor v. State of Louisiana* 419 U.S. 522 (1975). Justice White, who delivered the opinion of the majority of the US Supreme Court, said (at page 701):

"Accepting as we do, however, the view that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male. To this extent we cannot follow the contrary implications of the prior cases, including Hoyt v. Florida 368 U.S. 57 (1961). If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place. Nothing persuasive has been presented to us in this case suggesting that all-male venires in the parishes involved here are fairly representative of the local population otherwise eligible for jury service."

effect is therefore that, however impartial the actual jury may in fact have been, the principle may nevertheless be offended against if those from whom the jury are selected are not representative of society.

Furthermore, the principle is not directed towards the constitution of the particular jury in question. It is recognized that it is impossible to achieve, by the process of random selection, a representative jury; indeed if the aim was to achieve a representative jury, this could only be done by interference with the process of random selection which itself would not only be open to abuse, but however fairly done could be suspected of abuse, and could never in fact achieve a jury truly representative of all sections of society. This is no doubt why the American principle looks rather to the lists from which individual juries are drawn, and requires that those lists shall be compiled from a fair cross-section of society. This makes it all the more difficult to derive the principle from a provision such as section 10(1) of the Constitution of Mauritius, which is concerned rather with the actual tribunal by which the case is tried, and with the impartiality of that tribunal. Whether the jurisprudence on Article 6(1) of the European Convention of Human Rights is likely to develop in that direction, is very difficult to foresee; but any such development would require a substantial piece of creative interpretation which has the effect of expanding the meaning of the words of Article 6(1) beyond their ordinary meaning.”¹⁶

22. In *Poonoosamy & ors. v. State* (1996) MR 1, it was argued that the appellants did not have a fair trial in that the Presiding Magistrate who heard the case had heard a previous civil case (*A. Poonoosamy & Anor v/s Y. Kaidoo* Cause No. 939/88) in which the issue was exactly the one raised in this particular case. Regarding the requirement of an independent and impartial tribunal, the Court referred to what the European Court of Human Rights has had to say on Article 6(1) ECHR [which is couched in same terms as section 10(1) of the constitution] in the case of *Piersack v. Belgium* decided on 1 October 1982¹⁷ and in the case

¹⁶ See also *Poongavanam v. DPP* (1993) MR 298.

¹⁷ In the *Piersack* case, the President of the Assize Court that convicted the applicant of murder had, before his appointment as a judge, been the head of a section of the Public Prosecutor’s Department when it had investigated the case against the applicant. According to the applicant, the judge had taken part in the investigation; according to the government, his involvement in the case had been administrative only. Without finding it necessary to determine the extent of the judge’s involvement, the Court unanimously held that there had been a breach of the requirement of ‘impartiality’ in Article 6(1). The Court had this to say regarding impartiality:

“Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a

of *Hauschildt v. Denmark* of 24 May 1989¹⁸, and also what author Patrick Wachsman had to say:

given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.

(a) As regards the first approach, the Court notes that the applicant is pleased to pay tribute to Mr. Van de Walle's personal impartiality;...

However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance... As the Belgian Court of Cassation observed in its judgment of 21 February 1979... any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence, which the courts must inspire in the public in a democratic society.

(b) It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution... would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence.

Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality...

(d)... In order that the courts may inspire in the public the confidence, which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

This was what occurred in the present case ...”

¹⁸In the case of *Hauschildt v. Denmark* a trial judge had earlier refused an accused bail. The following extracts from *Jurisprudence de la Cour Européenne des Droits de l'Homme* (4th ed.) by Vincent Berger are relevant, as to the approach taken by the Court:

“L'impartialité doit s'apprécier selon une démarche subjective (essayant de déterminer la conviction personnelle de tel juge en telle occasion) et aussi selon une démarche objective (amenant à s'assurer qu'il offrait des garanties suffisantes pour exclure à cet égard tout doute légitime).

Quant à la première, la Cour note qu'aucune preuve n'a été fournie de la partialité personnelle des juges concernés.

Quant à la seconde, elle examine si certains faits vérifiables autorisent à suspecter l'impartialité des juges concernés. Qu'un juge de première instance ou d'appel, dans un système de procédure pénale comme le danois, ait déjà pris des décisions avant le procès, notamment au sujet de la détention provisoire, ne peut passer pour justifier en soi des appréhensions quant à son impartialité.

Certaines circonstances peuvent néanmoins en l'espèce autoriser une conclusion différente. A plusieurs reprises avant l'ouverture des divers procès, le juge du tribunal municipal comme certains magistrats de la cour d'appel fondèrent explicitement leur décision de maintenir Mogens Hauschildt en détention provisoire

“L’indépendance s’apprécie par rapport au pouvoir exécutif et par rapport aux parties. Les pouvoirs publics ne peuvent évidemment adresser d’instructions aux membres du tribunal quant à l’exercice de leurs fonctions ni interdire l’exécution des décisions rendues (arrêt Van de Hurk c. Pays-Bas du 19 avril 1994), mais la Cour va au-delà de ce type d’exigences en intégrant des considérations d’ordre psychologique, notant dans son arrêt Sramek du 22 octobre 1984: «Dès lors qu’un tribunal compte parmi ses membres une personne se trouvant – comme en l’espèce – dans un état de subordination de fonctions et de services par rapport à l’une des parties, les justiciables peuvent légitimement douter de l’indépendance de cette personne. Pareille situation met gravement en cause la confiance que les juridictions se doivent d’inspirer dans une société démocratique». Des considérations du même ordre guident la Commission et la Cour dans leur analyse de l’impartialité du tribunal, mais la jurisprudence revêt sur ce point une subtilité qu’il est permis de trouver excessive. Ainsi de la question de savoir si un magistrat qui a eu l’occasion d’intervenir au cours de l’instruction peut participer au jugement de l’affaire. Elle ne peut recevoir sa solution qu’au vu des circonstances, au terme d’une analyse complexe de la similitude des questions tranchées à l’un et l’autre stade (arrêt *Hauschildt* du 24 mai 1989).”

23. In *Chundunsing v. State* (1997) MR 202 [SCJ 349], it was argued that the appellant did not benefit from a fair hearing by an independent and impartial court under section 10(1) of the Constitution since the trial Magistrate was at the relevant time an Acting Magistrate on secondment from the Attorney General’s Office which is part of the Executive. The Court considered that, as laid down by the European Court of Human Rights in *Piersack v Belgium*¹⁹, referred to in *Poonoosamy and Others v State* (1996) MR 1 at page 2, the test applicable in determining whether a trial Magistrate is objectively independent and impartial is to consider whether he offers “*guarantees sufficient to exclude any legitimate doubt in this respect*”. And the Court went on to say that:

“It is significant that in the judicial and legal system of Mauritius also, officers of the Attorney-General’s Office are transferred to the Magistracy and vice-versa,

sur l’article 762 paragraphe 2 de la loi sur l’administration de la justice. Avant d’appliquer cette disposition, un juge doit s’assurer de l’existence de «soupçons particulièrement renforcés» que l’intéressé a commis les infractions dont on l’accuse. D’après les explications officielles, cela signifie qu’il lui faut avoir la conviction d’une culpabilité «très claire». L’écart entre la question à trancher pour recourir audit article et le problème à résoudre à l’issue du procès devient alors infime. La Cour estime en conséquence que l’impartialité des juridictions compétentes pouvait paraître sujette à caution et l’on peut considérer comme objectivement justifiées les craintes du requérant à cet égard. Il y a donc eu violation de l’article 6 paragraphe 1.”

¹⁹ See *supra*, note 14.

sometimes for a short spell of duty. When a legal officer is seconded for duty at the Magistracy, as in the present case, the decision is taken by the Judicial and Legal Service Commission, an independent body, (section 86 of the Constitution) and the officer automatically cuts off all his links with the Attorney-General's Office, ceases to be a law officer and comes under the administrative control of the Chief Justice - vide section 121 of the Courts Act. He takes the judicial oath as District Magistrate before a Judge, proclaiming that he will "*do right to all people, according to law, without fear or favour, affection or ill-will*" (section 4 of the Oaths Act) and presides a District Court and is known as a District Magistrate - vide section 94 of the Courts Act. Although for administrative purposes only, the officer may be an acting or temporary Magistrate, he is to all intents and purposes a full-time District Magistrate who performs judicial functions. That is the reason why in the present case the trial Magistrate is properly mentioned throughout in the record as a District Magistrate and not as an acting District Magistrate. Moreover, when a law officer is appointed Magistrate in a permanent or temporary capacity, he performs only judicial functions or such analogous functions which are becoming of a Magistrate, as the Chief Justice may permit him to perform. It has certainly never been the practice for the Chief Justice to allow any Magistrate, pursuant to section 120 of the Courts Act, to perform simultaneously additional duties in the Attorney-General's Office, as this would be clearly improper.

Applying the test of the European Court of Human Rights and bearing in mind its pertinent observations to the facts of the present case, as highlighted above, we have no hesitation in holding that there has been no breach of the guarantees of independence and impartiality enshrined in section 10(1) of the Constitution. It is interesting to note that the requirements of independence and impartiality in article 6(1) of the European Convention on Human Rights and English case-law on the requirements of a fair trial appear to be similar. Thus, the House of Lords in *Regina v Gough* (1993) 2 AER 724 stated that the test whether bias affected a trial was "*whether a reasonable and fair minded person sitting in the Court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial of the defendant was not possible*". The Court went on to observe that - "*In formulating the appropriate test it was unnecessary to require that the Court should look at the matter through the eyes of a reasonable man, because the Court personified the reasonable man. For the avoidance of doubt the test should be stated in terms of real danger rather than real likelihood, to ensure that the Court was thinking in terms of possibility rather than probability of bias*".

Adopting the test of the House of Lords to the facts of the present case, we consider that there was no real danger of bias in the Court of the District Magistrate who retained throughout her capacity to ensure an independent and impartial judgment in the performance of her judicial functions."

24. In *Francois v. State* (1993) MR 15, the question arose whether an accused could claim to have been deprived of a fair hearing by an independent and impartial court inasmuch as the trial was heard by one of the magistrates who heard the application for bail. The Court took the view that in those circumstances²⁰ the likelihood of a doubt in the public mind as to the fairness of the trial cannot be discarded. The Court had this to say on the issue:

“The basic principle with which we are concerned is of course that, according to section 10(1) of the Constitution, a person charged is entitled to be tried by an impartial tribunal. In England, the particular point we have to consider is dealt with as follows in section 42 of the Magistrates’ Courts Act 1980:

“A justice of the peace, shall not take part in trying the issue of an accused’s guilt on the summary trial of an information if in the course of the same proceedings the justice has been informed, for the purpose of determining whether the accused shall be granted bail, that he has one or more previous convictions.”

In France it is article 253 of the Code de Procédure pénale which takes care of the situation. The Cour de Cassation has had occasion to hold, by reference to that provision and to article 6 of the European Convention on Human Rights (which is the equivalent of section 10 of our Constitution), in the following terms:

“toute personne a droit à ce que sa cause soit entendue par un tribunal impartial, c’est à dire des magistrats n’abordant pas les débats au fond, avec une idée toute faite. Ceux qui ont participé à l’instruction préparatoire de type inquisitorial, ne peuvent en conséquence siéger lors de l’instruction définitive de caractère accusatoire (Cass. Crim. 28.1.86, GP 1987 Somm. 1)”;

“... étendre la règle de l’incompatibilité au magistrat qui a participé à une précédente décision statuant sur la détention provisoire de la personne en cause car à cette occasion il a nécessairement du procéder à un examen préalable au fond (Cass. Crim. 23.1.85, GP 1985 2 Somm. 217).”

We may also usefully refer to a passage from an English decision which points to the object to be achieved in such matters:

“The decision whether there is a real likelihood of bias is one of degree to be taken in

²⁰ One of the reasons for refusing bail was the heavy criminal antecedents of the accused which had been disclosed. Moreover, the bail record had, somehow, found its way into the trial record and was therefore accessible to the Magistrates who delivered judgment in the trial case.

each individual case, and the basis is the effect likely to be produced on the public mind as to the fairness of the administration of justice if in the individual circumstances the justice hears the case". (R.v. London JJ. ex parte South Metropolitan Gas Co. (1908 72 JP 137).

That is the spirit in which this Court, in *Edoo v. R* (1984) S.C.J. 150 refused to "hold as a matter of principle that, if a magistrate who decides on a motion for bail takes the trial to its end and convicts, the conviction must be quashed," a proposition to which we entirely subscribe. The same guidelines no doubt govern the attitude of the English Courts where the antecedents of an accused person become known to the jury accidentally or as a result of the accused's own doing, when the Judge is given a discretion to discharge the jury or not to. Similarly it has been held that "a judge or magistrate who has heard one case concerning a litigant cannot, without more, thereupon be said to be likely to be biased one way or the other in any subsequent case concerning that litigant" (*Re B (an infant)* (1971) Ch. 270). And we may refer to our own constant practice whereby, for example, a magistrate who has heard a criminal case does not sit to hear a subsequent civil matter between the same parties regarding the same facts.

We know also that the normal cursus before our lower courts is that motions for bail are entertained in the record of a provisional charge so that the trial proper follows later, sometimes much later, and more often than not before a different court or a different magistrate on a formal information in another record. Moreover, there are numerous cases where the question of the accused's release is determined with reference to the seriousness of the charge and the heavy penalty likely to be meted out, the protection of the public etc., in other words without the magistrate who hears the bail application being in any way involved with the person's antecedents."

25. In *Seegoolam v. State* (1994) MR 184, the Supreme Court pointed out that:

"This Court has never said that a magistrate can never sit to hear the trial of a person charged with an offence if he or she has dealt with an application for bail by that person. Since an accused party is entitled, according to section 10(1) of the Bail Act, to ask for bail owing to his *continued* detention or remand, it follows that, by invoking section 5 of the Constitution, for example, such a person may, strictly speaking, make an application for bail every time the case is postponed because he is not being afforded a trial within a reasonable time. One can easily see that, if there was a strict rule applicable in the matter, an ingenious lawyer could thus try to go through our limited list of magistrates with a series of bail applications ...

The sole test is that the accused must be seen to have a fair trial and that the trial record should not contain anything giving rise to a suspicion that the ability of the magistrate to decide upon the accused's guilt or innocence may be influenced by extraneous considerations."

26. In *Jeewoath v. State* (1998) MR 201, the question arose whether a magistrate who had signed a search warrant can be said to be biased because he was satisfied upon information on oath that there was reasonable ground for suspecting that an offence had been committed. It was considered that there was no risk of the perception in the public mind of a likelihood of bias, since it is well known to the layman that the prosecution must prove its case beyond reasonable doubt and that mere suspicion is not proof of guilt. The Court endorsed the observation of the New Zealand Court of Appeal in the case of *Cullen*.²¹
27. In *State v. Bacha* (1996) MR 240, the question arose whether extensive news coverage can affect the outcome of a trial, in that the jury who are exposed to such news coverage may be swayed by what they read or hear.²² The Court considered that the key question in free press/fair trial disputes is the point at which publicity creates prejudgment in such a large number of potential jurors that empanelling an impartial jury becomes impossible as a practical matter. This would only be so when the prejudice is so indelibly impressed on the minds of potential jurors that it is unlikely that an unbiased jury could be obtained.

²¹In *R. v. Cullen* (1993) 1LRC 610, the trial was scheduled in the morning but the applicant turned up in the afternoon, claiming that he had walked to court from home. In fact, a police car had been despatched to his home that morning and the applicant had already left for court by the time it arrived. The judge did not accept the applicant's explanation and remanded him in custody until the following day for the pre-trial application concerning the admissibility of the statements. Counsel for the applicant protested that the same judge should not hear the application which would raise questions about the applicant's credibility, but the judge refused to disqualify herself from hearing the matter. On appeal, the Supreme Court of New Zealand held that:-

"We are quite unable to agree that these circumstances required the judge to disqualify herself. It ignores the realities and necessities of daily life in the District Court. It is inevitable that defendants will appear more than once before the same judge and there may be some happening on a prior occasion which is discreditable to the defendant. Judges are well able to put such things out of their minds, just as juries are expected to do from time to time under proper directions. The informed objective bystander (see *E H Cochraine Ltd v Ministry of Transport* [1987] 1 NZLR 146 at 152-153) would not form the opinion that there was a reasonable suspicion of bias."

²² See also *R v. Shummoogum* (1977) MR 1.

(3) Right of a person charged with a criminal offence to a Public Hearing (In Open Court) [Section 10(9) & (10) of the Constitution]

28. Section 10(9) of the Constitution provides that, except with the agreement of all the parties, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

Section 10(10) of the Constitution, however, is to the effect that a court or other authority is not prevented from excluding from the proceedings (except the announcement of the decision of the court or other authority) persons other than the parties and their legal representatives, to such extent as the court or other authority may by law (a) be empowered so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of persons under the age of 18 years or the protection of the privacy of persons concerned in the proceedings; or (b) be empowered or required to do so in the interests of defence, public safety or public order.

29. Section 161A of Courts Act provides that “any Judge, Magistrate or other person having by law authority to hear, receive or examine evidence may, where he considers it necessary or expedient (a) in circumstances where publicity would prejudice the interests of justice or public morality; (b) in order to safeguard the welfare of persons under the age of 18; (c) in order to protect the privacy of persons concerned in the proceedings; (d) in the interests of defence, public safety or public order, exclude from the proceedings (except the announcement of the decision) any person other than the parties to the trial and their legal representatives.”

30. In *Andony v. State* (1992) MR 249, where the accused was charged with rape and the trial court proceeded to hear the case in camera, it was pointed out that

“The right to a trial in public is one of the fundamental safeguards which every democratic society affords to its citizens. This sacred principle is expressly recognized by the Constitution which however permits possible derogations in specific cases. Section 161 A of the Courts Act which is a derogation to Section 10(9) of the Constitution must therefore be interpreted restrictively.

As hinted earlier, the learned Magistrates did not consider it necessary to say why the case had to be heard in camera. Their power to do so is limited and the discretion conferred upon them, which may be subject to review, must be exercised judiciously... An accused person cannot, in a democratic society, be deprived of his constitutional right to a public trial unless there are compelling reasons to do so. This Court, as guardian of the fundamental rights enshrined in the Constitution, would fail in its duty if it were to accept that such a fundamental right may be abridged without reasons being given. For this reason alone we consider that the appellant has been denied a fair trial ...”

The Court was also concerned that the Magistrates should have considered it necessary to hear *all* the witnesses in camera. It wondered on which of the reasons listed in paragraphs (a) to (d) of section 161 A of the Courts Act did the Magistrates rely to order that the evidence of the draughtsman, the evidence of the Police photographer or that of the officers who recorded appellant’s statements be tendered behind closed doors. The Court also raised the question whether public morality demands that a grown up woman who, of her own free will, decides to report to the Police that she has been raped must necessarily be heard in camera.

31. In *Maroam v. State* (1998) MR 205 [SCJ 150], the appellant was convicted of the offence of insult. It was alleged that he had used vulgar language towards a female colleague. At the trial the latter’s request that the proceedings be held in camera was granted by the Magistrate ‘in the interests of justice’ in spite of the appellant’s objection. The appellate Court quashed

the conviction, inter alia, because of a breach of the constitutional provisions relating to a fair trial on the ground of publicity. The Court examined the requirements of publicity in the light of the jurisprudence of the European Court and Commission on human Rights²³, as section 10 of the Constitution is in almost identical terms with Article 6(1) ECHR²⁴, and in the light of decisions from Commonwealth jurisdictions.²⁵ The Court also analyzed the scope of a

²³ The Court referred to what the author, Donna Gomien, a senior researcher of the Norwegian Institute of Human Rights, had to say on the right to publicity in a concise study by the Council of Europe entitled Short Guide to the European Convention on Human Rights (Strasbourg 1995), at pp. 43-44:

“There has been relatively little case-law addressing this clause of Article 6.1. In part this is because the scope of the right to publicity is more clear than is the case for other aspects of the right to a fair hearing. The interests to be served by public proceedings are not only those of the parties, but those of the public at large: to ensure confidence in the administration of justice. In the case of Axen v. Federal Republic of Germany (1983), the Court noted that the publicity requirement applies to any phase of a proceeding which affects the determination” of the matter at issue. In the case of Le Compte, Van Leuven and De Meyere v. Belgium (1981), the Court held that the right to publicity may not necessarily be violated if both parties to a proceeding consent to its being held in camera. In general, the Commission and Court consider whether one of the specific conditions listed in Article 6.1 prevails (for example, the interest of morals, public order, national security, or certain privacy interests) before accepting that a given proceeding in camera has not been conducted in violation of the article. In all circumstances, however, judgments must be pronounced publicly.”

²⁴ Article 6(1) of the European Convention on Human Rights reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

²⁵ In *Boodram v. The Attorney-General & Anor* (1996) Commonwealth Human Rights Law Digest 58, the Court of Appeal of Trinidad & Tobago held *inter alia* that:

“An essential part of the notion of a fair trial was that it be conducted in public under the watchful eye of citizens, subject to a few exceptions. This openness was essential to remove public fear and distrust in the system. If trials were conducted behind closed doors, people would naturally be suspicious of the results, whereas, if they were visible justice would be seen to be done.”

In the case of *Scott v. Scott* (1913) AC 417, Lord Shaw at page 477 quoted Bentham, as saying:

“In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no

Court's power to hear a case in camera²⁶ and stressed that "since proceedings in camera are the exception, any decision to authorize that proceedings be held in camera should clearly be motivated and explained so that the tribunal acceding to a request for proceedings to be heard in private shows clearly that in so doing it has borne in mind the limitations set out in section 10(10) of the Constitution and exemplified in section 161A of the Courts Act." The Court pointed out that, as mentioned in Blackstone's Criminal Practice 1996, at page 977, "the principles of open justice should be strictly confined to cases where the public's presence would genuinely frustrate the administration of justice and should not be used merely to save parties, witnesses or others from embarrassment."

32. In *Veerasawmy v State* (2005) MR 238, appellant challenged the decision of the trial court to have allowed the complainant, in terms of section 161A of the Courts Act, to depose in camera, even though he was present, arguing that this was in breach of section 10 (9) of the Constitution, which requires court proceedings to be held in public as a general rule. The Court observed that the general rule set down in 10 (9) of the Constitution is qualified by the words "except with the agreement of all parties". It has become an accepted practice for trial courts to favourably allow requests to hear victims of sexual offences in camera. Section 161A of the Courts Act and section 10 of the Constitution permit the Court, on its own initiative and in cases akin to the present one, to hear a complainant "in camera" even where no motion is made by the prosecution.

publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial."

²⁶ In the case of *Scott v. Scott* (1913) AC 417, Viscount Haldane stated at page 463:

"... the power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing shall take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge."

(B) Right of a person charged with a criminal offence to be informed as soon as reasonably practicable, in a language that he understands and, in detail, of the nature of the offence (right to be informed of the charge against him) [Section 10(2)(b) of the Constitution]

33. Section 10(2)(b) of the Constitution provides that every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and, in detail, of the nature of the offence.
34. In *Babeea v. R* (1981) MR 67, the Supreme Court had this to say about section 10(2)(b):

“The right of the citizen to be informed of what the State holds against him is so important that specific provision has been made for it whether he is under arrest or detention (vide Section 5(2) of the Constitution) or facing trial, whether he is in custody or not, as provided under section 10(2)(b). When a person is facing trial, it is the responsibility of the Court to ensure that he is not deprived of that right. No doubt counsel representing a person has a duty to ensure that his client is not deprived of his constitutional right. But the responsibility of the Court must be insisted upon and it cannot properly, in our view be delegated either tacitly or otherwise to counsel.

It is in the perspective of the discharge of the Court’s responsibility in giving meaningful effect to the guarantees provided for in section 10(2)(b) of the Constitution that Section 72(1) of the Intermediate and District Courts (Criminal Jurisdiction) must be seen when it requires that –

When the accused shall be present at the hearing, the substance of the information shall be stated to him and he shall be asked if he has any cause to show why he should not be convicted.

The taking and recording of his plea by the Court as to whether he is or is not guilty is the most certain way of ensuring that the requirements of that section have been complied with and that the Court has discharged its responsibility in ensuring that the accused party has not been deprived of his constitutional right, particularly in a

country where the official language is not necessarily the language of the common man.”

35. Failure to record the plea, notwithstanding that the proceedings are conducted on the basis that the plea is one of not guilty, will render the proceedings nul. In *Tahal v.R (1968) M.R 117*, the appellate Court thus quashed a conviction by a District Magistrate because of the failure of the latter to take the appellant’s plea. The point was taken *proprio motu* by the Court as the matter was one, which went to the root of the case and vitiated the whole proceedings.
36. The plea should not be taken anew, should there occur a change in the constitution of the court. Once that has been done before a Court having jurisdiction to try the accused and his plea is entered in the court record, it does not matter whether he is subsequently tried by the same magistrate(s) who recorded his plea. In *Jhingut v.R (1972) MR 219* the accused pleaded before one district magistrate, and the case was subsequently heard by another magistrate who did not take the plea anew. The Court held that the omission to renew the plea was no ground for quashing the conviction, as the accused had suffered no prejudice and the Magistrate who heard the case was aware of the plea of the accused since it was put on record. The court followed the decision reached in *Chakoory v.R S.C.R. 2447*. *Chakoory* had first appeared before one magistrate, when the information was read over to him and a plea of not guilty was recorded. At a subsequent sitting, the case was heard by another magistrate who did not record the plea anew. The Court had this to say:
- “In our view, the appellant was in no way prejudiced thereby, since at an earlier sitting he had been fully acquainted with the charge on which he was to be tried, at the hearing he was duly represented by counsel, and the trial clearly and unequivocally proceeded on the assumption that the plea was one of non guilty. We do not accordingly propose to intervene.”
37. In *Lebon v. R. (1977) M.R 295*, the Supreme Court held that section 128(1) of District and Intermediate Courts (Criminal Jurisdiction) Act, which allows a magistrate to convict for embezzlement on a charge of larceny and vice versa, when the circumstances warrant it, does

not violate section 10(2)(b) of the constitution as an accused is informed of the charge and is not prejudiced in his defence.

38. Section 10(2)(b) of the Constitution is to the effect that an accused party must know what offence he is prosecuted for and this must be explained to him before the trial starts. A court cannot, therefore, make a finding as to any aggravating circumstance, even where the evidence so discloses, unless it has been specifically averred in the information. It was thus held in *Heerah v. R* (1988) MR 249, with respect to the Dangerous Drugs Act 1986, that the fact of being in possession of drugs *qua* trafficker, carrying as it does a heavier penalty than that prescribed under section 28 of the Act, is nothing else than an aggravating circumstance which must be averred. As pointed out by the Court, one could not imagine someone charged with larceny being told, after conviction, that, as the evidence had disclosed that he was armed at the time, he would be sentenced for armed robbery. Still less, in our context, could a person charged with importing heroin before a Judge without a jury be told, at the end of the trial, that he would be sentenced to death as the evidence had disclosed that he had introduced the drug for trafficking.
39. In *Sabapathee v. State* (1999) MR 233 [P.C. Appeal No. 1 of 1999], the Judicial Committee of the Privy Council considered that the reason why the aggravation requires to be alleged in the information is that the question whether the accused was engaged in trafficking in drugs is a question of fact which must be established at the trial. Regarding the distinction between those kinds of aggravation which form part of the facts which constitute the offence charged and those which are independent of those facts, the Privy Council had this to say:

“Where the aggravation forms part of the offence charged the aggravation must be alleged in the information. It must then be proved as part of the case made against the accused by the prosecutor relating to his guilt of the offence charged. Where it is independent of those facts the evidence to establish it cannot form part of the evidence against the accused relating to his guilt of the offence charged. It must be laid before the judge after conviction, if necessary by the leading of oral evidence, at the stage when he is considering sentence. An aggravation which relates to the circumstances in which the offence was committed, to the nature or degree of the

violence used or to the accused's purpose or motive in committing it will normally form part of the facts relating to the offence charged. That kind of aggravation will need to be established at the same time as the question whether the accused is guilty of the offence. It is an aggravation of a different kind from that which depends upon the proof or admission of facts which do not relate in any way to the circumstances of the offence charged, of which an allegation of previous convictions is the typical example ...”

The Judicial Committee then went on to state that:

“It is plain that the question whether the accused was engaged in the trafficking of drugs within the meaning of section 38(2) must be answered by examining the facts relating to the offence which the accused is alleged to have been committing at the time when he is alleged to have been engaged in trafficking. The answer to the question must be found in the facts which have been led to establish guilt by the prosecutor. Section 38(1) has recognized that this is so, because it provides that the court “which tries” the person for the offences listed there must make a finding whether the accused is a trafficker in drugs. Subsections (3) and (4), which set out the increased penalties, provide for their imposition on a person “who is found to be a trafficker”. The language of the section envisages that a finding to that effect will be made at the stage of the accused's conviction by the trial court ...

If the accused wishes to challenge the allegation that he is a trafficker in drugs he must do so during the course of the trial. The purpose of including the allegation in the information is to put him on notice that he must do so before the trial court proceeds to consider its verdict. He is not deprived by that allegation of his right to remain silent. But if he decides to remain silent he takes the risk that the trial court will make the finding against him that he was engaged in trafficking if it holds that he is guilty of the offence with which he has been charged.”

40. When during proceedings prosecution wants to amend the information, the plea must be taken anew in order to prevent any prejudice to the accused from arising.²⁷

²⁷ See, in this connection, *Backreelall v. R* (1970) MR 180, *Bungaroo v. R* (1975) MR 1 and *Ramcharrun v. R* (1998) MR 1.

(D) Right of a person charged with a criminal offence to be judged only in accordance with the substantive criminal law in force at the time of the offence (as opposed to that in force at the time of the trial) (Prohibition of Retroactive Criminal Laws) [Section 10(4) of the Constitution]

41. Section 10(4) of the Constitution prohibits the application of retrospective criminal legislation, in that no person should be held be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; no penalty should be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed. Section 17(4) of the Interpretation and General Clauses Act thus provides that where any person is liable under a repealed enactment to a penalty, forfeiture or punishment which is lighter than that imposed by the repealing enactment, the lighter penalty, forfeiture, or punishment shall be inflicted.
42. In *Thomas v. Queen (1968) MR 27*, the appellants were convicted of unlawful possession of an offensive weapon, contrary to Regulation 7(1) of the Emergency Powers (Control of Arms and Explosives) Regulations 1968. The regulation under which they were prosecuted was published in the Government Gazette on the very day on which at 11.25 a.m. they were held to have committed the offence charged. The question arose whether the act in question committed by the appellants was at the material time an offence under the law. The Supreme Court held that under the then section 35 of the Interpretation and General Clauses Ordinance of 1957 (now section 13 of the Interpretation and General Clauses Act of 1974), the regulation must be construed as having come into operation on the expiration of the previous day. The Court further considered that "even if it could be said that the time of the offence should be considered

in relation to the actual time of publication ... the convictions could only be quashed if the Court were satisfied that the incriminated act did not constitute an offence at the time it was committed, a fact which, in the absence of indication as to the precise time of publication, the evidence by no means establishes".

43. In *R v. Mazar Khan Chinkan Ali (1987) MR 162*, the accused was charged with importing heroin on 12 September 1986 at about 7.00 a.m., in breach of section 28(1)(c) of the Dangerous Drugs Act 1986. It was further averred that, having regard to all the circumstances of the case against him, the accused was engaged in trafficking of drugs, as provided by section 38(2) of the Act. The information was filed before the Supreme Court (a judge sitting without a jury). On the very day on which the accused was arrested, the Dangerous Drugs Act 1986 came into operation by a proclamation issued by the then Governor-General. The Dangerous Drugs Act of 1986, which repealed the Dangerous Drugs Act of 1974, provided inter alia that (i) a person charged for importation of drugs can be tried before a judge without a jury, the Intermediate Court or the District Court at the discretion of the DPP; (ii) any person found guilty of importing drugs may be sentenced to death, whereas under the 1974 Act such a person would be punished for a term of not less than five years and not more than twenty years.

At the trial of the case, it was submitted on behalf of the accused that (i) he could not be tried under the Dangerous Drugs Act 1986 as the Act was not in force at the time the accused committed the appeal; (ii) the Supreme Court sitting without a jury had no jurisdiction to try the accused as the Criminal Procedure Amendment Act, which conferred that jurisdiction on the Supreme Court, only came into force in September 1987.

The trial judge considered that the importation of drugs by the accused must be deemed to have been made in breach of the Dangerous Drugs Act 1986, section 13 of the Interpretation and General Clauses Act providing that "every enactment ... shall into operation on the expiration of the day before commencement". But he considered, in the light of the observations made in *Thomas v. R (1968) MR 27*, that he would violate the sacrosanct provisions of section 10(4) of the constitution if he were to apply a more severe penalty than - and which could have been

imposed at the material time of the act in question - what was provided by the Dangerous Drugs Act of 1974; there was evidence the Proclamation was only published in an Extraordinary Gazette late in the afternoon of 12 September 1986, well after the offence charged was committed.

The view was also taken by the trial judge that he had jurisdiction to try the case. The trial judge considered that under section 28(8) of the Dangerous Drugs Act of 1986, a Judge of the Supreme Court sitting without a jury had, ever since the 12 September 1986, jurisdiction to try offences under section 28(1)(c) and (d) of the Act, even though it is by virtue of the Criminal Procedure Amendment Act of 1986 that such jurisdiction was afterwards extended to cover the other offences created by the Dangerous Drugs Act. It was pointed out that "en principe, les lois de compétence et procédure (law regulating procedure and conferring jurisdiction) s'appliquent dès leur publication, même aux faits commis antérieurement ... le texte modifiant la compétence est immédiatement applicable ... même pour les faits antérieurs à la loi nouvelle".

The decision of the trial judge has been later confirmed on appeal: vide *Chinkan Ali v. R (1988) MR 226*.

44. It is to be noted that section 10(4) of the Constitution, which contains provisions similar to those contained in Article 7(1) ECHR, is not confined to prohibiting the retrospective application of the criminal law to an accused person's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused person's detriment, for instance by analogy. It follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.²⁸

²⁸ Vide paragraph 52 of the judgment of the European Court of Human Rights in *Kokkinakis v. Greece (1993)* 17 E.H.H.R. 397.

45. The principle of legality requires that an offence against the criminal law must be defined with sufficient clarity to enable a person to judge whether his acts or omissions will fall within it and render him liable to prosecution on the ground that they are criminal. The requirement for clarity must be seen in the light of what is practicable and it is permissible to take into account the way in which a statutory provision is being applied and interpreted in deciding whether or not the principle has been breached. On this issue, the Judicial Committee of the Privy Council in *Sabapathee v. State* (1999) MR 233 [P.C. Appeal No. 1 of 1999] had this to say:

“As the Board held in *Ahnee v. Director of Public Prosecutions* [1999] 2 W.L.R. 1305 there is to be implied in section 10(4) the requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct. So the principle of legality applies, and legislation which is hopelessly vague must be struck down as unconstitutional. But the precision which is needed to avoid that result will necessarily vary according to the subject matter. The fact that a law is expressed in broad terms does not mean that it must be held to have failed to reach the required standard. In an ideal world it ought to be possible to define a crime in terms which identified the precise dividing line between conduct which was, and that which was not, criminal. But some conduct which the law may quite properly wish to prescribe as criminal may well be described by reference to the nature of the activity rather than to particular methods of committing it. It may be impossible to predict all these methods with absolute certainty, or there may be good grounds for thinking that attempts to do so would lead to undesirable rigidity. In such situations a description of the nature of the activity which is to be penalized will provide sufficient notice to the individual that any conduct falling within that description is to be regarded as criminal. The application of that description to the various situations as they arise will then be a matter for the courts to decide in the light of experience. In this way the law as explained by its operation in practice through case law will offer the citizen the guidance which he requires to avoid engaging in conduct which is likely to be held to be criminal.”

Against this background, the Judicial Committee considered that section 38(2) of the Dangerous Drugs Act of 1986, which is that a person shall be a trafficker where having regard to all the circumstances of the case against him it can be reasonably inferred that he was engaged in trafficking, does not offend against the principle of legality.²⁹

²⁹ The Judicial Committee considered that:

46. In *Samynaden v Commissioner of Prisons* (2005) MR 156, plaintiff sought to declare ultra vires legislation which denied entitlement to remission of one third of sentence to all those convicted of drug offences before amending legislation passed in 1994 came into effect. He also sought to declare that the period he spent on remand pending the trial and determination of the appeal should be counted as served sentence and that he be released forthwith from prison. The Court held that the Dangerous Drugs (Amendment) Act 1994 and the Child Protection Act 1994 were in breach of section 10 (4) of the Constitution to the extent that they purport to extend the application of the new provisions to those imprisoned for offences committed prior to the coming into force of that provision. The one and only factor to be taken into account by the prison authorities should be the date of the commission of the offence, so that the plaintiff was entitled to benefit from the provision of section 50 of the Reform Institutions Act giving him remission of one third of his sentence. However, the period of time spent on remand by him cannot be considered as served sentence.
47. In *De Boucherville v Commissioner of Prisons* (2006) MR 20, the applicant committed murder in 1984 and was convicted and sentenced to death in 1985. Before he was executed, the death penalty was abolished. Section 2 (3) of the Abolition of Death Penalty Act 1995 provides that, “where any person has been sentenced to death, and the sentence has not been executed, the person shall be deemed to have been sentenced to penal servitude for life”.

“Experience has shown that trafficking in drugs takes many forms, which vary according to the nature and quality of the drug and the market in which the trafficker seeks to operate. Attempts to penalize the activity by reference to such yardsticks as value or quantity may be counterproductive, or at least ineffective, as individual transactions can be so easily adjusted to avoid the penalty. In any event, it is artificial to set limits on an activity which is infinitely variable. The policy of parliament in enacting section 38 was to strike at the heart of the problem by penalizing the act of dealing in dangerous drugs, whatever form this might take and whatever the quantities. This is a legitimate approach, as there is a clear distinction between the handling of drugs for personal use and trading in drugs by buying and selling them, which is the essence of trafficking ...

It would not be right to use the word “discretion” to describe the nature of the task which a judge must face when applying his mind to the evidence. His task is to decide what facts have been proved to the required standard and, having done so, to decide what inferences, if any, can reasonably be drawn from those proved facts. The exercise is one of judgment, and the question whether trafficking has been proved beyond reasonable doubt is to be answered in the light of all the circumstances. No limit is set by statute as to the circumstances which may be taken into account. But the decision which the judge takes must be reached upon a consideration of the facts which have been established beyond reasonable doubt by the evidence.”

Section 11 (2) of the Criminal Code, as amended in 1984, provided that the maximum term which could be imposed was 20 years. The figure was amended from “20” to “30” in 1985 and the amendment became operative on 16 March 1986. In February 1986, the respondents pronounced that the applicant’s term of imprisonment was 30 years. Applicant sought a declaration that his term of imprisonment, in fact, ought to be 20 years. The Supreme Court held that that in 1984 the maximum sentence of penal servitude which could have been imposed in a case where no terms had been specified was 20 years. However, in applicant’s case, the term which had been imposed was “for life”. This word must be given its ordinary dictionary meaning so that penal servitude for life means that the penalty is “for life”.³⁰

On appeal, the Judicial Committee of the Privy Council declared the sentence passed upon the appellant to be unconstitutional and invited the appellant to make an application to the Supreme Court under section 5 of the Criminal Procedure (Amendment) Act 2007, which contains a transitional provision applicable to prisoners sentenced to penal servitude for life. The Board considered the sentence, so interpreted, as manifestly disproportionate and arbitrary and contrary to section 10 of the Constitution.³¹

³⁰ In *State of Mauritius v Jeetun* (2006) MR 140, the respondent was convicted in February 1986 of manslaughter for an offence committed in June 1983. He was sentenced to penal servitude for life. At that time the maximum term for which punishment could be imposed, where the term had not been specified in the law, was 20 years. This provision was amended in March 1986 to read 30 years, instead of 20. In 2002, the respondent had applied for an order to declare that his sentence of “penal servitude for life” should be for 20 years and the Court had granted the application. In the light of the decision in *De Boucherville* (2006), the State applied to have Jeetun’s 2002 order stayed and his term of penal servitude changed from 20 years to “penal servitude for life”. Held, on appeal, that the Jeetun order had neither been recalled nor been the object of a new trial or appeal and could not now be stayed, in the light of the principle of finality in legal proceedings. Moreover, a litigant could not be deprived of the benefit of a judgment which he has lawfully obtained. The decision on the life sentence of *De Boucherville* could only apply prospectively, assuming it was correct in its interpretation of the law regarding the sentence imposed for manslaughter. The enactments which abolished death penalty and which provided for maximum terms of penal servitude had, by failing to deal with the lesser offence of manslaughter, created an anomaly. It could not have been the intention of the legislature to punish those convicted of manslaughter in the same way as those convicted of murder. The application was set aside and the order to stay the order granted in *Jeetun* in 2002 was discharged.

³¹ Mr. Fitzgerald, counsel for appellant, argued that such a sentence permitted no distinction to be drawn between one offence of murder and another, despite the great and well-known disparity between the culpability of different murderers, even where an intention to kill is necessary ingredient of the offence. It allowed no account to be taken of the youth, age, vulnerability or circumstances of the individual offender. It

(D) Right of a person charged with a criminal offence to be presumed innocent until he is proved or has pleaded guilty (Presumption of Innocence) [Section 10(2)(a) & (11)(a) of the Constitution]

48. Section 10 (2) (a) of the Constitution provides that an accused party shall be presumed innocent until he is proved or has pleaded guilty. In *Sabapathee v. State* (1999) MR 233 [P.C. Appeal No. 1 of 1999], the Judicial Committee of the Privy Council had this to say on section 10(2)(a):

“The effect of section 10(2)(a) is to enshrine in the Constitution the basic right of every person charged with a criminal offence to the presumption of innocence. The common law requires that this presumption can only be overcome by evidence which is relevant to the crime with which he has been charged. It also requires that the burden of proof lies with the prosecutor, and that the standard of proof which must be discharged by that evidence is proof beyond reasonable doubt. Although these common law rules are not mentioned expressly in section 10(2), they are fundamentally bound up with the presumption of innocence. They are, by necessary implication, part of what paragraph (a) of that subsection means when it uses the word ‘proved’.”³²

gave the defendant no opportunity to plead for a lesser penalty before being deprived of every thing worth living for, save life itself. It permitted no account to be taken of a defendant’s remorse or the prospects of his rehabilitation. A hearing which gave the court no scope to mitigate such a sentence was not a fair hearing.

³² The Judicial Committee found no substance in the argument put forward by counsel for appellant that the effect of section 38(2) of the Dangerous Drugs Act of 1986, which is that a person shall be a trafficker where having regard to all the circumstances of the case against him it can be reasonably inferred that he was engaged in trafficking, was to reduce the standard of proof from that of proof beyond reasonable doubt. Their lordships considered that:

“The rule which is laid down in section 38(2) amounts to nothing more than a restatement of the ordinary common law rule that, where direct evidence is not available to prove any fact which requires to be proved, the court may find that fact established by inference from other facts which have been proved. The inference must, of course, be a reasonable one having regard to all the circumstances. But the standard of proof remains, as in the case of proof by means of direct evidence, that of proof beyond reasonable doubt. In order to satisfy that standard the court must be sure that the inference is the right one to draw in all the circumstances. There is nothing in the language of section 38(2) which indicates an intention on the part of Parliament to depart from these fundamental rules.”

49. Section 10(11) (a) of the Constitution is to the effect that the presumption of innocence ordained under section 10(2)(a) is not absolute, as the burden of proving particular facts may still rest on an accused person. In *DPP v. Labavarde* [1965] MR 72, it was considered that the imposition on the defence of the onus of proving particular facts is permissible so long as the whole burden is not cast on the defence by the creation of a presumption of guilt on the mere preferment of the charge.

The Supreme Court have had the opportunity to express itself on what are those particular facts, referred to in section 10(11)(a) of the Constitution, the burden of proving which the Legislature is exceptionally authorised, without infringing an accused's fundamental right, to place upon his shoulders, and what is the scope and object of its power to do so. In *Police v. Moorbanoo* [1972] MR 22, the court had this to say:

"To say that an accused party is to be presumed innocent is really to say that the burden is on the prosecution to prove every ingredient of the charge against him. It has long ago been realised, however, that if that rule were strictly adhered to, many acts or omissions which the Legislature deems of the utmost importance to prohibit for the public good would have to be left unpunished because the prohibition would be incapable of enforcement, and there has from early times been elaborated a qualification to the rule which is, that facts which bring a defendant within the ambit of a particular exception, if they are peculiarly or exclusively within his knowledge, should be regarded as matters which it is for him to establish. The reason behind that qualification was or must have been that the defendant in such a case had or should have had readily available to him the means by which he could establish whether or not he fell within the expected class of persons, and if he did not come forward with his evidence, it could safely be inferred that he did not so fall.

Acting on that view, the courts have found it possible to construe a number of statutes in which it was made an offence for a person to do or not to do an act unless he had some qualification, authority or licence to do or not to do it as throwing upon the accused the burden of showing that he came within the exception. It is plain enough that a prohibition of that kind would soon become inoperative if the prosecution had to undertake in each case an investigation with a view to ascertaining whether the offender is possessed of the necessary qualification, authority or licence. The legislature itself in some statutes of this class has used words to the effect that the burden of establishing the exception shall be on the accused. We have no doubt that in so doing the legislative was guided by the same principle as has been applied by the courts, but has itself so to say,

predetermined that the facts constituting the exception were or should be particularly within the knowledge of the accused.

There is yet another category of cases where the legislature has relieved the prosecution of part of its original onus by providing that certain acts will be prima facie evidence of some other acts which it is incumbent on the prosecution to prove under the charge. The presumption thus created usually does little more than reflect the probative value of the basic fact. In other words, the basic fact is of the kind that could according to common experience reasonably warrant the inference of the other fact and the legislature has done no more than, so to speak, force upon the court the drawing of that inference and make it prima facie evidence sufficient to cast on the defence the burden of proving the contrary. It is essential, however, that there should exist a rational connection between the principal and subsidiary facts to justify the statutory inference.

These, therefore, are permissible as ways of alleviating the burden imposed on the prosecution and the idea behind them. It has for effect not to dispense the prosecution with the onus of proving the elements of the offence charged but to determine what evidence would in certain circumstances be sufficient to prove those elements in the absence of proof to the contrary. It does not, could not and should not operate so as to cast directly or indirectly upon the person charged the burden of disproving the basic allegation of any of those elements."

50. In *Police v. Fra* (1975) MR 157, the Supreme Court made the following observations:

"It is permissible for the Legislature, if it deems it expedient, to prohibit absolutely and make an offence of any act however innocent morally it may be thought to be and however foolish or arbitrary it may seem for the legislature to forbid it, provided the prohibition does not violate the Constitution generally, or particularly the citizen's fundamental rights as established by the constitution.

It is also permissible for the Legislature, subject to the same restriction, to make the doing of any particular act an offence, save in specified circumstances, or by persons of specified classes, or with special qualifications or with the permission or licence of specified authorities; the effect of the enactment being in such a case to prohibit either expressly or by necessary implication the doing of the act in question subject to a proviso, exception, excuse or qualification, and the burden of proving that the proviso and the like applies being placed on the contravener. Such an enactment would not infringe subsection 2(a) of section 10 of the Constitution and is expressly allowed by subsection 11(a) of that section, which provides that a law that imposes upon a person charged with a criminal offence the burden of proving particular facts is not inconsistent with the presumption of innocence protected by subsection 2(a).

But it is not permissible for the legislature to make a law by the effect of which an act innocent in itself, which the law does not prohibit expressly or by necessary implication, would become an offence only if not satisfactorily explained; in other words, a law by the effect of which the person charged would have the burden of proving that an innocuous act is not a wrongful act.

The distinction between the second and third classes of enactment is not readily discernible but it exists. It is the same distinction as saying that an act is unlawful except in certain circumstances and subject to certain conditions and saying that doing an act is wrong unless it is shown innocent."³³

³³ See also *Velle Vindron v. Queen* [1973] M.R. 245; *Police v. Leonide* [1976] M.R. 250; *Lecordier v. Lalane* [1979] M.R. 168; *Parmessur v. R* [1979] M.R. 205; *Police v. Seechurn* [1980] M.R. 248; *Simadree v. State* [1993] M.R. 333.

In *DPP v. Kohealle* (1999) MR 113 [SCJ 255], the respondent was charged inter alia with using a motor vehicle for a purpose other than the one for which it was licensed namely using a private car as taxi. The Director of Public Prosecutions had appealed against the dismissal essentially on the ground that the Learned Magistrate has failed to direct his mind to the statutory presumptions created by section 188(1)(a) and (b) of the Act. At the hearing, however, learned counsel for the appellant did not press the appeal as she could not rely on section 188(1)(a) and (b) of the Act and invited the Court to declare these provisions as being unconstitutional. It was her contention that these provisions fell foul of section 10(2) and (10) of the Constitution as their effect was to saddle an accused party with the burden of proving that he was not guilty. Learned counsel referred us to the decisions of this Court in *DPP v. Labavarde* (1965) MR 72, *Police v. Moorbanoo* (1972) MR 22, *Vellevindron v. R* (1973) MR 245 and *Police v Fra* 1975 MR 157 and submitted that such a burden cannot be placed on the defence.

The Court agreed with learned counsel for the appellant that section 188(1)(a) and (b) of the Road Traffic Act was inconsistent with the presumption of innocence enshrined in section 10(2)(a) of the Constitution. The Court was of the opinion that in a prosecution under section 21(3) of the Act, the prosecution has to establish that the motor vehicle used by the accused was licensed for one purpose but was being used for another purpose. In the present case, for example, the prosecution had to establish that the respondent was using his private car as taxi. In view of the definition of “taxi” in section 2, coupled with section 75 of the Act, the prosecution had to establish that the passengers were being carried for hire or reward. Section 188(1) provides as follows –

- (1) In any proceedings for an offence under this Act, insofar as it may be necessary to establish the offence charged, it shall be presumed, until the contrary is proved, that –
 - (a) a conveyance of persons or goods in a motor vehicle was for hire or reward;
 - (b) the passengers carried in a motor vehicle were being carried in consideration of joint payments made by them ...”

It was considered that the effect of that statutory presumption is that the accused assumes the burden of proving that the passengers were not being carried for hire or reward or, to quote from *Police v. Fra*, “the persons charged would have the burden of proving that an innocuous act is not a wrongful act.” With the presumption created in section 188(1)(a), the prosecution could rest content with proving nothing more than a

51. A statute can place the burden on an accused either expressly or by implication. The accused may have to bear the burden where:

(1) It is an offence for a person to do or not to do an act unless he has some qualification, authority or licence to do or not to do it, the accused may bear the burden of showing that he comes within the exception. Eg section 42 of the Dangerous Drugs Act of 1986 provides that where in any proceedings for an offence a question arise as to whether any person was or was not authorised to be in possession of any dangerous drug, the burden of proof that such a person was authorised to be in possession of drug, shall lie on that person. Similarly section 29(1) of the Criminal Code (Supplementary) Act is to the effect that the burden of establishing that someone had lawful authority or reasonable excuse to have an offensive weapon in a public place is specifically put on the accused.³⁴

(2) The prohibition of the doing of an act is subject to an exception, proviso, exemption and the like. Section 125(2) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that any exception, exemption, proviso or qualification, whether it does or does not accompany the description of the offence in the law creating such offence, may be proved by the defendant but need not be specified in the information or proved by the prosecutor.³⁵

person was driving his family to the beach in his private car, when there is nothing sinister or suspicious in the fact of having passengers in a private car. As pointed out by the Court in *Police v. Seechurn* the burden can shift to the accused only if the evidence adduced by the prosecution points to some unlawful or sinister or suspicious act. In the circumstances the Court held that section 188(1)(a) and (b) of the Road Traffic Act is repugnant to section 10(2)(a) of the Constitution.

³⁴ See *DPP v. District Magistrate of Grand Port* (1992) MR 222.

³⁵ The purport of that section was considered in *Ramdin v. R* 1958 MR 131 where the appellant was charged with carrying a gun on Crown land without the permission of the Governor or the consent of the person under whose guardianship the land had been placed, the issue in the case being whether the appellant had the consent of the guardian.

The Court had the following to say–

“The effect of this sub section 125)(2) is that the burden of proof lay upon the appellant to prove that he had the consent of the guardian; it was not necessary for the prosecution to raise a prima facie case that he did

However, see *Beekhan v. R* (1976) MR 3: what is framed as an apparent exception may in fact constitute an essential element without which no offence exists; the burden is then on the prosecution. Section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act merely restates the fundamental principle that all the essential elements of the offence must be stated in the information, and in order to decide if an element is essential, one must look at the substance and not at the form of the enactment.³⁶

- (3) Through the operation of a presumption an offence is established through the proof of a basic fact, the accused may bear the burden of proving the non-existence of the presumed fact. For example, someone who is living with a prostitute being considered as a pimp, that is as someone living on the earnings of prostitution.

The particular facts the burden of proving which is cast upon the accused must be peculiarly or exclusively within his knowledge so that they are regarded as matters which it is for him to establish.

52. In *Lobogun v State* (2006) MR 63, appellant had been found guilty of carrying on a betting activity without licence in breach of the Gaming Act. On appeal, one of the grounds was that the information did not disclose an offence known in law. It was contended that section 61 of the Act did not include any reference to an activity as “bookmaker operating outside the

not have such consent, nor to aver it in the information. The burden would not be of proving beyond reasonable doubt but of satisfying the Court of the probability of that of which the defendant is called upon to establish: The King v. Carr – Briant [1943] K.B 607, cited in Toofany v. R 1957 MR 186, at page 196.”

³⁶In *Beekhan v. R* 1976 MR 3 the court said–

“If one goes back to first principles, one expects the prosecution to prove everything which constitutes guilt, unless there are valid reasons for dispensing them from such proof and for casting the burden of proof on the defence. Thus it is unreasonable to demand of the prosecution to negative in advance every conceivable lawful excuse. That is why, where a negative averment is specifically within the knowledge of the accused, for instance, where it is averred that he did some act without a permit or without lawful authority, it is natural to ask him to prove that he had such permit or authority.”

stand” and that the information was also defective in law since it failed to aver a betting activity “other than in relation to a sweepstake or lottery”. The Court held that an averment framed in the negative form may constitute an essential element of the offence. In deciding if it is, one must look at the substance and not at the form of the enactment. Importance must be attached to the constitutional safeguards for a fair hearing embodied in section 10 (2) of the Constitution, i.e., the presumption of innocence and the right to be informed in detail of the nature of the offence. The words “other than in relation to a sweepstake or lottery” formed a constitutive component of the offence and had to be expressly set out in the information in order to create a complete criminal offence known to law and also in order to enable the appellant to know with precision the offence with which he stood charged. Failure to aver this essential element was fatal to the case.

(E) Right of a person charged with a criminal offence to be given adequate time and facilities for the preparation of his defence [Section 10(2)(c) of the Constitution]

53. Section 10(2)(c) of the constitution provides that every person charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence. In *Bégué v. R* (1973) MR 278, the Court considered that it is not the duty of the trial court to ascertain whether an accused requires time to prepare his defence.³⁷

54. In *Lamarques v. R* (1974) MR 291, the case was heard on the very day the accused was brought to court and the Magistrate rejected a motion for adjournment of the case by counsel for the

³⁷Note that section 68(1) of the Intermediate and District Courts (Criminal Jurisdiction) Act lays down that when an accused is brought before a Magistrate, the Magistrate may proceed to hear the charge if the accused does not require further time to answer it. The Court considered in *Bégué* that this provision, just as section 10 (2) (c) of the Constitution, confers a right on the accused which it is up to him to invoke. The Court was also of the opinion that assuming that there was some kind of duty on the Magistrate to inform the accused of the effect of section 68(1) of the Act, it would hold that a failure on his part to do so could entail the quashing of a conviction only if a miscarriage of justice has occurred.

defence, on the ground that the case against the accused might not otherwise be established as the prosecution witnesses (foreign sailors who were leaving in the afternoon) would most likely not be in attendance. The view was taken on appeal that when the Magistrate decided, there and then, to proceed with the hearing of the case and to hear the principal witness for the prosecution after he had refused an application for an adjournment, he had acted in contravention of section 10(2)(c) of the Constitution. The appellate court considered that by no stretch of imagination could it be said that the time given to the appellant for the preparation of his defence was, in the circumstances of the case, adequate.

55. In *François v. R* (1975) MR 236, accused was only given eight days to prepare his defence and retain services of counsel while he was in goal, and the trial court refused counsel's request for postponement. It was held on appeal that the refusal of the postponement amounted to a denial of appellant's constitutional rights – the time granted to the appellant to prepare his defence and retain counsel was unusually short.³⁸

56. In *Nirsimloo v State* (2000) MR 244, on his trial for embezzlement before the District Court, the appellant who was not assisted by Counsel, had asked for communication of the statements given to the Police by the prosecution witnesses. The Magistrate had turned down the request. The Court held, on appeal, there had been no breach of the applicant's constitutional right to a fair trial under section 10 of the Constitution. Statements by witnesses for the prosecution are not usually communicated to the defence in trials before the District Courts (as opposed to before the Intermediate Court). However, in appropriate cases before a District Court, the DPP would allow the defence access to original statements upon good reasons being shown. Merely asking for communication of those statements, as was done by the appellant, would not constitute "good reasons". Appellant also had to demonstrate that the trial would otherwise be unfair or that the conduct of the defence would be impeded if the statements were not made available.

³⁸ In *Mohit & ors. v. R* (1980) MR 317 a motion for postponement was refused when witness for defence who had been duly summoned was absent. The conviction was quashed; on appeal the view was taken the trial court had not acted judicially.

(F) Right of a person charged with a criminal offence to be permitted to defend himself in person [Section 10(2)(d) of the Constitution]

57. Section 10(2)(d) of the Constitution provides that every person who is charged with a criminal shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense.

58. An accused party is presumed to be aware of his right to defend himself in person or by counsel. That presumption, however, can be rebutted by the accused himself if on pro forma day, he behaves in such a manner or says anything which would indicate his ignorance of his rights. In *Hypolite v. R* (1988) MR 246, the Court stated the law on the matter as follows:

“As aptly stated by this Court in *R. Kelawon v. R* (1984) S.C.J. 110, there is a presumption, in the light of our well-established system of administration of justice and of a lively and active legal profession, that an accused party is aware of his right to defend himself in person or by Counsel, in the absence of evidence to the contrary. However, that presumption can be rebutted by an accused party himself. If there does happen to be any person who, for some unaccountable reason, is totally unaware of his rights in this regard, one would expect him so to conduct himself in the proceedings or to say something which would indicate his ignorance to the trial Court.”

59. In *Sunassee v. State* (1998) MR 84 [SCJ 324], observations were made on the trial court's duty when accused is undefended:

“The accused in a criminal case certainly has a number of rights and is entitled to take several courses of action as the trial proceeds. When an accused in *inops consilii*, it is the court's duty to offer him a certain amount of guidance in order to help him not to

miss important opportunities which are open to him, under the existing procedure, to challenge the evidence of the prosecution or to present his own defence.³⁹

It stands to reason, however, that whilst the essential stages of the procedure are to be brought home to an accused who is unrepresented by counsel, the court cannot act as an adviser to the accused as to the various tactical possibilities open to him as the trial unfolds nor can the court indicate to him all possible moves open to him at every stage and which could have been adopted by counsel if there was one assisting the accused.”⁴⁰

60. In *R v. Mensa* (1989) MR 137, the Court examined the scope of an accused right to dispense with counsel. The Court considered that it is clear from the provisions of section 10(2)(d) that an accused can defend himself in person and waive his right to counsel. But the Court went on to say, however, that as the right to counsel is a fundamental component to the right of a fair trial, a waiver to counsel, made particularly on a serious charge involving a mandatory death sentence, cannot be granted on the mere request of the accused:

“In *Carnley v. Cochran*, a U.S. decision of 1962, where the US Supreme Court held that to sustain a claim for waiver “the record must show, or there must be an allegation and evidence must show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not a waiver.” The Court was here following the earlier case of *Von Moltke v. Gillies* decided in 1948 where the Court held that “to be valid a waiver must be made with an apprehension of the nature of the charges, the statutory offences included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A Judge can make certain that an accused’s

³⁹ In *Bhuttoo v. Queen* (1964) MR 48, the Supreme Court reminded the magistrates of the importance of ensuring not only that an accused party is made aware of his rights, but also that the record does show that he has been made aware of such rights.

⁴⁰ In *Balloo v. R* (1969) MR 128, the Supreme Court had this to say on the duty of a trial court when the accused is inop consilii:

“When an accused party defends himself in person, it is the duty of the magistrate trying his case to see that he understands what is said at the trial, that he has an opportunity of cross-examining the witnesses for the prosecution, that he is informed of his right to give evidence on his own behalf and to call witnesses. Without actually conducting his case for him, the magistrate can help him to put forward his defence. Indeed, it is the duty of the magistrate to see that the rules of procedure and evidence are observed and that the accused has a fair trial.”

professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances.”

Commenting on how the guidelines laid down in the case of *Von Moltke & Gillies* should be used Wayne R. Lafave and Jerold H. Israel in their textbook *Criminal Procedure* (West Publishing Co. St. Paul Minn, 1985) have this to say at pages 490-491. “Consideration must be given to all of the surrounding circumstances, including not only the statements of the trial Judge and defendant, but also the defendant’s age, mental condition, and prior experience with the criminal process, previous hearings in the case, and the general nature of the offence charged. Each factor will have a bearing on the other. Where “the background and experience of the defendant on legal matters (is) apparent from the record”, the waiver may be sustained notwithstanding a trial Judge’s failure to explore several of the *Von Moltke* factors. On the other hand, where there is some question as to defendant’s mental capacity, or where his statements before the Court suggest that he is confused, anything short of a complete *Von Moltke* enquiry is likely to result in the waiver being held invalid.”

In the present case, the accused, however, did ask for the assistance of counsel. That in itself raises a strong presumption whereby he felt he could not conduct his defence. To accede to his request without an enquiry on the lines suggested by the U.S Supreme Court would, to my mind, not be fair.”

(G) Right of a person charged with a criminal offence to be permitted to defend himself, at his own expense, by a legal representative of his own choice [Section 10(2)(d) of the Constitution]⁴¹

Right to be represented by Counsel

61. In *Ragoobeer v. R* (1974) MR 177, the Court made the following observations on an accused person's constitutional right to be represented by a legal representative of his own choice:

“The issue raised concerning the alleged breach of the appellant's constitutional right of being represented by counsel of his choice is not novel, nor has our Constitution, from the time it first embodied provisions for the protection of fundamental rights and freedoms, conferred on an accused party a privilege which he had not up to then enjoyed. Section 8(1)(d) of the 1964 Constitution (section 10(2)(d) of the present Constitution), in its effect on criminal procedure, does not go much further, if it does at all, than Ordinance No. 35 of 1852 [now section 66(2) of the Intermediate and District Courts (Criminal Jurisdiction) Ordinance - cap. 174] under which the accused was entitled to make his defence by counsel or attorney. The decisions of this Court ... show that the rules evolved by the Court in interpreting and applying the latter enactments are radically the same as those which it later held resulted from a true construction of the constitutional provision. The Court actually expressed its view in one instance *Baloo v. R*. 1969 MR 128 that it could for that reason legitimately seek guidance from the pronouncements made in the pre-constitutional period for the purpose of determining the real purport of section 10(2)(d) of the present Constitution....

Prior to 1964, the Court had held that the adjournment of a trial was a matter essentially within the discretion of the Magistrate. The appellate court would not interfere to quash a conviction unless it were shown that the Magistrate had made a wrongful use of his discretion, and then only if the court was satisfied that the refusal

⁴¹ Section 10(11)(aa) of the Constitution, enacted by section 3 of Act No. 40 of 2000, provides that a law authorising a police officer to direct that any person arrested upon reasonable suspicion of having committed any drug dealing offence be detained in police custody for a period not exceeding 36 hours from his arrest without having access to any person, other than a police officer not below the rank of Inspector or a Government Medical Officer, is not to be held as inconsistent with section 10(2)(d).

to adjourn had resulted in a miscarriage of justice. The right of an accused party to have a legal representative required that he should be given the opportunity of retaining the services of a lawyer, if he so wished, but the responsibility for ensuring that the lawyer was in attendance on the day fixed for the hearing lay on the accused party himself. If, therefore, on the day fixed for trial the accused was unrepresented either because he had failed to retain a legal adviser or because the adviser whom he had retained did not appear, or if at any time during the trial he was deprived of the services of his lawyer, and an application was made by him or on his behalf for a postponement for the purpose of retaining the services of a lawyer or of another lawyer, a refusal on the part of the Magistrate to adjourn would not constitute a wrongful exercise of his discretion or an infringement of the accused's right, unless there was a valid reason for the non-appearance of the accused's lawyer and the accused was, by the non-appearance or by the withdrawal of his lawyer in circumstances over which he had no control and for which he could not be made responsible, suddenly placed at such a disadvantage as not to be able to put his defence properly. On the question whether a miscarriage of justice had occurred owing to the accused being unrepresented, it had been thought relevant to enquire whether the accused had been able to make known his defence by cross-examining the prosecution witnesses, by giving evidence and having his witnesses heard.

Since 1964, the Court has had to reconsider the question and ascertain whether the accused's right to be represented at his trial as laid down in the Constitution was of greater content than, or was in any way different from, what it had been previously and, if so, what was its nature and extent. The Court, as earlier observed, was of opinion that the accused's right ought not to be viewed in the narrow context of the Constitution but in the wider context of our case-law ...”

62. Whilst it is an accused’s constitutional right to be represented by counsel of his own choice, it is his duty to secure attendance of counsel in court on trial day. Therefore whenever accused is deprived of services of counsel (counsel being absent in court or counsel withdrawing from the case on trial day), a distinction has to be drawn between someone who is being deprived of the services of counsel of his own choice by his own fault, and someone who is deprived of such services through no fault of his and is thereby prejudiced.

In *Lallchand v. R* (1975) MR 211, where the case was called pro forma and there was a letter from counsel suggesting dates for trial but the Magistrate nevertheless proceeded to hear the case in absence of counsel and convicted the accused, it was held on appeal that by trying the case in the absence of counsel the Magistrate had deprived the accused of his constitutional rights. There is no duty on accused to have counsel or witnesses in attendance on pro forma.

In *Chan Kwong Miow v. R* (1968) MR 239, counsel was not retained by accused on the ground that he was under the impression that the case was coming pro forma and it was argued that the Magistrate's refusal to grant postponement for the purpose of retaining counsel violated section 10(2)(d) of the Constitution. It was held on appeal that accused had ample opportunity to retain counsel and his allegation he believed the case was merely coming pro forma was a pretence to delay proceedings. The Court considered that accused had himself to blame for his laches. It is the duty of accused to secure presence of counsel on trial day.

Absence of Counsel on trial day and the right to be represented by Counsel

63. In *Gooranah v. R* (1968) MR 122, accused, on trial day, produced a letter from counsel informing the court that his services has just been retained and praying for a postponement as he was engaged elsewhere and had not had time to study the case. The motion for postponement was refused. It was held on appeal that the Magistrate had made a judicious use of his discretion. The accused, by retaining at the last hour services of a counsel who was not free to appear on that day, didn't exercise his right to a legal representative of his own choice but had made an abuse of that right. Chief Justice Rivalland, who delivered judgment, made the following observations:

“The all important words of paragraph (d) in my view are “shall be permitted to defend himself”. The duty on the Court is clear and is impliedly twofold: an accused party must be given a reasonable opportunity to retain the services of a legal representative of his choice and, at the trial of the case, the legal representative must be given full latitude – in accordance with the laws of this country - to defend the accused. On the other hand, the duty to retain the services of a legal representative of his choice lies on an accused party and the words “of his choice” are here again important: they necessarily connote the idea that, if he has a wide choice from among the members of the Bar, the responsibility for the choice is his, not that of the Court. The duty cast on the Court is purely a passive one in so far as the presence of counsel at the trial is concerned, while the responsibility for the briefing of the legal representative and ensuring his presence in Court devolves from the very words of the

Constitution on the accused party. The provisions of the Constitution were never intended to be a cloak for the laches of an accused party.⁴²

In the present case, the appellant was given more than an ample opportunity to retain the services of counsel in time, bearing in mind that he appeared three times before the Court before the case was eventually fixed for trial. By retaining at the last hour the services of a counsel who was not free to appear on that day he did not exercise his right but made an abuse of that right, and if such abuses were to be condoned by the Courts, the administration of justice would soon be brought to a standstill in this country. To take another instance: from time immemorial, it has been the custom that counsel retained by an accused party writes to the magistrate of the Court of trial on the day the case is called *pro forma* to suggest dates for the hearing. If the case has been fixed to one of the dates suggested by counsel and he fails to be present on that day without invoking a reason considered adequate by the Court - such as illness for instance - could it be argued that the Constitution has imposed a duty on the Court to postpone the case? The answer, in my opinion, is definitely in the negative. I hasten however to add that the position might be different if the dates suggested by counsel were not convenient to the Court and the case was fixed peremptorily to some other date and a subsequent request by counsel for a change of date was refused. The Court would in such a case have in fact denied the accused party a reasonable opportunity of having himself represented by a legal representative of his choice.”

64. The Supreme Court in *Gooranah* also observed that it is not the duty of the trial court to elicit from accused whether there exists a good reason for the delay in retaining counsel:

“It is clearly not the duty of a Court to enquire from an accused party the reasons for the absence of his legal representative: any Court doing so would not only be enquiring into the relations between an accused party and his legal adviser but would be inviting allegations in public by the former against the latter in his absence - two matters which would be clearly undesirable and against public policy.”

65. In *Periag & anor v. R* (1974) MR 59, counsel requested a postponement as he was engaged before the Assizes in a *forma pauperis* case. It was held on appeal that the trial court’s refusal to grant a postponement in the circumstances was a wrong exercise of the discretion of the

⁴² In *Jheelan v. R* (1981) MR 251, the Court pointed out that it is the duty of an accused party to ensure counsel's presence on trial day.

Magistrate, which had caused prejudice to the accused who found themselves inops consilii through no fault of theirs.⁴³

But in *Chakooree v. R* (1984) MR 20, where counsel required a postponement as he was engaged before Assizes, it was held on appeal that counsel had impertinently assumed that the trial court was bound to defer to his convenience and the Magistrate was therefore right to refuse the postponement. The Court also observed that the right of a person charged with a criminal offence to be permitted to defend himself or to have himself defended by counsel of his own choice does not allow him either deliberately or by his own fault or negligence to make an abuse of that right so as to hamper the course of Justice.

66. In *Ragoobeer v. R* (1974) MR 177, on trial day counsel retained was not present and another counsel appeared replacing him. On accused stating he did not wish replacing counsel to appear, the latter was allowed to withdraw and the case ordered to proceed. On appeal, it was held there was no ground for saying the Magistrate was wrong to proceed with the accused's trial in the circumstances.⁴⁴

67. In *Duval v. R* (1967) MR 92, on the day fixed for the trial, counsel was ill but the information to that effect conveyed by letter reached the magistrate after the case had been heard and

⁴³ As observed by the Court:

“We have no doubt that the refusal of the postponement in the circumstances was not only prejudicial to the accused who through no fault of theirs were left undefended throughout the trial but was also a wrong exercise of the power vested in the magistrate to refuse to grant a postponement. Moreover the criticism addressed to Counsel that he should not have accepted the brief was unjustified, if reference was being made to the brief of the case before the District Court, Counsel was already committed to appear and if it meant the brief before the Assizes, then the magistrate overlooked that Counsel had been appointed “*in forma pauperis*” and could not do otherwise than ask for the postponement of the cases before the District Court.”

⁴⁴ As pointed out by the Court, “the conclusion must be that not only has he not been deprived of his fundamental right to be defended by a legal representative of his choice, but also that no failure of justice has ensued from his being unrepresented. His trial had been fixed to a day not less than three months after the case had come *pro forma* before the court so that ... the counsel whom he had instructed had ample time in which to be ready with the defence and to ask for a change of date if, for any reason, he was unable to appear on the appointed one.”

adjourned for judgment. The magistrate proceeded to judgment on a later day and did not give to counsel an opportunity to cross-examine witnesses for the prosecution and, if deemed necessary, to call additional evidence. On appeal, it was held that the decision of the magistrate to proceed to judgment amounted in the circumstances to an infringement of the constitutional right of the accused to be represented by counsel of his choice: failure of counsel to be present in court was independent of the will of accused or his counsel.

In *Peroumal v. R* (1983) MR 130, where the trial Court refused to accede to a written request for postponement by Counsel who was sick and heard the appellant's case in the absence of his Counsel, the Supreme Court on appeal quashed the appellant's conviction on the ground that he had been deprived of his constitutional right to be represented by Counsel through no fault of his.

In *Juste v. R* (1989) MR 256, counsel was under the impression the case was coming pro forma and asked for a postponement, which was refused by the magistrate who proceeded to hear the case. It appears from the trial court record that accused was not properly notified the case was coming for trial. On appeal, it was held that the appellant was deprived of the right to be defended by counsel in circumstances where the Supreme Court, which can only be guided by the record of the court below, cannot say the appellant was wholly responsible for the absence of his counsel.

68. In *Codabux v. R* (1984) MR 159, it was held that where counsel is absent on the day of trial without any explanation being offered and the Court has allowed some reasonable time to elapse to cover unforeseen mishaps, the trial may proceed. Counsel may, on good ground, move, before judgment, that the case be reopened but there is no duty on the Court to offer the accused a new trial or the opportunity to retain other counsel.⁴⁵

⁴⁵ The Court made the following observations:

“It is the business of the accused in a criminal matter to ensure that he retains counsel and that counsel is present to defend him. If counsel who has been retained is not present at the trial and a valid excuse is given for his absence the Court will adjourn the case, although a Court would be free, if counsel is responsible for more than one adjournment, to invite the accused to choose another advocate. But it is equally clear that,

69. In *Ochotoya v. R* (1988) MR 90, the appellant appealed on the ground that there had been a miscarriage of justice because the trial court allowed his counsel to withdraw in his absence. The Court held, on appeal, that where an accused's counsel is absent on the trial day and the accused does not move for a postponement but elects to conduct his own defence, the accused cannot complain that he has been deprived of the constitutional right to be defended by counsel. It is an accused's duty, in such circumstances, to move for postponement to brief counsel.

Withdrawal of Counsel and the right to be represented by Counsel

70. In *Balloo v. R* (1969) MR 128, it was argued that accused had been deprived of his right to legal representation as court refused a request for postponement after counsel had withdrawn from the case for lack of instructions. The Court held that, an accused who, by his own fault, had deprived himself of the assistance of counsel, was not justified in asking the appellate court to quash his conviction on the ground that "he was prejudiced by the fact that he was not represented by counsel". The Court had this to say:

"It is necessary to make a distinction between those persons who, by their own choice or through lack of means, defend themselves without legal assistance, and those who retain the services of a legal representative and are deprived of such services. If they are deprived of the services of counsel of their choice by their own fault, they cannot subsequently complain that, because they were unrepresented, they did not have the

provided the accused and counsel have been given some latitude to cater for unforeseen mishaps, if counsel has not turned up ... and no explanation is forthcoming, the magistrate should get on with the case.

We cannot agree, as the ground of appeal suggests, that it was the magistrate's duty to offer the appellant a postponement. And it would have been most improper to suggest that he could retain other counsel ... The Court only has to ensure that the accused's rights under the Constitution are protected. And counsel also has a duty to follow up his cases ...

On looking at the record, we were surprised to note that the magistrate had taken no action to pursue what appeared to be, on the part of counsel, a plain contempt in the face of the Court. Quite apart from dealing with cases in the light of the above guidelines, magistrates should call upon counsel to furnish explanations for their unexplained absence and, if no satisfactory excuse is forthcoming, report the matter to the Chief Justice."

benefit of a fair trial. If, on the other hand, they are deprived of such services through no fault of their own, the conviction is liable to be set aside by the appellate Court ...

By failing to instruct his counsel, whose services he had retained five months earlier and who had already appeared for him, and by applying for a postponement after his counsel had withdrawn for want of instructions, the appellant was, in our opinion, not exercising his right under s. 10(2)(d) of the Constitution but was clearly making an abuse of that right.”

71. In *Ameer v. R* (1981) MR 545, counsel was allowed to withdraw from the case on the very day of the trial so that accused found himself unrepresented. It was held on appeal that a trial court has the duty to be satisfied that an accused party has none but himself to blame, if, as a result of the court's decision to allow counsel to withdraw and further to refuse any consequential motion for postponement, he finally finds himself unrepresented at the trial. As observed by the Court:

“We appreciate that it may not be desirable to do anything which may be considered as an inquiry into the relations of client and legal adviser and that it may be even more undesirable to open the door to allegations, in public, against counsel in the latter's *absence*.

We must not, however, allow these considerations to outweigh the duty which the Court has to be satisfied that an accused party has none but himself to blame, if, as a result of the Court's decision to allow Counsel to withdraw and further to refuse any consequential motion for postponement, he finally finds himself unrepresented at the trial.

In a democratic society where the right of an accused party to be represented by Counsel is considered as one of the basic and inalienable fundamental rights of the citizen, it is hard to conceive that a Court of Law may, without violating the Constitution, deprive a person of that right on a mere declaration of Counsel and without the interested person being heard.

When a Counsel who has represented himself as having been retained by an accused party chooses to inform the Court that his client has not bothered to give him proper instructions, he is, undoubtedly, disclosing, at least partly, the relations between himself and his client in a way that may have far reaching consequences for the client. It is therefore only fair that the client also should be invited to tell the Court whatever he may consider necessary to dispel the impression that he may have been guilty of laches. This seems to us to be even more important in a country where, in ninety per cent of the cases, the accused standing in the dock may not even grasp what his

Counsel tells the Court in a language he does not understand and where the word “instructions” may not necessarily have its dictionary meaning ...

Magistrates who, on the day of the trial, grant Counsel’s motion to withdraw as a matter of course should, as a corollary, consider favourably any motion of an accused party to a postponement in order to retain the services of another counsel, unless there is clear evidence to show that the accused’s motion is but an abuse of his constitutional right.”⁴⁶

72. In *Chakooree & anor v. R* (1984) MR 20, Counsel X engaged to represent the appellant in a criminal case withdrew from the case on the day it came for hearing for “want of instructions” and because the appellant had failed to see or communicate with him since the time the case came *pro forma*. A letter produced by the appellant on that same day from Counsel Y who was to all intents and purposes under the wrong impression that the case was being called *pro forma* and who, therefore, suggested that the case be fixed for trial on

⁴⁶ In *Yan Wah & anor v. R* (1986) MR 274, where the trial court acceded to counsel’s request to withdraw for lack of instructions, the case proceeded and accused were not allowed to explaining themselves concerning counsel’s motion for withdrawal. It was considered on appeal that the appellants’ constitutional rights had been infringed. The Court had this to say:

“Since counsel requires leave of the Court before withdrawing from a case, it stands to reason that the accused should, before leave is granted, be explained the gist of his counsel’s statement, unless of course he agrees that he understands English. But we hasten to add that if this exercise is done after leave to withdraw has been granted, this will not *per se* be a ground for quashing a conviction. What is important is whether or not an accused party has been unduly penalised by the fact that his counsel was allowed to withdraw at the last minute, having regard particularly to what takes place immediately afterwards ...

The difficulty arises, however, because of the manner in which the trial Court dealt with the matter. As we have seen, the record shows that, after counsel was allowed to withdraw, the appellants were explained “the statement made by counsel and the decision of the Court “case to proceed”. This gives the impression that the appellants were not allowed to say anything at all. But suppose they were given a chance to say something and one of them had come out with the following: I met with a car accident and remained in hospital for several weeks; I have been out of work since and have been trying unsuccessfully to raise funds to fully retain counsel; I have now get another job and, if given another 10 days, will be able to brief another counsel, or for that matter give proper “instructions” to the barrister I had retained initially. If, after some probing if necessary by the trial Court, the Magistrates were convinced that this was a genuine explanation, would they still have made a decision that the case should proceed with the accused standing trial *inops concilii* on a serious charge?

In all the circumstances, therefore, with some reluctance, and while repeating our behest that our decision is not to be relied upon as one of general application, we have formed the opinion that the appellants’ constitutional rights have been infringed.”

another day was disregarded by the Magistrate. It was held on appeal that the Magistrate was right to proceed with the hearing and that in the particular circumstances the appellant was fully responsible for the predicament in which he found himself.

73. In *Allaghen v. R* (1984) MR 156, the appellant was absent on the day of trial when his counsel who had already warned him of his proposed withdrawal, unless properly instructed, was allowed by the court to withdraw. The case was postponed because of the appellant's absence and the trial resumed a few months later. After conviction, he complained that he had been deprived of a fair trial in that the trial court had been wrong to allow counsel to withdraw without seeking an explanation from the appellant and had also failed to inform the appellant of the withdrawal. The appeal was dismissed as it was considered that the appellant had been warned in time of his counsel's proposed withdrawal; that when his trial resumed, he was fully aware counsel no longer represented him. The Court made the following observations:

“Constitutional rights of representation in order to secure a fair trial necessarily require a minimum of initiative on the part of accused persons and, no doubt, of certain minimum standards of professional conduct on the part of the legal profession. And the Court will exercise appropriate vigilance to ensure that these rights are not infringed. However, *ex post facto* complaints of breaches of these rights can turn out, as indeed they do in this case, to be abusive, particularly as there has been no suggestion of any miscarriage of justice ...”⁴⁷

74. In *Hosany v. R* (1984) MR 161, after several postponements of the case for various reasons, Counsel retained by the appellant was given leave by the Court to withdraw on the ground that his client did not wish to follow his advice. The appellant managed to secure the services of another Counsel within the one hour granted by the Court for the purpose. The new Counsel sought a postponement of the case to study the bulky record before assuming the defence of his client. The request was refused and the case was proceeded with, the appellant being unrepresented, and he was eventually convicted. On appeal the Court held that the appellant had been deprived of his constitutional right of being represented by Counsel.

⁴⁷ In *Iqbal v. State* (1992) MR 78, it was pointed out that a person who, on being told that his case is fixed for merits over three months later and simply fails to do anything in the meantime to even go and see his counsel, cannot expect that the trial Court will adjourn the case once more.

Right to be represented by Counsel on trial day: Duty of Court and Professional Ethics of Counsel

75. In *François v. R* (1975) MR 236, the Court made observations on some factors, which could be considered by a trial court in granting or refusing postponements, so as not to deprive an accused of the reasonable opportunity of retaining the services of a legal representative of his choice:

“It seems to us that it would be hazardous to attempt to lay down hard and fast rules on so tricky a subject. A wide discretion must be left to the magistrates, who have the difficult task of reconciling conflicting interests: on the one hand, they must not deny to accused parties their constitutional right of being defended by Counsel of their choice; on the other hand, they must bear in mind that justice delayed is justice denied, and in consequence they must show firmness in refusing unwarranted or frivolous postponements ...

In fixing the date of trial the magistrate may have regard to the fact that a co-accused is being remanded to gaol; to grant an overlong postponement would penalise the accused who is on remand. Again, if a magistrate has warned the accused that for a valid reason he has decided on an early trial, the accused will have only himself to blame if a belated motion for postponement is subsequently refused. Thirdly, if a magistrate has given an accused ample time to retain the services of Counsel, it is objectionable to write to the magistrate on the day of trial to apply for a postponement; such a practice shows scant regard for the convenience of the witnesses, and is lacking in courtesy towards the Court. If Counsel finds that he is unable to attend on the day fixed for trial, his duty is to call on the magistrate in Chambers, or at least to write well in advance to obtain a change of date. Fourthly, no Counsel is entitled to accept so many briefs that he disrupts the business of the Court by suggesting remote dates or by repeatedly applying for postponements.

The above list does not pretend to be exhaustive: it merely recites a few of the factors which most often fall to be considered in deciding whether to grant or to refuse a postponement.”

76. In *Pillay v. Boisram* (1986) MR 266, the Court pointed out that what is more often than not at issue is whether the practitioner has behaved improperly or negligently⁴⁸ and, consequently,

⁴⁸ In *Goorannah v. Queen* (1968) MR 122, Chief Justice Rivalland made the following comments:

whether the Magistrate has dealt with the problem as reason and common sense command, bearing in mind admittedly whether the litigant in his turn has been careless or negligent or whether he has been left in the lurch by his lawyers. It was emphasized that the constitutional right of a defendant in a criminal trial to counsel of his choice must be viewed along with the accused's right (also enshrined in the Constitution) to a fair trial within a reasonable time, which it is the Court's duty to ensure. And the Court stressed that a party to a case should not be unduly penalised where it appears that he is not to be blamed for his lawyer's laches. The Court also noted that one should not forget the plight of the unfortunate witnesses; it is the Court that subpoenas them, so it has a compelling duty to put them to the least possible inconvenience. The Court then went on to say that it is the duty of counsel to follow up his cases, so that situations in which counsel does not appear in court on the day fixed for trial do

“Counsel for the appellant made the further submission that “accused parties have no remedy against counsel for any negligence he may have shown in the conduct of a case”.

This submission seems to me to stem from a misapprehension of the *ratio decidendi* of the recent decision of the House of Lords in *Rondel vs. Worsley* [1967] 3. W.L.R. 1666. That case is no authority for the proposition that a legal representative who has been duly briefed and who has agreed to defend an accused party on a certain day would not be guilty of professional misconduct which could lead to disciplinary proceedings against him if he fails without reasonable excuse to be present in Court on that day.

I quote from the head note:

held, dismissing the appeal, that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court and the preliminary work connected therewith such as the drawing of pleadings. That immunity was not based on the absence of contract between barrister and client but on public policy and long usage in that (a) the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently; (b) actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation, contrary to the public interest; and (c) a barrister was obliged to accept any client, however difficult, who sought his services.

It cannot be seriously doubted that the risk of disciplinary proceedings will always be a far greater deterrent than the risk of a civil action in damages. Further, it is a moot point whether the words “conduct and management of a cause in court and the preliminary work connected therewith such as the drawing of pleadings” do extend to the default of Counsel who, after having been duly briefed, fails, without serious impediment, to be in attendance in court at the trial.”

In *Maurel v. Queen* (1979) MR 88, the Court observed that counsel who obtain so many postponements that a trial is turned into a mockery of justice expose themselves to disciplinary action. Chief Justice Rault said:

“Let not Counsel run away with the idea that the Court will for ever content itself with merely verbal censures. Since words have had no effect, we intend to have recourse to action in the future.”

not occur. Counsel should not accept a retainer in a case already fixed for hearing on a date on which he is not free, or which is close at hand that he will not have enough time to do justice to it without first at once consulting his opponent and getting in touch personally with the magistrate to ensure that a change of date will be granted. As regards instances where counsel moves to withdraw from a case, there are no situations where it can legitimately be made on the trial day without prior warning to the court and to the client except one where the client turns out on that day to be no longer willing to follow advice previously tendered and accepted. All the other cases, such as lack of adequate instructions or refusing to follow advice, must be foreseen in advance and warning given to the court, preferably in writing while informing client of his stand.

77. In *Jhingai & ors v. R* (1983) MR 148, the Court observed that, with a view to ensuring that an accused does avail himself of his constitutional right to counsel, counsel has a duty to follow up on letters addressed to lower courts, and that it is the Magistrate's duty to ensure that he or she takes cognizance of letters addressed to the court:

“We concede that, in order not to insist on counsel, particularly when they are not instructed by an attorney, having to appear in person or being replaced on formal days in district Courts, it is accepted practice that letters, telegrams and phone calls can do the job. But all too often we see that counsel who has caused a message to be passed on to a magistrate, such as a letter suggesting trial dates, does not take the trouble to pursue the matter but waits for the client to relay the magistrate's reaction. This can easily be illustrated by frequent applications for a change of trial date. If counsel has suggested seven dates to one magistrate, it may happen that, being unable to block all of them until his client turns up, counsel will find that he has another engagement by the time he is made aware of the date chosen by the magistrate. In our opinion, it is counsel's duty to get in touch with the District Clerk, by telephone if need be, as soon as possible to enquire about his case ...

Magistrates [should also] ensure that any letter addressed to them and which is not handed over personally to them should be brought to their notice at once so that a proper entry is made in the record.”

78. In *Hosany v. R* (1984) MR 161, the Court stressed that counsel should be very careful before they decide to withdraw from a case after they have been retained; any withdrawal by counsel

must be on reasonable grounds and must not jeopardize the accused and his right to representation by another counsel of his choice on the day of trial.⁴⁹

(H) Right of a person charged with a criminal offence to be permitted to defend himself, where so prescribed, by a legal representative provided at the public expense [Section 10(2)(d) of the Constitution]

79. The Legal Aid Act does provide for a lawyer to be appointed at the public expense where the conditions laid down in the Act are satisfied. In *Hummujuddy v. R* (1961) MR 158, the Supreme Court observed that:

“Cases before the Intermediate Criminal Court are nearly all of a serious nature. It would help in the administration of justice if the assistance of counsel for the defence

⁴⁹ Justice Ahmed made the following comments:

“The reason which counsel gave to withdraw from this case was that his client was not willing to follow his advice. On the face of the record, I can only surmise what was the advice given which the appellant refused to follow. If it was one concerning the plea advising the appellant to change his plea and plead guilty, it is necessary to point out that the appellant should have had complete freedom of choice and decide in the end whether to plead guilty or not guilty without any sword of Damocles hanging over his head. In Boulton, *Conduct and Etiquette at the Bar*, 6th Edition at p. 72, I read: -

Defending counsel must be completely free to do what is his duty in advising his client about pleading guilty or not guilty to a charge and to give the best advice he can if need be in strong terms. That advice may be that a guilty plea showing an element of remorse is a mitigating factor which may enable the Court to give a lesser sentence. The accused having considered counsel’s advice must have complete freedom of choice whether to plead guilty or not guilty.

And in Halsbury’s *Laws of England* Vol. 3: Barristers para. 1140: under the heading “counsel’s duty in criminal trial: -

What a barrister defending a client on a criminal charge may legitimately do in the course of the defence is nowhere laid down... The client must decide on his plea, his line of defence and whether or not he is to give evidence himself. Counsel may of course properly advise on these matters, in strong terms if need be, but it is the client who must make the decisions...”

were available in cases involving any intricate questions of law or difficult investigation of facts. The Master and Registrar will be directed to make arrangements in consultation with the President of the Intermediate Criminal Court in order to ensure that deserving accused parties who cannot afford to retain counsel are given legal aid - at least in those cases which prior to the Courts (Amendment) Ordinance, 1960, were triable only at the Assizes.”⁵⁰

80. In *Andony v. State* (1992) MR 249, where the accused was charged with rape, the Court observed that after allowing counsel to withdraw for alleged “lack of instructions” the Magistrates should have considered whether the appellant who “was not working and was having problems” did not, in the circumstances disclosed, deserve legal aid, rape being until 1960 triable before the Assizes only.

But, as pointed out in *R v. Mensa* (1989) MR 137:

“Counsel cannot be imposed on an accused who is unwilling to accept one. Support from this proposition can be sought from Archbold Criminal Evidence, Practice and Procedure 43rd ed. at paragraph 4-19. The relevant passage reads as follows: “where at the beginning of a trial a defendant expresses the desire to conduct his own defence, he should be allowed to do so and counsel should not be assigned to him against his will.” In Stephen’s Commentaries on the Laws of England 21st Ed. Volume IV Criminal Law, at page 281 the following observation is made: “... it is the custom in a serious case, where the prisoner is not defended by counsel, for the judge to request some member of the bar to undertake the defence if the prisoner is willing to accept his services.”

... What would be the result if counsel is imposed upon an accused against his wish? The answer is provided by a decision of U.S. Supreme Court, *Faretta v. California* decided in 1975, and where the majority held as follows: “It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas... This allocation can only be justified, however, by the defendant’s

⁵⁰ In *Galos Hired and anor. v. R* (1944) A.C. 149, 155, Lord Maugham in delivering the judgment of the Privy Council said:

“The importance of persons accused of serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel”.

consent at the outset, to accept counsel as his representative. An unwanted counsel “represents” the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed to him by the Constitution, for in a very real sense, it is not his defense.” The Court went on to say “The right to defend is personal... And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law”.

(I) Right of a person charged with a criminal offence to be tried in his presence [Section 10(2) of the Constitution]

81. Section 10(2) of the Constitution provides that, except with his own consent, the trial of every person charged with a criminal offence shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(J) Right of a person charged with a criminal offence to be afforded facilities to examine, in person or by his legal representative, the witnesses called by the prosecution before any court [Section 10(2)(e) of the Constitution]

82. In *Appa v. R* (1988) MR 237, the Court held that where an accused is *inops consilii*, he should be informed by the trial court of his right to cross-examine witnesses called by the prosecution and be given an opportunity of exercising this right.⁵¹

83. In *Police v. Poonoosamy* (1986) MR 134, the question arose whether section 35 of the Bank of Mauritius which provides that in any proceedings in which the genuineness of a currency note or coin purporting to have been issued by the Bank is in question, a certificate under the hand of the Managing Director to the effect that such currency note or coin is spurious shall be received in all courts as conclusive evidence of the spuriousness of such currency note or coin and the Managing Director shall not be examined or cross-examined with respect to any such certificate, did contravene section 10(2)(e) of the Constitution. The Court had this to say:

“The procedural guarantees enshrined in section 10 (2) (e) of the Constitution, as is evident from its express terms, relate only to “witnesses” and not to evidence generally. Our law of evidence ... allows proof of particular matters by a number of modes of proof which may take the form *inter alia* of parole evidence, documentary evidence or other exhibits. In the present case, the mode of proof which section 35 of the Bank of Mauritius Act allows dispenses the prosecution with the need to call the Managing Director as a witness with regard to the contents of the certificate. Since the Managing Director is not a witness, it would not be correct to say that he ought to be subject to cross-examination by virtue of section 10 (2) (e) of the Constitution.”

⁵¹ See also *Appadoo v. R* (1988) MR 126.

84. In *Bégué v. R* (1973) MR 278, the Court considered that it is not the duty of the trial court to tell the accused that he may cross-examine the prosecutor who is not properly speaking a witness in the case.⁵²

(K) Right of a person charged with a criminal offence to obtain the attendance and carry out the examination of witnesses to testify on his behalf before Court on the same conditions as those applying to witnesses called by the prosecution [Section 10(2)(e) of the Constitution]

85. Section 10(2)(e) must be read together with section 10(11)(b) to the effect that a law may impose conditions that must be satisfied if witness called to testify on behalf of an accused person are to be paid their expenses out of public funds.

86. In *Tarachand v. R* (1971) MR 281, the question arose whether the trial court should inform an accused his right to usher evidence. The Court held that it is desirable as a matter of practice that the accused should be informed of his right to give evidence or to call witnesses; failure by a magistrate to inform an accused of his right to give evidence or to call witnesses may not be fatal to a conviction unless the appellate court comes to the conclusion that a miscarriage of justice has occurred.

⁵² As pointed out by the Court:

“The prosecutor who sustains the charge is not properly speaking a witness. No doubt he may be questioned but it is not imperative that he should be cross-examined nor has the Magistrate the duty of informing an accused party that he may cross-examine the prosecutor. The persons whom it is the duty of the Magistrate to warn the accused of his right to cross-examine them are those witnesses which appearing on the back of the information are called by the prosecution to depose or tendered for cross-examination and also additional witnesses that the prosecution may call.”

87. In *Mohit & ors v. R* (1980) MR 317, it was pointed out that a trial court should, before rejecting a motion for postponement by accused because one of his witnesses is not in attendance, find out whether the defence is not in any way to blame for the non-attendance of the witness on that day; the accused would otherwise be considered as having been arbitrarily deprived of his right to have a witness who had been duly summoned, heard.⁵³
88. With a view to afford to the accused the opportunity to obtain and carry out the examination of witnesses on his behalf, there is a duty on the prosecution to make available to the defence materials not led in evidence, which may assist the accused. In *State v. Bacha & anor* (1996) SCJ 79, Sik Yuen J., as he then was, considered, on the authority of the House of Lords case of *R v. Preston & ors* (1994) 98 Cr App Rep 405, that all material evidence had to be disclosed even if not admissible as such in evidence.

(L) Right of a person charged with a criminal offence not to be compelled to give evidence at his trial (right to remain silent) [Section 10(7) of the Constitution]

89. In *Ramdeen v. R* (1985) MR 125, the Court held that the right of an accused to silence, whether from the beginning of his arrest at the enquiry stage or throughout the proceedings at the trial stage, is a fundamental principle of our criminal law. The Court considered that:

"This right is founded on the constitutional presumption of innocence. For this reason, an accused person is cautioned at the enquiry stage before he is questioned.⁵⁴ For this reason as well, at the trial stage, he is reminded by the Court, if he is not represented by counsel, that it is his right to remain silent or else to make a statement from the dock or to depose, if he so wishes."

⁵³ In *Chan Kwong Miow v. R* (1968) MR 239, it was pointed out that laches on the part of an accused party to call his witnesses would amount to an abuse of his constitutional right.

⁵⁴ Any person arrested must be cautioned in the manner laid down in the Judges Rules before being interrogated by police officers. The Judges Rules relate to interrogation and taking of statements by the police.

Section 15(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides that an officer after the arrest of a person shall not offer him any inducement by threat, promise or otherwise to make any disclosure, but shall inform him of the cause of his arrest and leave him free to speak or keep silent.

90. In *R v. Boyjoo* (1991) MR 284, the Court had this to say on the waiver of the constitutional right to silence:

“Whilst it cannot be denied that confessions play a major role in the enforcement of the criminal law, if given voluntarily, it is equally to be borne in mind that a confession is like no other evidence. A suspect’s “own confession is probably the most probative and damaging evidence that can be admitted against him, the most knowledgeable and unimpeachable source of information about his past conduct.” [*Bruton v. United States* 391 US 123 (1968)].

It is precisely because of this startling nature of a confession that we have it as a fundamental rule of our criminal justice system that the prosecution assume the burden of proving the guilt of an accused person. This principle of the presumption of innocence [section 10(2)(a) of our Constitution] by itself justifies the rule against self-incrimination embodied in section 10(7) of the Constitution and which provides that:—*No person who is tried for a criminal offence shall be compelled to give evidence at the trial.*”

The same principle is to be found in section 184 of the Courts Act. Section 184(1) makes an accused competent for himself but he cannot be compelled to give evidence: s. 184(2) (a).

This constitutional principle against self incrimination is not limited to cases where the accused is charged before a court of law. At the stage of the police enquiry, when he has been charged and before he is questioned, the accused must be told of his right of silence, leaving it to him to make the choice whether he wishes to waive the privilege or not. This particular point was formally recognized in the American case of *Miranda v. Arizona* 384 U.S. 436 (1966). The Fifth Amendment to the American Constitution declares: “No person shall be compelled in any criminal case to be a witness against himself.” Elaborating on this principle the United States Supreme had this to say:—

“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The

defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any state of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.”

The constitutional principle against self-incrimination itself contains no guidance or test as to how the rule must be given effect in practice. We therefore have to refer to the numerous decisions of the Courts both here and in common law countries, which have for years interpreted provisions similar to those embodied in section 10(7). Alongside these different pronouncements Judges’ Rules provide a guideline on how the police should act in order not to flout a suspect’s right to silence ...

The rule against self-incrimination would be ineffective if this fact is not brought home to the accused. And bringing that fact to the accused enables him to make a choice about making a statement or not. This would be highly relevant for the purposes of the voluntariness test. Indeed failure to administer the caution may well be construed as a breach of the voluntariness test and will therefore offend against the principle of self-incrimination. This would result in the virtual exclusion of a confession on the ground that a constitutional provision would have been breached in the sense that the rule against self incrimination and the accompanying right to be cautioned are part and parcel of the fair trial requirement which is guaranteed to an accused under the Constitution. Confessions therefore must reflect the standard of fairness laid down in the Constitution.”

91. In *R v. Wahedally* (1973) MR 103, the Supreme Court pointed out that section 10(7) gives constitutional protection to a particular form of the exercise of the long recognized right of an accused party to remain silent; any statement that may be construed as denying that right to the accused would be wrong in law. The court observed that, on the other hand, it is equally well established that the trial judge may comment on an accused's silence. A reference to the accused's silence will not constitute a misdirection unless it would suggest that the accused's silence is inconsistent with innocence; and in considering whether the comment has had that effect, the fact that the judge has called the attention of the jury to the accused's right to remain silent will be taken into account.⁵⁵

⁵⁵ In *R v. Ramana* (1975) MR 110, the trial judge during his summing-up commented upon the accused's silence in the following terms: "but you must think that the defence would have laid greater weight if they had elected to tell you their story in their own words". It was contended on behalf of the appellants that this amounted to an

92. In *Abdullah v. R* (1980) MR 161, the Supreme Court held that a trial Court is not entitled to draw any adverse inference against an accused from the fact that, when identified on a parade, he remained silent, which he was perfectly entitled to do. It was pointed out, however, in *Ramdeen v. R* (1985) MR 125 that the right to silence does not prevent a court to consider effect of a failure to depose:

“The right of an accused person to silence, however, only means that the burden of proving his guilty beyond reasonable doubt is cast squarely on the prosecution. And no accused person should be expected to explain or contradict until so much has been proved as to justify the reasonable conclusion of his guilt, in the absence of an explanation, which it is, and must remain, within the province of the trial court to accept or reject. And where an explanation has been given by an accused person in the course of the enquiry, its weight or otherwise when pitted against the evidence adduced by the prosecution may depend on a number of factors, including on when it was given as well as on whether it was given on oath even though it may be forthcoming for the first time at the trial.”

93. In *Fullee v. R* (1992) MR 1 [SCJ 77], the Court observed that the Constitution, no doubt, confers on any accused the sacred right to remain silent but the Constitution does not forbid our Courts to draw, in appropriate cases, certain inferences from an accused’s silence when the circumstances are such that one would expect some form of explanation from him. In *Jannoo v. State* (2000) SCJ 30, the Court considered that it is in no way improper, and it does not infringe an accused’s right to silence under section 10 (7) of our Constitution, for a Magistrate to convey the idea that, after the prosecution had established a *prima facie* case, one would expect the accused, on whom a tactical burden lay, to offer some evidence in rebuttal.⁵⁶

adverse comment, and therefore was improper. The Supreme Court, on appeal, being of the opinion that the Presiding Judge had not gone beyond the permissible, rejected this contention.

⁵⁶ Reference was made to the European Court of Human Rights decision in *Averill v United Kingdom* [ECHR 6 June 2000], where the Court explained that the question whether the drawing of adverse inferences from an accused party’s silence infringes article 6 of the European Convention on Human Rights is to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national Courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

94. In *Aubeeluck v State* (2007) MR 6, it was argued on appeal that the trial magistrate was wrong to order the appellant to furnish particulars on his challenge to the admissibility of his statement, and that the ruling undermined the principle of fairness of the proceedings. The Supreme Court considered that since the prosecution bore the burden of satisfying the trial court that the statements of the appellant had been given voluntarily, they should have, in all fairness, been informed by the defence, of the specific grounds upon which it intended to object to the production of those statements so that the prosecution would be fully prepared to have evidence adduced, if any, to prove the admissibility of the impugned statements, or to rebut the allegations of the defence. The view was taken that the constitutional right of the appellant under section 10(7) of the Constitution was therefore not infringed, having only been requested to furnish particulars of his motion, which had been vaguely expressed. Furthermore, he was not in any way compelled to give evidence at the trial in breach of his fundamental right as set out in section 10(7) of the Constitution.

(M) Right of a person charged with a criminal offence to have without payment the assistance of an Interpreter if he cannot understand the language used at the trial of the offence [Section 10(2) (f) of the Constitution]

95. In *R v. Kramutally* (1989) MR 198, the Court considered that the provisions of sections 14 and 189, which govern the language to be used at the Assizes⁵⁷, of the Courts Act must be read subject to sections 10(2) (d) and (f) of the Constitution.⁵⁸ The Court considered that:

⁵⁷ Sections 14 and 189 of the Courts Act provide –

14. (1) *The official language to be used in the Supreme Court of Mauritius shall be English.*

(2) *When a person appearing before the Court satisfies the Court that he does not possess a competent knowledge of the English language, he may give his evidence or make any statement in the language with which he is best acquainted.*

“ The use of the word “*and*” at the end of paragraph (e) of subsection (2) immediately before paragraph (f) suggests that an accused party is not only entitled to be defended by Counsel but also to be permitted to have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial.

The question is one of great constitutional importance⁵⁹ in a country where the vast

189. Where at a trial before a Judge, either with or without a jury, a witness speaks in a language which is well understood by the accused, by all the jurors, as well as by the Judge, the law officers of the Crown and the Counsel engaged in the case, the examination of the witness may take place in such language and it shall not be necessary to translate the deposition in English.

⁵⁸ Sections 10(2) (d) and (f) of the Constitution read as follows–

Every person who is charged with a criminal offence–

(d) shall be permitted to defend himself in person, or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense;

(e)...; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence.

⁵⁹ In the United Kingdom, the Court of Criminal Appeal, had the opportunity, at the beginning of this century, to consider the question of the right of an accused party not understanding the English language in the case of *The King v. Lee Kun* reported at IKB (1916) p. 337.

The head note to that decision reads –

When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by Counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by the prisoner. If he is defended by Counsel, the evidence must be translated to him unless he or his Counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the Judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

In the course of the judgment, Lord Reading C.J. considered the case of an accused party represented by Counsel and made the following observations:

“The more difficult question arises when an accused foreigner, ignorant of the English language, is defended by counsel and no application is made to the Court for the translation of the evidence. There is no rule of law to be found in the books on the subject, and as a result of inquiry which we have made since the argument, it has become clear that the practice of the Courts in this respect has varied considerably during the last fifty years. It was stated at the bar by counsel for the Crown that the practice has been for the Court not to require the translation of the evidence unless the accused or his counsel applied for it. There is no doubt that this

practice has been followed by some judges; whereas other judges have inquired at the outset of the trial whether the accused or his counsel wished the translation to be made, and if the answer was in the negative they have permitted the trial to proceed without having the evidence interpreted to the accused. Again, some judges have always insisted upon the translation except when the accused or his counsel stated that he did not wish it, and other judges have acquired translation notwithstanding such a statement. The only practice in this respect upon which there has been uniformity is that whenever any desire has been manifested by the accused or his counsel for the translation it has always been permitted.

We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him except when he or counsel on his behalf expresses a wish to dispense with it. The judge should not permit it unless he is of opinion that because of what has passed before the trial the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the interests of the accused which has distinguished the administration of justice in our criminal Courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception above mentioned. Speaking generally, police court proceedings will have taken place and the evidence will there have been translated to the accused before he has to stand his trial on the indictment, so that at the trial he knows the case to be made against him. He can instruct his counsel upon it and he may leave his defence in counsel's hands without having the evidence again translated to explain to him that which he already knows, and there seems no reasonable objection to such a course. If there should be a substantial departure from the evidence recorded in the depositions the judge would take care, even if counsel omitted to ask it, that the variation or addition should be translated to the accused, so that he might throw any further light upon the case. The importance of the translation of any new or additional evidence cannot be doubted; ...”.

In *Kramutally*, the Court stressed that we in Mauritius cannot as Lord Reading say that “there is no rule of law to be found in the books on the subject”. Our supreme law, the Constitution, specifically provides for the right of an accused to interpretation.

The Court in *Kramutally* pointed out that this question has been the subject of judicial pronouncement in at least one other country of the Commonwealth and I may refer to a judgment of the Supreme Court of Nigeria reported in the 1985 Edition of the Commonwealth Law Reports at page 980 et seq. where a passage from a judgment of Karibi – Whyte J.C.A. in *The Queen v. Equabor* (1962) 1 All NLR 287 is quoted with approval. It reads –

“In the course of the argument before us Mr. Azaki submitted that appellants were represented by Counsel and could not rely on the provisions of Section 33(6) (e)... This appears to be a view driven from the decision of Beerainoh Ajayi & Anor v. Zaria NA (1963) 1 All N.L.R. 169, where the view was expressed that an unrepresented accused would by the mere fact of not having been represented by Counsel have shown that he was denied a fair trial. The invariable inference is that a represented accused cannot rely on the non compliance with the section, thereby losing the fundamental right to which he is entitled under section 33 (6) (a) of the Constitution 1979. This is a non sequitur. In the appeal before us the appellants were represented by Counsel and therefore come within the quare which now faces us. Gally – Brown-Paterside contends that there is still a failure of justice within the meaning of the provision if the provisions are not complied with even when appellants are represented by Counsel. I agree entirely with that submission”.

majority of persons brought to trial do not, and I take judicial notice of this fact, understand the English language ...

I have no doubt that in Mauritius, an accused party who informs the Court that he does not understand the language in which his trial is conducted is constitutionally entitled to have the proceedings interpreted to him even if he is represented by Counsel.”⁶⁰

96. In *Kunnath v. State* (1990) MR 303, an uneducated peasant from Kerala in Southern India, whose native language is Malayalam who was tried before the Supreme Court charged under the Dangerous Drugs Act, had the assistance of an interpreter. This interpreter translated (i) to the accused the charge at the beginning of the trial and a minor amendment thereto on the third day, and (ii) to the court the accused's statement from the dock. The interpreter translated not a word of the evidence, he translated only on instruction of the presiding judge, and was under the impression that he could only do so when given such instructions. It does not appear that either the appellant or his counsel at any time indicated their assent to the evidence not being translated. It was argued before the Court of Criminal Appeal "the failure to ensure that the appellant understood the evidence adduced at his trial and was in a position to rebut the evidence resulted in the miscarriage of justice". The Court of Criminal Appeal rejected this ground of appeal and concluded that there had been no such miscarriage of justice as would warrant a quashing of the conviction. The Court of Criminal Appeal had this to say:

"In our opinion, although the principle of a fair trial underlies all systems of law, we should, in such a matter, allow ourselves to be guided not so much by principles of the English common law, as exemplified in, for example, *R. v. Lee Kun* [1916] 1 K.B. 337, as by judicial interpretation given to provisions in the Constitutions of other countries which are similar to ours. We are in entire agreement with the position

⁶⁰ Lord Reading C.J. in the case of *R v. Lee Kun* (supra) said:

"No trial for felony can be had except in the presence of the accused, unless he creates a disturbance preventing a continuance of the trial... The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings".

adopted by the full Bench of the Nigerian Supreme Court in *The State v. Gwonto and Others* (1985) LRO (Const) 890."

The Court of Criminal Appeal referred to the following paragraph in the leading judgment of Nnamani JSC, as justifying their conclusion:-

"I think, with all respect, that the point which was missed here is that the importance of the issue of representation lies in the fact that if an accused person is represented by counsel such counsel ought to demand his client's right to interpretation or object to any irregularity such as lack of interpretation. If neither he nor the accused objects, the right is lost for all time and certainly cannot be invoked in a Court of Appeal."

97. The Judicial Committee of the Privy Council had this to say on appeal [(1992) MR 1, PC Appeal No. 41 of 1992]:

"In following the reasoning in the Nigerian case of *The State v. Gwonto and Others* rather than that in *Rex v. Lee Kun* the Court of Criminal Appeal were, in their Lordships' view, in error. The circumstances in *Gwonto* were fundamentally different from those in the present case inasmuch as no request for an interpreter had been made by or on behalf of the accused and the trial judge was unaware that they could not properly understand the proceedings. *Gwonto* is therefore of no assistance in a case where the trial judge is aware from the beginning of an accused's language difficulty.

It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the accused (*Lawrence v. The King* [1933] A.C. 699 at page 708). As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the accused, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him (*Rex v. Kwok Leung and Others* (1909) 4 H.K.L.R. 161, Gompertz J. at page 173, *Rex v. Lee Kun* [1916] 1 K.B. 337, Lord Reading C.J. at page 341). An accused who has not understood the conduct of proceedings against him cannot, in the absence of express consent, be said to have had a fair trial ...

Their Lordships have no doubt that the course advocated by the Lord Chief Justice in *Rex v. Lee Kun* is highly desirable one and should be followed wherever foreign accused, not fully conversant with the language of the proceedings, is represented by

counsel. If it is not followed, the risk will be great of a substantial miscarriage of justice occurring. In the present case there was no preliminary hearing, as in *Rex v. Lee Kun*, and the appellant had therefore no prior knowledge of the evidence to be given by the prosecution. He did not understand the evidence when it was given with the result that the trial was for all practical purposes conducted out with his presence. The appellant was accordingly deprived of the opportunity of a fair trial and a substantial miscarriage of justice had occurred. The miscarriage would have been avoided if the trial judge had ensured that the evidence was translated to the appellant. Even if he had failed to take this step he should on any view have ordered a retrial as soon as the appellant made clear his lack of understanding in his statement from the dock.”

Their Lordships went on to say that:

“Section 10(2)(f) of the Constitution requires that an interpreter shall be made available free of charge when an accused cannot understand the language used at the trial. That section further provides that, except with the accused's own consent, and subject to one other immaterial exception, the trial shall not take place in the absence of the accused. The primary purpose of the requirement that the accused shall be present at his trial is to enable him to hear the evidence against him and so be equipped to decide what course should be taken at the trial in the light of the evidence so given. Reading together these provisions it appears that the Constitution must have been intended to produce a result no less favourable to an accused than that resulting from existing common law principles. Indeed it would be surprising if a Constitution intended to protect the rights of the individual should be construed to have the opposite effect.”

Their Lordships further considered that there ha been a substantial miscarriage of justice, given the circumstances in which the statement was taken by an interpreter not conversant with the appellant's native tongue, and the doubt as to how accurately the English translation recorded what he said, particularly having regard to the failure to translate words spoken by him in Malayalam, lead to the conclusion that it would not be safe to apply the proviso.⁶¹

⁶¹ Their Lordships allowed the appeal and quashed the conviction since there is no procedure for ordering a retrial in Mauritius, and the circumstances of the case fall fairly and squarely within the following dictum of Lord Sumner, when commenting on the circumstances in which the Board will allow criminal appeals, in *Ibrahim v. The King* [1914] A.C. 599 at page 615:-

(N) Right, after a conviction or acquittal, not to be tried a second time for the same offence or for any other criminal offence of which he could have been convicted at the trial of that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal (Prohibition of Double Jeopardy: Plea of Autrefois Acquit or Autrefois Convict) [Section 10(5) of the Constitution]

98. In *DPP v. Joomun* (1983) MR 63, the Court considered that for the plea of ‘autrefois acquit’ to have substance there must have been a previous trial in respect of which there has been an acquittal. The Court had this to say:

“The principle on which this plea “autrefois acquit” depends has often been stated. It is this: that the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, i.e. found to be not guilty of the offence by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment ... What is essential to the plea of “autrefois acquit” is proof of a verdict of acquittal of the offence alleged - not proof that the accused was in peril of conviction for that offence. In so far as a verdict on any count by its terms specifies an offence, it speaks for itself. In so far as it does not, its effect may be ascertained by enquiring of what offences comprised in that count the accused stood in peril of conviction ... What seems essential, therefore, from the foregoing pronouncement is that there should be an acquittal flowing from a lawful verdict for a plea of ‘autrefois acquit’ to be maintained.”

"There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg.v. Bertrand* [1867] L.R. 1 P.C. 520."

99. Section 46 of the Interpretation and General Clauses Act [IGCA] provides that “Where an act constitutes an offence under 2 or more enactments, the offender shall be liable to be prosecuted under either or any of those enactments but he shall not be liable to be punished twice for the same act.”⁶² In *Chutturbhooj v. R* (1988) MR 146, the Supreme Court considered that notwithstanding the provisions contained in section 10(5) of the Constitution the Legislator has thought it fit to include in our present text section 46 of the IGCA which provides for one further protection to the citizen by adding to the already existing guarantee of no double punishment for the same offence the further guarantee of no double punishment for the same act.⁶³ But in *Omarsaib v. State* (1996) MR 6 [SCJ 30], the Court disagreed with this view:

“We respectfully disagree with this interpretation which, in our view, is not warranted upon a close reading of section 46 of the 1974 Act and equally upon a careful comparison of the wording of the relevant enactments under the previous and present law respectively.

⁶² Section 46 of the 1974 Act corresponds to section 27 of 1957 Interpretation and Clauses Ordinance, with a slight difference in wording as follows:

Section 27 of the 1957 Ordinance:

Where an act or omission constitutes an offence under two or more enactments, the offender shall, unless the contrary intention be expressed, be liable to be prosecuted under any one of those enactments, but he shall not be liable to be punished twice for the same offence.

Section 46 of the 1974 Act:

Offences under 2 or more enactments

Where an act constitutes an offence under 2 or more enactments, the offender shall be liable to be prosecuted under either or any of those enactments but he shall not be liable to be punished twice for the same act.

⁶³ In *Chutturbhooj v R* 1988, M.R. the Court (Ahnee J. and Boolell J.) pointed out that the wording of sect. 27 of the previous Ordinance was a more or less reproduction of section 33 of the U.K. Interpretation Act 1889 which provides as follows:

“Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law... the offender shall... be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence”

The Court went on to note that, as decided in *R v Thomas* (1950) 1 KB 26, that section of the British Act had been interpreted as reflecting the common law, namely that it was double prosecution for the same offence, and not for the same act, that was prohibited.

The pronouncement in *Chutterbhooj* was reached without any discussion or refutation of the reasoning of the learned judges (Rault C.J. and de Ravel J.) in the previous case of *Mackdoombukus v R 1979, M.R. 145*, where these judges looked at the precise wording of section 46 of the 1974 Act and held as follows, in relation to the facts of that case:

“The result of that enactment is that if the “act” for which the appellant was convicted on the first count was the same “act” as the one which was charged in the second count, the Court, after convicting on the first count ought to have stayed proceedings on the second count.”

They went on to explain that:

“It is not enough to show that the two acts were simultaneous: one must also show that they were in effect the same act. Now the elements into which the “act” charged in the first count may be analyzed are (a) imprudence; (b) homicide resulting from the imprudence. The elements of the act charged in the second count are (a) driving a motor vehicle; (b) being under the influence of drink to such an extent as to be incapable of having proper control of it. In the first case, there is no need of driving or of being drunk, in the second case, there is no need of killing, or even injuring anybody. It seems clear to us that the constituents of the two “acts” are so different that even if they had been absolutely simultaneous, that would not have transformed them into a single act. Further it is clear that the offence of driving under the influence of drink had already been committed before the accident which resulted in the homicide that took place. We therefore hold that the act charged under the second count was a different act, and the appellant could be convicted on both counts. [...]

We are also of opinion that by joining the two counts the prosecution were not acting in an oppressive manner, and the appellant cannot invoke the maxim “*Nemo debet bis vexari pro eadem causa*”.

We are of the view that this approach is the correct one. Indeed a close look at the wording of section 46 of the 1974 Act shows that this enactment prohibits the prosecution and punishment of a person twice for the same act “*where (that) act constitutes an offence under 2 or more enactments.*” It is obvious, therefore, that the legislator has here used the word “act” in a specific sense, namely that of conduct constituting an offence. And such “act” or conduct constituting an offence is in effect the offence itself, with all its ingredients.

The difference in wording between the previous section 27 and the present sect. 46, which consists essentially in using the word “act” rather than offence, is merely due, in our view, to a question of style, the draftsman who was revising the contents of the 1957 Ordinance having, as a matter of language and style, considered that the

words “for the same act” were more appropriate as a follow up to the opening words of the section “where an act constitutes...”. No change in the law was, in our view contemplated, the legislator having never intended to widen the established principle which we had borrowed from the common law of England and which was given legislative recognition in section 33 of the U.K. Interpretation Act 1889. Accordingly English cases like *R v Thomas (1950) 1 KB 26* which interpret this enactment would still offer useful guidance in our interpretation of section 46 of the Interpretation and General Clauses Act.

Furthermore, as Parliament has, by virtue of its power to make laws, under sect. 45 of the Constitution, defined and confined the principle of no double prosecution and punishment for the same act as it has done in section 46 of the 1974 Act, it would be incorrect to consider that the principle of double jeopardy can be interpreted more widely than is permitted by on the one hand, the notion of “autrefois acquit” and “autrefois convict” contained in section 10(5) of the Constitution, and on the other hand, the rule against double punishment embodied in section 46 of the 1974 Act. And it follows that unless prosecution for offences arising from the same factual situation infringes the provisions of these enactments, one could not successfully invoke the argument of “abuse of process”. Pronouncements in English cases, like *R v Burnham Justices. Ex Parte Ansoorge (1959) 3 All E R 505*, where the courts have held that they will apply the notion of abuse of process, and proceed no further where the facts relied upon for a second prosecution are the very facts that gave rise to a first conviction, are not, accordingly, in our view, applicable in Mauritius.”

(O) Other Procedural Guarantees

100. According to section 10(3) of the Constitution, where a person is tried for any criminal offence, the accused person or any person authorized by him in that behalf shall, if he so requires, and subject to payment of such reasonable fee as may be prescribed by or under the law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

101. By virtue of section 10(6) of the Constitution, no person shall be tried for a criminal offence if he shows that he has been granted a pardon, by competent authority, for that offence.

102. An accused party has the right to appeal against his conviction or sentence.⁶⁴

⁶⁴ Vide section 80(2), 81(1) and (2), and 82(2) of the Constitution.

Concluding Observations

103. The constitutional protection afforded to an accused person is in line with the international standards safeguarding a fair trial. We note, however, that the right to compensation for miscarriage of justice has not been expressly provided for in the Constitution. We also note that the rights of witnesses and victims, as well as the rights of the child in the administration of justice are not sufficiently safeguarded. There are also no specific standard regarding need for availability of non-custodial measures.
104. Judicial pronouncements by the Supreme Court and the Judicial Committee of the Privy Council Courts have shed light on the various constitutional guarantees afforded to an accused person. We consider, nonetheless, that the impact of the constitutional requirement of a fair hearing on the rules of evidence has not so far been fully canvassed before the Courts. This is a constitutional issue we shall address when examining any proposed reform to the law of evidence.
105. The legislature has the responsibility to take such legislative measures as are necessary to give effect to the rights guaranteed in the Constitution. The proposals contained in our Issue Paper released last December on ‘Disclosure in Criminal Proceedings’ are meant to give effect to the right to equality before the courts, which also ensures equality of arms.

Annex 1 : Select Human Rights Provisions dealing with Fair Trial

Article 14 CCPR

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15 CCPR

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 7 ACHPR

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 6 ECHR – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has

not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 ECHR – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Annex 2: UN Human Rights Committee General Comment No. 32 (23 August 2007) [CCPR/C/GC/32] – Article 14: Right to equality before courts and tribunals and to a fair trial

[Available on site of Office of UN High Commissioner for Human Rights at <http://www2.ohchr.org/english/bodies/comments.htm>]

Annex 3: UN Basic Principles on the Independence of the Judiciary (1985)

[Available on site of Office of UN High Commissioner for Human Rights at <http://www2.ohchr.org/english/law/index.htm#core>]

Annex 4: Guidelines for Judicial Conduct [*General Notice No. 2077 of 2002*]

[Available on site of Supreme Court of Mauritius at <http://supremecourt.intnet.mu>]

Annex 5: UN Basic Principles on the Role of Lawyers [1990]

[Available on site of Office of UN High Commissioner for Human Rights at <http://www2.ohchr.org/english/law/index.htm#core>]

Annex 6: UN Guidelines on the Role of Prosecutors [1990]

[Available on site of Office of UN High Commissioner for Human Rights at <http://www2.ohchr.org/english/law/index.htm#core>]

Annex 7: Code of Ethics for Barristers [General Notice No. 1702 of 1997]

[Available on site of Supreme Court of Mauritius at <http://supremecourt.intnet.mu>]