

No. 19 of 2013



FIFTH NATIONAL ASSEMBLY

PARLIAMENTARY

DEBATES

(HANSARD)

SECOND SESSION

WEDNESDAY 24 JULY 2013

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MAURITIUS

Fifth National Assembly

SECOND SESSION

Debate No. 19 of 2013

Sitting of 24 July 2013

The Assembly met in the Assembly House, Port Louis,

At 10.30 a.m

The National Anthem was played

(Mr Speaker in the Chair)

PAPERS LAID

The Prime Minister: Sir, the Papers have been laid on the Table –

Ministry of Finance and Economic Development –

- (1) Digest of Education Statistics 2012.
- (2) Gender Statistics 2012.
- (3) Consumer Price Index: April - June 2013.

MOTION

SUSPENSION OF S.O. 10 (2)

The Prime Minister: Mr Deputy Speaker, Sir, I move that all the business on today's Order Paper be exempted from the provisions of paragraph (2) of Standing Order 10.

The Deputy Prime Minister rose and seconded.

Question put and agreed to.

(10.39 a.m.)

PUBLIC BILL

Second Reading

THE CRIMINAL APPEAL (AMENDMENT) BILL

(No. XIX of 2013)

Order read for resuming adjourned debate on the Second Reading of the Criminal Appeal (Amendment) Bill (No. XIX of 2013).

Question again proposed.

The Leader of the Opposition (Mr A. Ganoo): Mr Speaker, Sir, the Opposition has very strong objections against this Bill, and it is with much regret that I have to say so.

When this Bill, which carried with it a certificate of urgency, was circulated to the Members of the House, for the first time, some 10 days ago, the Opposition reacted on that very same day. In fact, on the same Saturday morning that we received the Bill, the Opposition, through the comments made by hon. Paul Bérenger at a press conference, expressed in the name of the Opposition our reservations, and highlighted certain differences and disagreements that we had with this Bill. So, within a few hours, Mr Speaker, Sir, we promptly commented upon the contents of the Bill, and the Opposition underlined the several disturbing and distressing features that we noted in the Bill.

The Bill came to the House on Tuesday last. The hon. Attorney General presented the Bill to the House; he made a speech, introducing the Bill. He elaborated on the contents of the Bill, and the debates were postponed to yesterday, at the request of the Opposition, because we wanted to have some more time, which was gracefully agreed by the Government. The debates were then adjourned for today, Mr Speaker, Sir. Therefore, we are now before this House today to express our views on the Bill and the new amendments that have been brought to the Bill in the meantime.

But, since Tuesday last, Mr Speaker, Sir, the Members of the Opposition, including myself, met the hon. Attorney General. We discussed the amendments; we made our proposals in the hope that they would be retained, in the hope that we will manage to reach a consensus on the Bill. The Prime Minister also, at some point in time, listened to the proposals made by the Opposition. Some Members of the Opposition went to the Attorney General's Office, and we discussed with the Attorney General and his advisers. But, regretfully, I must say, Government has not acceded to all our proposals and suggestions. I say regretfully, Mr Speaker, Sir, because this Bill could have been a landmark legislation. It would have been a landmark legislation additionally, had it been the subject matter, according to us, of more debates, of deeper reflection, if it had undergone a wider process of ventilation. No doubt, when you look at the Bill, Mr Speaker, Sir, since it is a three-page Bill, it might look a very simple Bill; but, in fact, there is more than meets the eye. Although the Bill that has been circulated, as I said, is a three-page Bill, yet, Mr Speaker, Sir, we know that it deals with very important subjects and extremely profound issues. On the Opposition side, we believe it should not have been hurried through, and that expeditiously presented to the House, with a view for its adoption. I repeat, the Bill deals with eminently vital issues that go at the very heart of our criminal justice system, at the very core of our democratic system, Mr Speaker, Sir. Although only a three-page Bill, as I have just said, the Bill attempts, in fact, to grapple with two main subjects.

One, the possibility for the Director of Public Prosecutions to appeal against judgments of the Supreme Court, including verdicts rendered by the jury, which was not possible before since the DPP could only appeal against sentence.

Secondly, it introduces in our legal system the possibility for the DPP and a convicted person to ask for a review, leading to a retrial. So, the second *volet*, Mr Speaker, Sir, is the possibility for the Director of Public Prosecutions and the convicted person to ask for a review, with the possibility that after the case is referred to the Court of Criminal Appeal, there is a retrial.

Mr Speaker, Sir, both of these topics, of these two issues which I have just mentioned, you will agree with me, are matters which go at the very root of our judicial system; they strike at the core of, in fact, our constitutional structure, of the fundamental rights embedded in our Constitution. This is why, Mr Speaker, Sir, the Opposition was astounded and is still astounded with the manner Government has proceeded with this Bill. We, honestly, cannot understand this *empressement* when we are dealing with a Bill which purports to open not only new vistas and break new grounds in our judicial landscape, but also purport to impinge directly on fundamental rights embedded in our Constitution.

We, of course, Mr Speaker, Sir, understand that both these issues are linked to cases which are still *dans l'actualité à Maurice*, which are still the subject matter of a lot of controversy, debates among

the population, the Bar and Members of Parliament. We realise that the proposals in this Bill are linked with the outcome of two cases, and the most recent one had, in fact, been in the forefront of international news, had monopolised the news, and had attracted global attention from the media. We do realise all this, Mr Speaker, Sir. As patriots, we realise that probably Government has taken some commitment of which we are not and should not be in the secret. But, by releasing and circulating this Bill, I suppose Government has made its case that it is reflecting and trying to find a way to bring solutions where there were no solutions in the past as regards certain aspects of our criminal judicial system.

We insist, on this side of the House, Mr Speaker, Sir, when we take into consideration the deep-seated consequences of the contents of this Bill, and we strongly believe that Government should have, instead of rushing in this Bill, cautiously moved forward. So, the first question we ask: why did Government have to present such an important Bill with a Certificate of Urgency? Why did Government attempt to bulldoze this Bill into the House? In fact, we remember that the Bill was circulated on Saturday last, and the intention of Government was to have it passed through all stages on Tuesday last, which means within a span of three days Government had the intention to make the House adopt this Bill, Mr Speaker, Sir!

The Opposition had sensibilised the population and even the Bar, Mr Speaker, Sir, about the consequences of such a Bill, and subsequently we know that many quarters then reacted. The Bar Council has met a few times, and after its last meeting has, from what we understand, requested the hon. Attorney General to postpone the debates concerning this Bill. The DPP, Mr Speaker, Sir, has, in an interview, publicly called for a national debate on this Bill, meaning that Government should give more time to the nation, meaning that the Bill should be ventilated further.

Mr Speaker, Sir, yesterday, at 5 o'clock, on the air, on radio, Mr Justice Eddy Balancy, a senior member of the Judiciary - *qui n'est pas né de la dernière pluie* - who has been serving as a Judge for so long - for 20 years - commented on the matter in an interview. He has been Parliamentary Counsel for a long time too, Mr Speaker, Sir. When he was questioned about this Bill that we are debating today, he said in no uncertain terms, without ambiguity, that, according to him, Government should have taken more time; Government should have allowed more time *à la nation*. This is what he said; *la nation*! I listened very carefully to the interview yesterday, Mr Speaker, Sir, and he opined that Government should have allowed the different stakeholders time before adopting this Bill in the House. He suggested that more time should have been devoted to what takes place in other jurisdictions, and what measures other jurisdictions took before introducing in their law review proceedings concerning wrongful convictions and wrongful acquittals.

Therefore, Mr Speaker, Sir, the Bar Council, the DPP, Mr Justice Balancy and many Senior Counsels who made a press conference in the course of last week echoed the same argument. Not only the Opposition! It was not only the official or the unofficial Opposition! I am talking of the Bar Council, of a Senior Judge, of the DPP himself, who, at some point in time, expressed that opinion, Mr Speaker, Sir, which means that there must be some validity in the proposal that the nation and the stakeholders should have been granted more time before this Bill is presented to the House, and before it is adopted. This is why I say, Mr Speaker, Sir, this piece of legislation could have been a masterpiece, a landmark legislation if Government had taken care to dialogue in a more meaningful manner with all the stakeholders, *sans aucun empressement*.

Mr Speaker, Sir, do you know - and I am sure you should know, being a seasoned lawyer yourself, a Senior Counsel - how long did it take in the UK to define and determine which system to adopt, and which law to pass with regard to wrongful convictions? Do you know how many years did it take before the House of Commons adopted such a legislation, Mr Speaker, Sir? Do you know how many years it took before the UK decided to relax the Double Jeopardy Rule, Mr Speaker, Sir? But, I will come to the first one with regard to how long did it take for the UK to adopt a system with regard to wrongful convictions.

The Royal Commission on Criminal Justice was established on 14 March 1991, and was chaired by Viscount Runciman after a string of high-profile cases of miscarriage of justice came to light and had struck and shaken public confidence in the UK justice system, Mr Speaker, Sir, namely the Birmingham Six and Guildford Four. So, it was in 1991 that the Royal Commission was established to look into the question of miscarriage of justice, wrongful convictions, and what should be the solution. It was four years afterwards, in 1995, that the Criminal Appeal Act of 1995 was adopted. It was four years after the Royal Commission had been appointed to make recommendations on that issue that the Criminal Appeal Act of 1995 was adopted, and it set up the Criminal Cases Review Commission, Mr Speaker, Sir! It was only in 1997 that the Criminal Cases Review Commission (CCRC) started to operate, and to review wrongful convictions and also sentences, Mr Speaker, Sir. So, from 1991, the date on which the Royal Commission was set up, it was six years afterwards, in 1997, that this CCRC started to operate, as I have just said, and to deliver its services, Mr Speaker, Sir. So, it took nearly six years to set up the Commission in the UK. Six long years! That was for wrongful convictions.

In the case of accused parties who have been acquitted, and in the case of the possibility now to retry people who have been acquitted, that is, with regard to the infringement of the Double Jeopardy Rule, it took more than six years in the UK. So, this is the point we are making, Mr Speaker, Sir. We are not doing politics today, Mr Speaker, Sir. We think that the matter is sufficiently serious for Government

to have adopted, as I said, a more cautious approach. This was the first point I wanted to make, Mr Speaker, Sir.

I would also like to impress upon the House that we must not lose sight of the real nature of the debates we are involved in today, Mr Speaker, Sir. At the outset I reminded the House what are the two prongs of this Bill. I repeat, Mr Speaker, Sir, the provisions with regard to the DPP's power to appeal to the Court of Criminal Appeal against sentence and against judgement of the Supreme Court, including an acquittal by the Supreme Court, with or without Jury.

And, secondly, the DPP is now empowered, Mr Speaker, Sir, to apply to the Court of Criminal Appeal for a review of proceedings relating to an acquittal of the accused, or his conviction before the Supreme Court. So, now, the Court of Criminal Appeal will review the proceedings, and could quash the acquittal or conviction; in other words, Mr Speaker, Sir, wrongful acquittals and wrongful convictions would be subject to review after appeal procedures are exhausted.

So, these two issues are the issues which are to be found within the four corners of this Bill. These two issues, Mr Speaker, Sir, are the issues on the face of the Bill, but in a more important manner, they touch upon and have a direct bearing on other fundamental questions, namely the citizen's constitutional right to life. They deal with the citizen's right to life, to freedom, to liberty, to his democratic rights, and to his constitutional rights. This Bill could have constituted another scintillating milestone in the democratic march of our country, Mr Speaker, Sir. So profound it is, it is not like any other Judicial Provision Bill; it deals with more substantial issues, Mr Speaker, Sir.

The DPP's article published in the "Mauritius Times" was entitled "One is too many". In fact, Mr Speaker, Sir, one wrongly convicted person is too many, and we are dealing today with the right to life, to freedom and liberty. We must look at this Bill in a human rights perspective, because what is more important to a citizen than his liberty and his life, Mr Speaker, Sir? And this is an opportunity which Government should have secured to consolidate basic human rights, to promote human freedom, and further consolidate our democratic architecture, but, unfortunately, we missed the occasion. *C'était une occasion ratée*, Mr Speaker, Sir. This is why I said earlier it is a matter of regret that we were not able to forge a consensus. And, today, we are being provided with a Bill with half-baked measures - and I will come to that in a few minutes - which, unfortunately, cannot enlist the support of the Opposition, Mr Speaker, Sir.

This leads me, Sir, to the question of the review of proceedings relating to a conviction before the Supreme Court, and the power of the Court of Appeal to quash the conviction and order a retrial. I am, therefore, Mr Speaker, Sir, dwelling now on this issue. This Bill, simple as it looks, contains more than

the eye can meet. Mr Speaker, Sir, I wish to be very clear on what I am going to comment upon. I am going now to comment on the question, on the review of proceedings relating to somebody who has been convicted before the Supreme Court. As I said, now, I am not dealing with the appeal provisions; I am dealing with clause 8 –

“Application to Court for review and retrial”.

The new section 19A which will be inserted in the Principal Act reads as follows –

“Where a person has been acquitted following a trial before the Supreme Court or appellate proceedings before the Court, the Director of Public Prosecutions may, subject to paragraph (b), apply to the Court for a review of the proceedings relating to the acquittal”.

And further down, it is provided that after the accused party has been acquitted, the DPP now can apply for review of proceedings relating to the acquittal.

And also in the same clause, the person who has been convicted before the Supreme Court also may apply to the Court for a review of the proceedings relating to his conviction.

I am dealing, Mr Speaker, Sir, with the conviction, the person who has been convicted before the Supreme Court. Mr Speaker, Sir, right from day one, when the Bill was released, hon. Paul Bérenger responded within hours promptly, as I said, in the name of the Opposition. We proposed that the law should imperatively set up a mechanism for review of possible miscarriage of justice, and it would be up to this mechanism to refer appropriate cases to the Court of Criminal Appeal for review like in the UK. That is why we proposed the Criminal Cases Review Commission, in line with the one set up in the UK or in other jurisdictions, because other jurisdictions have also followed suit, Mr Speaker, Sir.

So, in fact, Mr Speaker, Sir, on that very Saturday that we received the Bill, we opined, we announced that we would propose that this Criminal Cases Review Commission be set up and introduced in the legislation. We proposed that the Bill be amended to take on board this mechanism, the Criminal Cases Review Commission (CCRC). And this was an early, timely and opportune response of the Opposition, Mr Speaker, Sir. Why did we do that? We had a basis to do that, Mr Speaker, Sir. We had legitimacy and a justification to do that, Mr Speaker, Sir.

In fact, we had rested our claim on the stand taken by the Director of Public Prosecutions himself. The DPP himself, Mr Speaker, Sir, had not only published in his news review, but also in the article which appeared on the same Saturday morning, the proposal for such a Commission. “A wind of change” was the title in *l’Express*. I have the article with me, Mr Speaker, Sir. That article appeared on the same Saturday which the Bill was circulated. We received the Bill, and on that very Saturday, at around 11

o'clock, hon. Bérenger responded in the name of the Opposition. The last paragraph of the article, Mr Speaker, Sir, reads as follows –

“I am of the considered view that we should go down this route eventually to remedy any miscarriage of justice.”

This is in more general terms. The article went on as follows -

“It can only buttress the public confidence in our criminal law system. But it would be wise in order to prevent any abuse that a Criminal Law Review Commission be instituted to act as a screening body in all cases where convicted parties or victims’ families alleged any miscarriage of justice”.

The DPP was clearly referring to the Criminal Cases Review Commission, Mr Speaker, Sir, which, in fact, does act as a screening body in cases where convicted parties or their families allege any miscarriage of justice.

Now, Mr Speaker, Sir, we have rested our claim not only on the proposal of the DPP, which is a wise proposal I should say. We have also, Mr Speaker, Sir, claimed the justification of our proposal on another important document, which is a document produced not by anybody, not by the Opposition, not by any lawyer who has an axe to grind with the Judiciary or with Government. I just mentioned the DPP, but *en second lieu*, Mr Speaker, Sir, we based ourselves on the Law Reform Commission which is a statutory body. The Law Reform Commission, Mr Speaker, Sir, in November last year, produced a report entitled ‘Mechanisms for Review of Alleged Wrongful Convictions or Acquittals’. With your permission, I read the first page -

“The Commission has examined, at the request of the hon. Attorney General, the desirability of having, in Mauritius, a Criminal Cases Review Commission such as the one in UK, which could be an independent public body mandated to review possible miscarriage of justice, and which could refer appropriate cases to the proper forum for review. The Commission has reviewed mechanisms for review of alleged wrongful convictions from a human rights and comparative perspective, and is recommending that a Criminal Cases Review Commission could be established by statute.”

And then, in the second paragraph, the report says that -

“The Commission has also examined, of its own initiative, the issue of wrongful acquittals (...).”

That is the rule against double jeopardy, to which I will come if I have some time.

Mr Speaker, Sir, let me concentrate on the first part, that is, wrongful convictions, and the advisability of setting up this Criminal Cases Review Commission. The Opposition, since day one, justified in claiming that this Commission should have been introduced in our law. The DPP and the Law Reform Commission, Mr Speaker, Sir, have both, in their wisdom, proposed that mechanism. In the case of the Law Reform Commission, we see that it was the former Attorney General who tasked the Law Reform Commission to examine the desirability of having in Mauritius a Criminal Cases Review Commission as the one in the UK. That was since November 2012.

Mr Speaker, Sir, the Opposition had clearly subscribed to the views of the DPP, of the Law Reform Commission, and also of the Senior Counsels at the Bar, Mr Raouf Gulbul, Mr Ivan Collendavelloo, and Mr Yousouf Mohamed. The latter made a press conference requesting for some more time before adopting such legislation. That is why, I repeat, we were really taken aback when the Bill was provided to us. And when we perused the Bill, we became aware that the Bill made no mention of the setting up of the Criminal Cases Review Commission. No mention was made in the first version of the Bill that was proposed 10 days ago, Mr Speaker, Sir. The Bill did not make any provision for any Commission to act as a filter to refer appropriate cases to the Criminal Court Appeal. Now, negotiations started.

As I said, last Tuesday, we started, like a civilised democracy, to exchange our views. I have already referred to the meetings before, and I will not do it again, but we imparted to the hon. Attorney General and to the hon. Prime Minister our proposal of setting up this Criminal Cases Review Commission, Mr Speaker, Sir. We discussed with Government, because to us this Commission is fundamental, Mr Speaker, Sir, to grapple with the problem of wrongful convictions. I must say, Mr Speaker, Sir, that when we met the Attorney General, when we exchanged our views with the hon. Prime Minister, the suggestion came from the Government side that the National Human Rights Commission could be a substitute to the Criminal Cases Review Commission. I am not going to *prendre la paternité*, Mr Speaker, Sir. I can't remember whether it was the hon. Attorney General, the hon. Prime Minister, or the Solicitor General who came up with this suggestion because that would mean less expenses to the exchequer. And it was suggested that the Human Rights Division could play the role of that body that the Opposition was proposing. We did not disagree with that, Mr Speaker, Sir. But, unfortunately, it was not only the setting up of a body that was important. It can be called by whatever name.

The recourse to the National Human Rights Division was because it was already equipped with some logistics. Mr Speaker, Sir, of course, the point will be made later on that the National Human Rights Division is itself pregnant with many problems. It has to be revamped and reinvigorated to fulfill its mission under the new amendments. But, by whatever name we call the Commission, it is not only a

question of setting up a Commission, as is provided in the amendments to the Bill, Mr Speaker, Sir. It is the body to which the convicted person may apply, which can refer his conviction to the Criminal Appeal Court for a review of the proceeding relating to his conviction.

Therefore, why is the Opposition today still not in agreement with the proposed amendment? Mr Speaker, Sir, the National Human Rights Division now has been introduced in the legislation, but we are still not agreeable with this amended Bill. Why do we still object, Mr Speaker, Sir? Government has made *un pas*, has taken on board the suggestion that we should have an institution, a screening body, but the Opposition is still in disagreement, Mr Speaker, Sir, because to us, *malheureusement, le gouvernement a fait le minimum*.

As I said earlier, Mr Speaker, Sir, the amendments we are debating today, especially with regard to the review of alleged wrongly convictions, are issues related to fundamental rights enshrined in our Constitution. We are dealing with cases when new evidence becomes available after the appeal process has been exhausted. This is what we are talking of, Mr Speaker, Sir. A convicted person has the possibility now to ask that his case be reviewed after having spent so many years in jail, and when he claims there is new evidence which is available. He has always been claiming his innocence. He claimed that there has been an *erreur judiciaire*. According to him, to his parents, to his counsel, there is new evidence. His appeal process has been exhausted. The delay for appeal is over. It is years now that he has asked for a review. Therefore, what is the role of this Commission? Why are we insisting that this Commission be set up in the law, and what is the role of this Commission? Why is it so important, Mr Speaker, Sir?

Let us be clear. We are trying to remedy a situation where an appeal is no longer possible. There are no avenues, no routes left for him except, of course, Mr Speaker, Sir, in our Criminal Appeal Act, the recourse to the President or to the Prerogative of Mercy, but we are not talking about that. We are talking of the accused desiderata and whose counsel wishes to have the conviction quashed, because according to him, the latter has been convicted wrongfully. So, this is why, therefore, Mr Speaker, Sir, we insist on this advisability of setting up this mechanism which will be the appropriate body to refer the relevant cases to the Court of Criminal Appeal. This mechanism must be a credible institution. It must have the means. It must have the logistics in line with the Criminal Cases Review Commission (CCRC) in the UK - in terms of staff, in terms of logistic, in terms of investigating powers, in terms of management officers. These are the indicators, the measures according to which we can judge whether the National Human Rights Division, Mr Speaker, Sir, will have the powers, or has the powers it needs to fulfill its mission.

Mr Speaker, Sir, to us the ideal body would have been the CCRC along the lines of the UK. But true it is *l'idéal n'existe pas dans la vie*. Government had proposed at one time the National Human

Rights Division. We could have accepted that, Mr Speaker, Sir, but it should have been a body, *un bouledogue musclé*, with all *l'apanage* which I have just referred to: logistic officers, chief executive officer, forensic laboratory enquiring officers and investigating officers, just as in the case of the CCRC.

More importantly in the UK, the CCRC, Mr Speaker, Sir, is subject to regular and frequent reviews by the Ministry of Justice, by authorities, to ensure that it operates on the right track. There is what they call, Mr Speaker, Sir, the annual review or the Triennial Review of the Criminal Cases Review Commission. This is when stakeholders and Government review the operations of this Commission and carry out an audit, in fact. Mr Speaker, Sir, the operations, all the complaints and the problems the Commission faces are probed into.

As I said, in spite of the fact that this Commission has not been set up along those lines, we could have agreed to a National Human Rights Commission revamped, reinvigorated, strengthened, consolidated, provided with all the means, with all the resources, with all the logistics. But there is a more fundamental quarrel with the proposals of the Bill, Mr Speaker, Sir. We have a more fundamental quarrel with Government, with the hon. Attorney General, Mr Speaker, Sir, although as I said, Government has made the concession of allowing the National Human Rights Division to act as the CCRC.

What is our fundamental objection? Our fundamental objection, Mr Speaker, Sir, is as follows: it relates to the test to be used by the Human Rights Division or by the CCRC to enable it to refer cases to the Criminal Appeal Court. Because, of course, this institution, whether we call it CCRC, as it is in the UK, or the Human Rights Division, cannot, if it is flooded, inundated by applications, just refer all of them to the Court of Criminal Appeal. This would have been a mockery of justice. Therefore, there must be a test to be used, Mr Speaker, Sir, because this screening body cannot refer each and every case to the Court of Appeal. This would mean opening the floodgates, and as I said, inundating the appellate court with inappropriate cases. Therefore, Mr Speaker, Sir, what is the test to be used and what is the test used in the UK?

We must know what has been the test suggested and proposed by Government, by the hon. Attorney General, in the amendments to the proposed Bill. The Bill has been amended to take on board the suggestion of the national Human Rights Division. So, what is the test, Mr Speaker, Sir? The test in the UK is governed by the Criminal Appeal Act of 1995. Section 13(a) of the Criminal Appeal Act provides that the test is where, I quote –

“There is a “real possibility” that a conviction, verdict, finding or sentence would not be upheld if a reference is made.”

These are the words used. When this Commission investigates, probes into the case, looks into the different aspects of the case, the Commission must come to the conclusion that there is a real possibility that the conviction would not be upheld by the Court of Appeal, Mr Speaker, Sir. So, principally, the test is that there is a real possibility; that the conviction, verdict, finding or sentence would not be upheld where there is reference to be made, Mr Speaker, Sir.

Now, in the case of our proposed amendment of the Bill, let us see whether this same test has been used. Unfortunately, Mr Speaker, Sir, it would seem that the Attorney General's Office has used the same test, that is, a real possibility test that the conviction, verdict, finding or sentence would not be upheld. But the Bill goes further, Mr Speaker, Sir. The Bill adds up an additional hurdle. I will read, Mr Speaker, Sir, what is to be found in this Bill.

The Human Rights Division shall not refer a conviction to the Court, unless it is satisfied "having regard to any fresh and compelling evidence" that there is a real possibility that the conviction will not be upheld if the reference is made. In the UK law, there is no question of "having regard to any fresh and compelling evidence". The test is only a real possibility that the conviction will not be upheld. In fact, in the UK law, there is another sub clause to the effect that, in exceptional circumstances, the case can be referred to the Court of Appeal.

The point which I wish to make, Mr Speaker, Sir, is that in the new proposal to the Bill, the hon. Attorney General is not only setting up the National Human Rights Division, but when we go deeper and look in what circumstances will that Division be able to refer cases to the Criminal Appeal Court, we are surprised to see, Mr Speaker, Sir, that it is provided that the Human Rights Division must be satisfied, when having regard to any fresh and compelling evidence. These are new criteria, Mr Speaker, Sir, in addition to that there is a real possibility that the conviction will not be upheld if the reference is made.

So, Government has made things more difficult for us. If we had any intention to agree to that legislation, Government has now complicated matters. In fact, when we look at that, we wonder who will pass this test. *En tout cas, pas les accusés de l'Amicale!* Who will pass this test, Mr Speaker, Sir? *Déjà*, when there is only the real possibility test in the UK, you know how many convictions have been quashed, Mr Speaker, Sir? *4% seulement* in the UK! *4% seulement*, Mr Speaker, Sir! I have the figures with me. I can give you later. So, in the UK, with the real possibility test, only *4% seulement* succeed. I have the figures concerning the recent 16,000 cases which have been referred to the CCRC in the UK. When we look at the figures which have been referred to the Court of Appeal and the cases in which, finally, the Court of Appeal overturned the conviction, quashed the conviction, it amounts to only 4%.

Now, when we are adding an additional burden on the accused party, with this reference of having regard to any fresh and compelling evidence – fresh and compelling evidence is defined in the law; it is an expression, a formula that is used in other jurisdictions, case law, the law itself, legislation also defines it, Mr Speaker, Sir - it would seem clearly, therefore, that the AG's Office had set up a still more difficult test, which would result inevitably in a very small number of cases which will be successful, and successfully referred to the Court of Criminal Appeal.

Therefore, the question we ask to Government and to the hon. Minister of Justice is: why has the Attorney General's Office imposed, over and above the real possibility test, the additional test of having regard to any fresh and compelling evidence which does not exist in the UK, or in any other jurisdiction?

Furthermore, in the Law Reform Commission Report, which I just referred to earlier on, Mr Speaker, Sir, there is no mention of such criteria. The Law Reform Commission never, by any stretch of imagination, made any reference, or indicated that such a heavy burden, such a tall order should be met by the convicted person. Mr Speaker, Sir, I was referring to the Triennial Review. Even in the UK, Mr Speaker, Sir, lawyers, human rights campaigners, human rights groups are having a go, are denouncing, are attacking every day the CCRC, and denouncing this real possibility test. This, of course, is from a human rights perspective. We know, Mr Speaker, Sir, how the campaigners are liberal in their commitment to human rights issues.

Mr Speaker, Sir, this Triennial Review is an official Government Report of the Ministry of Justice. This is what I can read from the document, which dates a few weeks ago; in fact, it dates June 2013. This is what I can read, Mr Speaker, Sir –

“The real possibility test – this comes from the human rights campaigners – has drastically shaped the function of the CCRC. It has rendered the CCRC a gatekeeper of the Court of Appeal, where its decision making process is underpinned by the question of whether the Court of Appeal will overturn the verdict. A consequence of this is that CCRC may be unable to refer convictions of those who might be innocent if it is felt to be unlikely that the Court of Appeal will quash them. Overall, the ‘real possibility’ test, under section 13 of the Criminal Appeal Act of 1995, of course, the UK law needs to be replaced with a different test that allows the CCRC more independence from the Court of appeal.”

So, the criticism made in the UK, Mr Speaker, Sir, where only the real possibility test exists, is that it should be replaced and done away with.

This test should be reviewed, because according to those critics, only 4% of the cases, Mr Speaker, Sir, are successfully dealt with. So, can we just imagine now, with the additional test of fresh

and compelling evidence, how difficult it will be for convicted persons here to have their cases successfully reviewed?

Mr Speaker, Sir, in fact, in terms of figures, out the figure of 16,350 applications which have been made to the CCRC, the cases referred to the Court of Appeal amount to 498. 498 out 16,350, which the CCRC has referred to the Court of Appeal, which the CCRC considers to have passed the real possibility test. Of the 498, Mr Speaker, Sir, only 341 convictions have been quashed, which means that only 4% have been successfully quashed.

So, this is the question I put to Government: can we imagine what will be the result in Mauritius, Mr Speaker, Sir? With this additional constraint, in fact, Government has proposed *une caricature d'un* CCRC. Unfortunately, I have to say that. Regretfully, Mr Speaker, Sir, the body that we are expecting will never see the light of day. As I mentioned, we know in what state the Human Rights Division is. But, additionally, the test to be used, provided for by the Bill is, unfortunately, disappointing. In fact, this amendment, according to me, Mr Speaker, Sir, is not only disappointing, but *c'est une peau de banane*; it is a device which will result in the torpedoing of all cases which have a potential to be referred to the Court of Appeal, and which had a potential to be successfully quashed.

Therefore, again, according to me, the proposed amendment of Government to introduce the National Human Rights Division as the body which will refer cases to the Court of Criminal Appeal, Mr Speaker, Sir, is a *cadeau empoisonné* to convicted persons. It will, in fact, negate all possibilities of having successful cases quashed by the Court of Criminal Appeal.

Mr Speaker, Sir, I think it would be needless on my part to highlight the advantages of having enquiries conducted by the Commission. Why do we hold on to that Commission, Mr Speaker, Sir? Why did the British, in their wisdom, set up the CCRC? Why did the Royal Commission come up with this idea of setting up this screening body, Mr Speaker, Sir? Why? There must be a logic. There must be a reason behind that, Mr Speaker, Sir, and the logic is clear; it will have the advantages of having enquiries conducted by the Commission in a thorough manner. Thorough reinvestigation will be carried out, and will seek to probe to the bottom of whatever claims the parents of the convicted person are making. This methodology should be distinguished from only a file review by a court, that is, by just going through the file and assessing the testimony of such and such witness. In this case, we are talking of a Commission which is conducting a thorough investigation, which will go back to the roots, *sur le terrain*, which will collect as much evidence as it can, Mr Speaker, Sir. Then, after this thorough investigation, they will, in their sovereignty, in their wisdom, decide whether the case should be referred to the Court of Criminal Appeal. Then, there is another tier, Mr Speaker, Sir, and the case will be referred to the Court of Criminal Appeal, which will decide whether to quash or to uphold the conviction.

What I am arguing, Mr Speaker, Sir, is that there is a difference between setting up a Commission with investigating powers and only just file reviews of the credibility of evidence. This is the point which the Opposition wanted to make, Mr Speaker, Sir. I have tried to enunciate why we are in disagreement with Government, and why we think that Government failed to rise to the occasion, and came with this disappointing proposal of not only proposing a flawed National Human Rights Division, but adding up this new test of fresh and compelling evidence.

Mr Speaker, Sir, to end, by way of general remarks, when we scrutinised this piece of legislation, we concluded that Government has done a very fine and subtle balancing act. It is true that convicted persons will be able to apply to the Human Rights Division or to the Court of Criminal Appeal for review of their cases. But, as we have seen, Mr Speaker, Sir, the test is so high that only a very limited number of applications will succeed in any way.

But, on the other hand, Mr Speaker, Sir, I think what the Government and the Attorney General's Office have done in a more positive manner is that they have given to the prosecuting authorities *la part du lion*. When this law will be voted, there are *deux nouveaux acquis* that the prosecution authorities will be provided with, Mr Speaker, Sir. From now on, the DPP will be able to appeal against a judgement of the Supreme Court, including against convictions of a judge sitting with a jury. Today, it is only against sentence that this is done. This is one.

Secondly, Mr Speaker, Sir, as we see, the Double Jeopardy Rule has been relaxed, and this will allow retrial of acquitted parties provided there is fresh and compelling evidence, and provided the retrial will be fair, as provided for in the Bill. But, I would just like to say one thing, Mr Speaker, Sir, as far as the Double Jeopardy Rule is concerned. I am commenting on the cases where the accused has been acquitted, and the possibility, the powers now which have been given to the DPP, after four or five years, after so many years, to ask for a review of this case. Mr Speaker, Sir, the Double Jeopardy Rule has existed since olden days, for ages, for centuries. It has been imported in all jurisdictions in the world; in the States, in Europe, and in the Commonwealth; in fact, in every jurisdiction, Mr Speaker, Sir. With the passage of time, the *autrefois acquit* theory can be challenged in exceptional circumstances. In our case, by virtue of section 10(5) of our Constitution, provision is made that, by an order of the Superior Court, this Rule of Double Jeopardy can be infringed. I would wish to make the following remark concerning this relaxation of the Rule of Double Jeopardy, Mr Speaker, Sir.

We must imagine the case, therefore, where somebody has been acquitted, and the DPP's Office now claims that it has fresh or compelling evidence, and goes to the Court requesting a review of this case, Mr Speaker, Sir; it claims that this acquittal be overturned, and requests for review and retrial, as provided by the law. Mr Speaker, Sir, in one case, it is very dangerous because once the Court of

Criminal Appeal has ruled that there is fresh and compelling evidence and the application is granted, we must be careful that publicity should not be given to that particular case, because now we are only at one tier, Mr Speaker, Sir. I repeat: once the Court of Appeal has ruled that there is fresh and compelling evidence and the application is granted, if publicity is given to this case, and the identity of the accused person is not protected, will not the accused be made to pay for this prejudicial publicity, which will result into a lack of fairness, Mr Speaker, Sir? Because it will be known by everybody that the DPP has passed the first test, and has been able to show to the Court conclusively that there is fresh and compelling evidence, and that the retrial should be ordered. Therefore, Mr Speaker, Sir, we can imagine how much prejudice and unfairness if the Court of Criminal Appeal would be already aware of the details, of the nature of evidence adduced and retained, and allowed for the case to be referred. So, this is the danger, Mr Speaker, Sir, which I wanted to underline for the protection of the accused party when the DPP has been able to adduce fresh and compelling.

Mr Speaker, Sir, there is one other issue which I would like to raise, which is relevant to the debates before the House today. Mr Speaker, Sir, I will touch on the issue of compensation to be paid to victims of wrongful conviction. In the UK and in other jurisdictions, people who have been exonerated and exculpated are usually compensated. Rightly so, because they are released after so many years! What happens to these convicted prisoners who have been convicted for whatever reasons by way of an *erreur judiciaire*? They are released after so many years, and we should reflect on the issue of compensation to be paid to those victims of wrongful convictions. At least, another piece of legislation, Mr Speaker, Sir, should be brought before this House to deal with this issue of compensation when the Court finds that, in fact, a wrongful conviction has taken place.

This is the last point I would wish to make, Mr Speaker, Sir. As I have said, to us, on the Opposition side, this Bill has caused a big disappointment. In spite of the discussions we started with Government, it is a matter of regret that Government has not come up all the way and retained our most important suggestions. The Government *n'a fait qu'un tout petit pas*, and refused to walk all way through, Mr Speaker, Sir. We should have been able to come today with a piece of legislation which would have attracted a large consensus in this House, but, unfortunately, this has not been the case. This is why, as I have explained in a very elaborated way, the Opposition totally disagrees, and objects very strongly to this proposed piece of legislation.

Thank you.

(11.53 a.m.)

Mr N. Bodha (First Member for Vacoas & Floreal): Mr Speaker, Sir, thank you for giving me the opportunity to address the House on this very important Bill. Today itself, Mr Speaker, Sir, I have read online in the ‘Daily Telegraph’ that we had a murder case which was 30 years old, and the Police have been able to find, after investigation, who was the real culprit. After 30 years!

Mr Speaker, Sir, the hon. Leader of the Opposition has gone a long way; he has made a marathon speech. I will tread on his path, and highlight a certain number of things. He has passed on the baton to me; so, I will continue. Mr Speaker, Sir, in this very small span of time, that is, since the Bill was introduced in the House with a Certificate of Urgency - it has been about a week - there has been a huge number of people, stakeholders, lawyers, some institutional people having institutional responsibilities like the DPP, the Bar Council, - one of the judges, as mentioned rightly by my colleague - that have expressed their views, and this shows that there is a need for a thorough national debate on this issue, and the thorough national debate we owe it to our people, we owe it to our democracy, and we owe it to our institutions. So, again, as the hon. Leader of the Opposition has put it, why such a hurry, *pourquoi cet empressement*, and why don’t we learn from the experience of other jurisdictions, other democracies like the United States, like the UK?

The hon. Attorney General has mentioned a number of cases in his Second Reading, where he spoke about many of the Commonwealth countries in the Caribbean. He mentioned also the UK. The issues which are in front of us today in this House are fundamental issues about one of the pillars of democracy, that is, the justice system. It raises a number of debates about individual rights to liberty, about another academic debate about judgements. Should we allow more importance to accuracy or to finality of a judgement when we speak about the Double Jeopardy Rule? Mr Speaker, Sir, this protection against double jeopardy, I have gone through history, and it is still uncertain when it started, but the early fundamental documents like the Magna Carta do not address this issue. However, by 13 A.D., Mr Speaker, Sir, there was a definition, and an authoritarian writer, Blackstone, summarised this Double Jeopardy Jurisprudence in a universal maxim, that –

“(...) no man is to be brought into jeopardy of his life more than once for the same offence (...)”

Mr Speaker, Sir, this has been the pillar for over 700 years, and when we are going to amend the legislation, why should we do it in seven days? My friend spoke about the experience in the UK by the Royal Commission; the setting up of the Royal Commission to address the issues of wrongful acquittals and wrongful convictions, the setting up of a Commission, the Criminal Cases Review Commission (CCRC) seven years later, and then you have the commission to review how the CCRC is working. When you have all these mechanisms, why should what has been done over years be done by us over

days? Everybody, from the Judiciary to the legal profession, the legislators, the other stakeholders, are asking this question.

Mr Speaker, Sir, we have a background; we have had the report on the allegedly wrongful conviction in the '*L'Amicale*' case. We had also the 'Legends' case, where there were documents ...

Mr Speaker: Hon. Member, I have to ask you to be careful; I'll not allow you to dispute the finding of a Court of Law. I will not allow that. The cases have already been decided; whether they have been decided wrongly or rightly is not our business. I will not allow you to indulge in that.

Mr Bodha: Thank you, Mr Speaker, Sir. What I was saying was that there were two documents which were released recently about these two cases. That's all I am saying, Mr Speaker, Sir.

The most important thing, Mr Speaker, Sir, is that our system of justice will have no credibility if there is no accuracy in our convictions, for example, or acquittals. But, at the same time, there are cases where there have been wrongful convictions and wrongful acquittals, Mr Speaker, Sir.

Let me now come on this issue of double jeopardy; when the conviction is not final, because with this law we are making, the conviction is not final as we can reopen the case. For example, in the verdict of a jury, I will mention what is being said in the United States, Mr Speaker, Sir, and here as well -

"American law accords absolute finality to a jury's verdict of acquittal no matter how erroneous its decision is."

My friends on the other side would address this issue of trial by jury. But what is the justification that a judgment should be final in the case of an acquittal? The justification is this, Mr Speaker, Sir: that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may still be found guilty.

This issue of a continuing state of anxiety and insecurity; that is the issue, Mr Speaker, Sir. When somebody has been acquitted, and there is this possibility of reopening the case, we have this issue of continuing state of anxiety and insecurity, and when the DPP is given the power to reopen the case, we should know when and how to do so, Mr Speaker, Sir, in the cases of wrongful acquittals.

Mr Speaker, Sir, I said that we have the issue of time; why should we rush where angels fear to tread? *Un consensus était possible! Tout à fait possible!* What should have been done? We should have had a Commission set up by Government to address this issue of wrongful convictions and wrongful acquittals, to indulge in a wide ranging debate, involving all the stakeholders, then to come forward with a

number of recommendations, taking into account the experience that we have seen in the UK, in the United States, and in other jurisdictions. And then, we could have come with this Commission, which has been advocated by my friend, the hon. Leader of the Opposition, by the DPP himself, by the outgoing Attorney, and by some of the learned Counsels in criminal law that we should be able to have this Commission. This is the case of the wrongful conviction, where the Commission can act as an authority to see whether the case can be referred to the Court of Appeal, or for a retrial, Mr Speaker, Sir.

When we see the workings of the Criminal Cases Review Commission, we find that the Commission has huge and investigative powers. May I ask one question, Mr Speaker, Sir? The convicted person has to go to Court to say that he has been wrongly convicted, or he can go now to the Human Rights Commission, but the key issue there is the fresh and compelling evidence. How will the convicted person come forward with fresh and compelling evidence, Mr Speaker, Sir? He is in prison; he has undergone a trial; he has been convicted to his expense; he has been deprived of his right to liberty; he is in prison; he has to come forward with fresh and compelling evidence to be able to convince the Court that the conviction be quashed, or to be able to come to the Human Rights Commission. How will he do that? He is not in a position to do that. His relatives, his Counsels may do it, as has been the case in one of the cases.

The issue of legal aid was raised in the UK about this, Mr Speaker, Sir. So, that is why the investigative powers of the Criminal Cases Review Commission are fundamental in this. It is the Commission which can make a thorough investigation, see to it that there is fresh and compelling evidence. Now, this is a very important question, Mr Speaker, Sir; otherwise all the convicted persons would wish to go to the Court, again according to the law. But, do they have the means to do it?

The test that the hon. Attorney General has put, fresh and compelling evidence, that is where he will be in a very difficult position to pass this test. But, on the contrary, when it comes to the DPP who wants to reopen the case, he will have the possibility of having the Police reinvestigate the case and have the fresh and compelling evidence to bring forward somebody who has been acquitted, Mr Speaker, Sir.

The hon. Leader of the Opposition has gone deeply into the matter as regards to the Criminal Cases Review Commission, how it should be set up, how it has done an excellent job in the United Kingdom, in spite of the fact that it opens the floodgates, because you had more than 16,000 cases, but only 500 were referred to, and only 300 were quashed. What I am saying is: this Commission should be able to help the convicted person to build up his case. He cannot build up his case alone. That is why we wanted the Commission to be a full-fledged Commission, and there were three issues we wanted to address if we had continued in our discussions with the Government and the Attorney General. I was one of the lawyers who went with hon. Ganoo, hon. Reza Uteem, hon. Steve Obeegadoo and Veda

Baloomoody, and we discussed with the hon. Attorney General. If the discussions would have continued, we would have addressed three issues about the Commission: the issue of independence, the issue of funding and resources, and the issue of composition. In the UK, I think, it is about 11 people.

(Interruptions)

At least 11; so, it is 16. We wanted to have three members on that Commission, with two having a legal background – so, a simple Commission. We agreed that it could have been under the aegis of the Human Rights Commission, and what, in fact, we thought is that the Government would come forward with what we call the Human Rights and Criminal Appeal Commission, and we would have addressed these three issues: first, the independence of the Commission; second, the funding and the resources, and third, the composition, Mr Speaker, Sir.

The Commission would be an authority, and would have acted as a screen - the DPP has mentioned this - and would have helped the convicted person to build up the case. Here, the test is for the convicted person, fresh and compelling evidence, and I explained how can a convicted person who is in prison find fresh and compelling evidence. The second test is that the trial would be fair. We said that there was a real possibility. In England, there is a fair chance, a real possibility that the verdict would be different if the reference is made, but we don't have it here. My colleague mentioned it. In fact, the number of cases which fall under this tight window is insignificant, but the way we wanted the Commission to be created with the composition, with the independence, with the resources and the investigative powers, a number of cases with tainted verdicts could have passed the test, and could have been referred to the Court of Appeal.

That is a very important issue, Mr Speaker, Sir, and to come back to the issue of the DPP being able to reopen the case, let me explain how it works in England. In England, the DPP serves as a gatekeeper to see to it that justice is done. Let me explain to you how it works. The DPP serves as a gatekeeper through which law enforcement and prosecution must pass. The DPP must give written consent before both reopening the investigation into a previously acquitted case and before applying to have an acquittal quashed. In fact, first, when a trigger event occurs that produces new evidence, or the reasonable expectation of new evidence, a senior rank police official may apply in writing for permission to the DPP to reopen an investigation of the previously acquitted person. So, the DPP has to give permission, and then the DPP may give his permission to reopen an investigation if the new evidence is sufficient to justify a new investigation. So, there are two tests already.

First of all, the Police have to go to the DPP to see to it that there is sufficient material to justify a new investigation. Later, the DPP will see to it whether there can be a second prosecution if the public

interest will be served by this new investigation and by this new prosecution, Mr Speaker, Sir. Here, what we are doing, in fact, is giving the powers to the DPP with a number of provisos; one is the fresh and compelling new evidence. I mentioned this fundamental difference between a convicted person and an acquitted person. Now, the DPP may come with fresh and compelling evidence. And in some cases now, how are we defining it? We are defining it as evidence which could not have been obtained at that time, or because of technological advance like the DNA. We can now provide some new evidence in a particular case, so that the DPP will be able to refer the case to the court.

Now, the second test as regards the DPP is the issue of time, whether it would be fair to have this prosecution meaning. Let's say somebody has committed a crime at the age of 60, and ten or fifteen years later, we come to the conclusion that we can have some fresh and new evidence. The question is: he is already 75 or 70; would it be fair in the given circumstances for the second prosecution?

Mr Speaker, Sir, I have a few questions to ask the hon. Attorney General. Among the functions of the Human Rights Commission, we have one section saying -

'The Commission shall not enquire into any matter after the expiry of 2 years from the date on which the act or omission which is the subject of a complaint is alleged to have occurred.'

Usually, the Human Rights Commission investigates in matters which are less than two years. Now, we are requesting the Human Rights Commission to be able to investigate into matters which may be five, 10, 15 years. So, I would like the hon. Attorney General to enlighten the House on this matter.

Then, Mr Speaker, Sir, on the issue of double jeopardy, we have the Constitution, which gives us the right to liberty, and the whole issue of constitutionality has not been raised yet. But I am convinced that sooner or later, once the law is passed, this issue of constitutionality will arise, because we are dealing with one of the fundamental rights of the individuals - right to liberty. This has been the case elsewhere, but I am convinced that whether this law will pass the test of constitutionality is yet to be seen, Mr Speaker, Sir.

This is what I had to say on the Bill. We have strong reservations. We have said it. The best path would have been to have a Commission, to have a huge debate, to take the time of the House, to take the time of the country, of the institutions, to take the time of all stakeholders to come forward with the best way for our democracy, for our citadel of justice to be able to address the issue of wrongful acquittals and wrongful convictions, Mr Speaker, Sir.

I just cannot understand. We are flabbergasted by the way the Government is rushing into this, and maybe the Prime Minister will enlighten us later why we have such hurry.

Last week, it would have gone through all the stages in one go, which would have been a sad day for Parliament. So, why are we not going like a democratic country safeguarding one of the most important pillars of our democracy, the Judiciary? This is my question. I hope that the hon. Prime Minister and the hon. Attorney General will enlighten us later in the debate.

Thank you, Mr Speaker, Sir.

At 12.20 p.m. the sitting was suspended.

On resuming at 1.52 p.m. with Mr Speaker in the Chair.

MATTER OF PRIVILEGE

“L’EXPRESS” NEWSPAPER – CAPTION “BONNET D’ÂNE – PRADIP PEETUMBER - DEPUTY SPEAKER – QUAND IL VEUT TROP FAIRE PLAISIR AUX MINISTRES”

Mr Speaker: Hon. Members, I wish to inform the House that I have received a privilege complaint from Dr. the hon. Hawoldar, Chief Government Whip, on Monday 22 July 2013, in regard to an article under the caption -

“Bonnet D’ÂNE - PRADIP PEETUMBER - Deputy Speaker - QUAND IL VEUT TROP FAIRE PLAISIR AUX MINISTRES”

which appeared in the daily L’Express of Saturday 20 July 2013. I have considered the matter. The contents of the said article may *prima facie* constitute an offence under section 6, subsection 1, paragraph (s) of the National Assembly (Privileges, Immunities and Powers) Act.

I, therefore, invite Dr. the hon. Hawoldar to make the appropriate motion under Standing Order 74, paragraph (4) of the Standing Orders and Rules of the National Assembly.

Dr. Hawoldar: Mr Speaker, Sir, in the light of your ruling, I move that the article under the caption -

“Bonnet D’ÂNE - PRADIP PEETUMBER - Deputy Speaker - QUAND IL VEUT TROP FAIRE PLAISIR AUX MINISTRES”

which appeared in the daily L’Express of Saturday 20 July 2013, be referred to the Director of Public Prosecutions for appropriate action.

I am laying a copy of the article on the Table of the Assembly.

Ms Anquetil rose and seconded.

Question put and agreed to.

The Minister of Labour, Industrial Relations and Employment (Mr S. Mohamed): Mr Speaker, Sir, I would like to start by saying that I have listened to the hon. Attorney General last week - if I am not mistaken - with much interest. I have also listened to the hon. Leader of the Opposition and hon. Bodha with a lot of interest.

There is no doubt that this piece of legislation is causing a lot of passion. And a lot of people out there, be it on the radio waves, politicians from the Opposition, NGOs, people concerned with the justice system, people who want a better justice system, and people who want justice are all buzzing with regard to this piece of legislation. Unfortunately, having heard my two hon. colleagues from the Opposition, I have the impression - and I am quite clear about that - that what we have heard today is simply that this Bill is being rushed through the National Assembly, that it is a danger to certain constitutional rights that the citizen enjoys, that it challenges the very foundations of liberty, that it goes against the very basic tenets of human rights.

Those are arguments that have been expressed very clearly. But something which I believe I am duty-bound to do in this Assembly today, Mr Speaker, Sir, is to clarify what is the situation as we speak today. Because many friends, be it from the Opposition - *et surtout* coming from the Opposition benches - have approached me, and have asked me what exactly is the situation today as opposed to what is being proposed.

Also non-lawyers, people who don't have a legal background want to know what the situation is, as we speak today, before any amendment is even taken into consideration. The answer to that is of utmost importance. We have to know where we are coming from before we know where we are going. As it stands today, if someone is found not guilty of any criminal offence before a District Court or before the Intermediate Court, it is open for the Director of Public Prosecutions to appeal not only against the sentence that has been imposed if the person is found guilty, but also against the conviction if he is being found not guilty.

So, to understand correctly what the situation is today, Mr Speaker, Sir, I think it is of utmost importance, not only for Members of this august Assembly, but for the population out there, not to be duped, not to be wrapped by unwarranted emotions. Because even though this is an issue that will raise emotion, even though this is an issue that talks about one of the fundamental rights we have, which is to enjoy freedom, to be free at last, we cannot be emotional about it. Because if we are to be emotional about it, we will, in my humble view, Mr Speaker, Sir, be ourselves perpetrating, continuing what we all want to avoid. Be it those who are against, or be it those who are for, we all want to avoid one thing: miscarriage of justice.

So, let us understand what the situation is today. Someone is charged with the heinous offence of rape, he is sent to the Intermediate Court. That is the case today. Whenever someone is charged with rape, most often he is sent to the Intermediate Court. And if he is found not guilty by a Magistrate, be it a full bench as well, the Director of Public Prosecutions can appeal against this finding of the hon. learned Magistrates.

In other words, this matter can go to the Supreme Court, and the Court will be invited to turn down a verdict of not guilty, or even it could go, if he is found guilty, against a sentence on its own. So, what is the situation today, as far as the lower Courts are concerned, be it the District Court or the Intermediate Court, is thereby being simply extended to the Supreme Court. I am trying to simplify things for those who have not got a legal training. I was going to say not all of us are tormented by having legal training, not to say blessed with a legal training, because sometimes it is a torment to be able to understand all those intricacies and end up with a Bill of this nature, and that is why we get emotional, because we are used to a system for so many years that we believe this system to be the only system that is the right system. That is the problem!

So, whatever we have heard the Opposition say, whatever we have heard hon. Bérenger, as has been repeated by the hon. Leader of the Opposition, say in a press conference and on the radio waves, everything that we have heard today, Mr Speaker, Sir, has been said *ad nauseam* in the United Kingdom when the law had to be changed; the Criminal Justice Act of 2003! Whenever this piece of legislation was being debated in the House of Commons, be it pre 2003 or post 2003, there have been a lot of debates, and a lot has been said against it. You will have on the one hand the human rights group who is afraid of one thing, which is what if an innocent is found guilty and is put behind bars. This is the stand of the human rights activists. Whereas, you have the stand of those who want to ensure that there is law and order, that the justice system works, who also tell you that we want to ensure not only that the innocent does not pay for something he has not done, but we want to ensure that the one who has committed a crime does end up behind bars. Because the concept of miscarriage of justice as it is exactly, what we are all concerned about and talking about here today, Mr Speaker, Sir, is not only because it is a common mistake – the idea that miscarriage of justice only applies to an innocent finding his way behind bars and staying behind bars for many years, but miscarriage for justice also applies, as I have said, not only to the innocent being jailed, but to the guilty walking away scot-free. And, when you read the reports in the United States of America and in the United Kingdom, when you read about how many innocent people have been released from prison, when you read how many guilty – when they have had legislation to go round the principle of *autrefois acquit autrefois convict* – how many of the real guilty have been sent to

jail, then the question that one should ask oneself is the following: do we live in such a dream world as to believe that miscarriage of justice does not occur in Mauritius?

Before going into the intricacies, let me say it outright, and I would like here to quote from - to understand what I am trying to mean - a case that was taken before the House of Lords in 1974. In that case, which is the *Director of Public Prosecutions v Shannon* (1974), in ruling 59, Criminal Appeal Reports, page 250, the House of Lords say - and it sums up the legal position that we enjoy in Mauritius, the adversarial system, very succinctly.

“The law in action is not concerned with absolute truth, but with proof before a fallible human tribunal to a requisite standard of probability in accordance with formal rules of evidence.”

Those are very important words full of meaning where the House of Lords in 1974 recognises that the tribunal that hears matters, be it jury, judges or magistrates, we are human and, therefore, fallible. We cannot and should not try to raise our feathers like a proud peacock would, and try to pretend that we are infallible. We should not pretend that there is no miscarriage of justice in the Republic of Mauritius. Let us not pretend that, because if we are to start from that premise, then, in my humble view, Mr Speaker, Sir, there is no point for us sitting in an august Assembly, and even calling Mauritius a democratic State as provided for in our Constitution!

A lot of what is being said outside this august Assembly, I have noted a lot of my hon. colleagues have avoided going directly to it. For instance, hon. Bodha has talked about the case of *L'Amicale*, and Mr Speaker, Sir, I understand at no time was he in any way challenging the finding of the Court or undermining it in any way; never was that his intention. I totally respect that. But, out there, what is being said is that there is a potential of a miscarriage of justice. Out there, what is being said is that people...

Mr Speaker: I have to interrupt the hon. Minister. Are you referring to the case of *L'Amicale*?

Mr Mohamed: I am referring to the case of what people are saying outside.

Mr Speaker: No, I would not allow any reference to the case '*L'Amicale*' or to the 'Legends' case!

Mr Mohamed: In any case, whenever there is a situation of miscarriage of justice, and here I am not referring to any case specifically, it would be totally appropriate for them to say that those people, in a hypothetical case, who are victims of a miscarriage of justice, should be released. It would be totally appropriate as well for those people, out there, to say those whom we know have carried out an offence should be behind bars because that also tantamount to a miscarriage of justice. Without referring

necessarily, obviously and surely to any case or judgment that is being delivered by a Supreme Court, I wish to address what we, as a Government, and what we, as a Parliament, are ready to do in order to first and foremost recognise that we are not infallible. We have, therefore, to go on the second premise; the first being that we are not infallible, the second being they were human, the third being that errors do happen either way, and the fourth being that we are people who would like to correct a system, and bring it to the closest possible to another concept which is that of perfection.

So, let me here refer to another document which I have read with much interest. It is the appeal of Mullen in the United Kingdom. In this judgement of Mullen, Lord Justice Schiemann spelt out the position of the criminal justice system and miscarriages of justice as follows, and I quote –

“The phrase miscarriage of justice does not simply mean that a guilty man has escaped or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial which the essential rights of the people or the defendant were disregarded or denied.”

It is in 2002 R. Mullen versus Secretary of State for the Home Department.

So, once again, what is the state of affairs today? I have talked about the District Court; I have talked about the Intermediate Court. What is the state of affairs today if a matter goes to the Supreme Court, for instance the assizes? What happens? The case is very important, and it is important for us to realise what happens when someone, anyone is prosecuted before the assizes and is found not guilty. Does the Director of Public Prosecutions have the right to appeal against that, on the conviction or on him having been found not guilty, one is acquitted? The answer, as we speak today, is no, but he can appeal maybe against the sentence, not against the non-conviction.

What happens, therefore, if later on there is something that has been found, which clearly indicates that that person is indeed the guilty person, which clearly indicates that that person has evaded the hands of justice? That person has managed to go away and run off from the hands of justice, and he cannot be behind bars because of some evidence which was not available at the time of the trial. What happens? This is a debate that has occurred in the United Kingdom, and they have gone round the principle of *autrefois acquit* and *autrefois convict*. They have gone round, and specified or qualified what, in fact, the principle of double jeopardy is. They have gone round it, and it has clearly shown - what we have seen ever since 2003 in the United Kingdom - that it is working.

If the hon. Leader of the Opposition is going to read only from Human Rights activists documents, he obviously is going to see only one side of things, and it does not help legislators to only look at one side of the coin. We, as legislators, cannot limit ourselves to only one side of the coin that

suits the political argument. When it comes to this type of legislation, we have to look at both sides of the coin, and there is another side of the coin which, unfortunately, the hon. Leader of the Opposition has not delved into.

Hon. Bodha has also made certain remarks that I would like to comment upon right away. Hon. Bodha has gone as far as to say there should be the creation of a body such as that exists in the United Kingdom, the CCRC, the Criminal Cases Review Commission. Hon. Ganoo has said the same thing; that there should be the creation of the Criminal Cases Review Commission. Hon. Bodha has gone as far as to say: does the Human Rights Commission have the possibility to investigate? Why is it that the Human Rights Commission is not given the same investigative powers as the Criminal Case Review Commission in the United Kingdom, hon. Bodha said? I humbly put it to hon. Bodha that this is where he has got things wrong. Here, I refer to the proposed amendments to be moved at Committee Stage; documents which have been circulated ever since yesterday. In that document, at clause 9 - Consequential amendment, I read the following -

“The Protection of Human Rights Act is amended -

4A.

(1) Notwithstanding this Act, a convicted person, or his representative, may apply to the Human Rights Division, in such form as may be prescribed, (...)”

As it says here, not only the person himself, but his representative as well -

“(...) for an enquiry to be conducted (...)”

Therefore, it is already provided here that an enquiry can be conducted by the Human Rights Division on application by the convicted person or his representative. So, I say it again: an enquiry can be conducted, and that is the reason why a convicted person or his representatives knocks at the door of the Human Rights Division.

“(...) as to whether there exists sufficient fresh and compelling evidence that may satisfy the Human Rights Division that a reference should be made under section 19A(4) of the Criminal Appeal Act.”

What is the situation with regard to the Criminal Cases Review Commission? I have here a document in my hand which is, in fact, frequently asked questions on the website of the CCRC of the United Kingdom, and at page 2 of the document I read something of utmost importance. What is new evidence or legal argument? This is a question which normally people very often go and ask the CCRC, and here the CCRC says to everyone at large wanting to know how they work, what do they really base themselves

upon in order to come to decide whether a matter has to be referred or not. They talk about new evidence, and the law in the United Kingdom also talks about new evidence. It does not talk about fresh evidence; it talks about new evidence. It talks about compelling evidence, just like our Bill also talks about compelling evidence.

So, on the one hand, you have ‘fresh and compelling evidence’, which is in our Bill; on the other hand, in the United Kingdom, you have ‘new and compelling evidence’. Therefore, as I am trying to say, we should not look at only one side of the coin in order to make a case suit a political objective. We should look at both sides of the coin. In other words, what is provided for in the United Kingdom with what is provided for here in the Bill. That is of utmost importance. What separates these two? And the question here is: what definition must someone, as a legislator, what are we saying here, what interpretation are we given to ‘fresh evidence and compelling evidence’? True it is that, in the piece of legislation that we have, it is defined at clause 8; where compelling evidence is defined, where fresh evidence is defined. The definition of ‘fresh evidence’, Mr Speaker, Sir, must be read very carefully. I read here –

“‘fresh evidence’ means evidence which –

- (a) was not adduced at the trial of the offence; and
- (b) could not, with the exercise of reasonable diligence, have been adduced at the trial.’

And that is where some people who are concerned about miscarriage of justice, with guilty people finding themselves behind bars, are worried about out there, Mr Speaker, Sir. What happens if someone is innocent, and he finds himself having gone through the process of appeal, having gone initially to the process of a trial, and then 10 years later, he still maintains his innocence, he insists upon his innocence? What can be done for him? And the question in the minds of people out there is: will he be limited to adducing or relying upon only fresh evidence, which is as well compelling? What is, therefore, the definition of ‘fresh’? Are we to read or be literal about it that –

“(...) with the exercise of reasonable diligence, it could not have been adduced at the trial.”

Let us take an example, a very simple example; any case for that matter, a hypothetical case. The Police have evidence in their possession because it is the Police that enquire into supposedly criminal cases, if at all there is a case. They enquire. Imagine, in this hypothetical case, the Police have a lot of evidence that they decide to keep, that they decide not to communicate to the defence. That is not the first time we hear about something like that, as lawyers. In many countries in the world, we have come across jurisprudence where even in Mauritius, it is, therefore, an obligation of the prosecution to communicate

material or even unused to the defence. But it has also been a time in Mauritius where this was not really looked at very carefully.

It was only being raised when after it had been raised in others' jurisdictions; unused material was not at a time in Mauritius communicated *de facto* to the defence; that is the truth. One had to apply for it. But when one would have had to apply, if one knew of its existence and if the prosecution in any hypothetical case does not communicate to the defence that this exists, how could the defence, therefore, ask for something he does not know really, in fact, exists?

If the defence does not know that something exists, it would be, therefore, not correct if we are to be afraid like people out there that this - where it is written 'reasonable diligence' - is read against the interest of any accused party or convicted party. It should be read in such a way as to mean, if the prosecutions have had in their possession evidence which they have never informed the defence about, the defence could still be said to have used reasonable diligence and, therefore, could not have used it at trial. Here, it does not mean that the prosecution could come and say that they did not use reasonable diligence, because if the prosecution is understood to say that they did not use reasonable diligence by not asking for, for example, camera recordings that exist in the hands of the prosecution, then there is a presumption on the part of the prosecution that the defence is aware that it exists. That would be unreasonable. This is not the purpose and the purport of this piece of legislation.

So, in any case where there is that type of evidence that exists that was never communicated to the defence by the prosecution - *et ce n'est pas à moi de faire un procès d'intention*, I am only talking about hypothetical situations - in my humble submission, the prosecution cannot and should not - and this is a commitment that the hon. Attorney General must take before this august Assembly, just like when the Criminal Justice Bill of 2003 was brought to the House of Commons, and the Attorney General in the United Kingdom also took a commitment - be allowed to do in the interest of justice. Here, I would like to see a commitment, and I am sure he will give that commitment. I will not say it, because I am already assured that he will give that commitment, that if there is evidence in the hands of the prosecution that they kept and did not communicate to the defence, the defence shall, therefore, not be penalised, nor shall a convicted person be penalised, nor shall be anyone who tries to claim his innocence be penalised by an objection on the part of the Director of Public Prosecutions in a court or before the Human Rights Commission, to say that this evidence should have been made available and produced in court, and there was a wrongful use of diligence. There was no reasonable use of diligence on the part of the defence, because that would be adding insult to injury. I am sure that this is not what is meant. So, what I have identified, Mr Speaker, Sir, in the interest of justice. I am underlying this in the interest of all of us here sitting as representatives of the people. When the hon. Leader of the Opposition rightly says that we want

a national debate, what he wrongly goes on to say or not understand is that we are having a national debate.

We are all representatives of the people in the National Assembly. We are all mandated by our electorate to come and discuss matters of public importance and legislation in this august Assembly. If this is not a national debate, what is it? And where hon. Nando Bodha also, in my humble view, with all due respect, may not have understood the purport and purpose of this legislation is the following. I read once again that particular clause 9 of the amendments that are proposed and circulated -

“4A.

(3) The Human Rights Division shall, without prejudice to its other powers under this Act, conduct the enquiry in such a manner as it considers appropriate (...).”

What does it cost to the citizen of this country who wants to go and knock at the door of the Human Rights Commission? The answer is nothing. It is exactly the same before the CCRC; it costs nothing. Why is it that this Government - and this is where it is important for everyone to understand this Government - under the leadership of the Prime Minister, Dr. Navin Ramgoolam, has gone with fundamental changes in re-establishing a situation which was unfair? What is that unfairness where the person whom he believes that he was wrongly convicted had no other avenue or recourse? None whatsoever! Now, he has recourse.

You have certain people who will say ‘no’. In hypothetical cases, people who are convicted and are behind bars have no recourse because they will only have to rely on fresh evidence, but then let us be very logical and let us not be emotional, let us be legal in our reasoning, and let us not be political. How does anyone expect to be released, and how does a wrong expect to be addressed on evidence? If it is on evidence that has already been adduced, then it is before the Court of Appeal. If it is to be on evidence which was never brought before trial, - as I have explained for many reasons - which was not available to the defence, or that the prosecution may have decided for tactical reasons or otherwise to keep and withhold from the defence, then that particular section of due diligence or exercise diligence cannot be used against the defence and, therefore, anyone who finds himself behind bars and knows that there is evidence that the prosecution has taken, for example, in hypothetical case, camera recordings, video recordings, and suits that particular clause, and can make use of this particular section of law, in order to ask the Human Rights Commission to enquire and decide whether he can refer. That is clear. All the fears of the Opposition are based on *rien de concret*.

Let us look at the situation today, someone in a hypothetical case, a young lady is raped. She could be related to anyone of us or any Mauritian out there whom we represent. A person is taken to the

Intermediate Court, - or even after the rape there is murder - he is taken to the assizes, and is found not guilty. It happens; fair enough. But what if something is found out later on that this person has, in fact, committed the offence? For example, he could go around parading himself like a peacock, saying: "I have committed it". But, because of *autrefois* acquit and *autrefois* convict, because of the rule against double jeopardy, I can go on all roofs of this country and say: "I did commit the rape! I did commit the murder! No one can touch me!" That would be a miscarriage of justice. That is what is happening exactly in this country today. You have innocent people as well as guilty people who are going through certain treatments in our criminal justice system, the adversarial system that I described at the outset, which has to be looked into. What I am saying here today, Mr Speaker, Sir, is not going around the Double Jeopardy Rule. It does not even raise any constitutional issue.

Section 10(5) of our Constitution already provides for a review. So, you cannot, therefore, say that there is a constitutional issue, and in any event, even in the European Court of Human Rights or the House of Lords, we have read pronouncements on this particular issue, where there is no human rights issue. So, let us not, therefore, in the interest of being emotional about this debate, in the interest of being political in this debate, try to say that there is a human right issue when there isn't one. Later on, I am sure, Mr Speaker, Sir, Members of the Opposition will say - and they have started by saying it; I already know, and I can read their minds - "well, your own father, Yousouf Mohamed, Senior Counsel, says that he believes otherwise." I know they are going to say it.

(Interruptions)

What I have to say to that, in order to answer to what they will say, and now that I have said it, I am sure they will not even have the courage of saying it. That is why I said it like that. It is the following: we are lawyers; this is a moot point. I am convinced about what I am saying, and I stand by what I am saying. I have established in this House a record, and I would like to go as far back as some time in the previous mandate of this Government.

Here, Mr Speaker, Sir, I am not talking about the judgment of the Supreme Court, of the District Court, of the Intermediate Court, of the Privy Council or any tribunal. I am talking about why passion is being raised like that, because of a report that has been published by the former Attorney General, Rama Valayden, as he was then hon. Rama Valayden. Hon. Rama Valayden was once upon a time Attorney General. If, in that report, what he says is true - and us, with all respect for a judgment of the Supreme Court, which I am not challenging - legal avenues are open, *tout en ayant un profond respect pour ce qui a été décidé par n'importe quelle cour de justice. Il n'y a pas lieu*, therefore, to even be emotional about it; if you believe Rama Valayden, as he is now, as he was once upon a time Attorney General. If anyone reads that report, and that report is found to contain fresh evidence that is comparable, then he can go

directly to the Supreme Court, or he can go and knock at the door of the Human Rights Commission as representative of those who believe that they have an issue at end. So the avenue is there. But what I would like to say for the purpose of the record and *pour la postérité* is the following: it is not the first time, and I am not talking here about the judgment of the Supreme Court. I am talking here of the Criminal Procedure (Amendment) Bill that was brought in 2007 in this august Assembly. This is connected to this particular piece of legislation as far as issues in the mind of the public at large, whom we have to address. It was the former Attorney General, Rama Valayden, who brought the Criminal Procedure (Amendment) Bill to this House. Hon. Uteem, I am happy to see, not very often he agrees with me but he agrees with me now. It is a good start.

When the former Attorney General brought that piece of legislation to this august Assembly, - and once again, I am being very careful, I am not challenging what the Court had decided, but there was, at the same time, a case in Court where the 45-year sentence which was mandatory was being challenged - had this amendment not been brought to this august Assembly, and I say it with conviction, there are all chances in the mind of a reasonable legal person to see that this sentence of 45-year mandatory would have been unconstitutional, thrown out and, therefore, since you cannot keep someone in jail on an unconstitutional sentence which has been declared unconstitutional, they would have had to walk. That is the truth. I stood up in this august Assembly, and I said that when a game of football has started - maybe I used rugby then but let us go to football - the referee had blown a penalty, it is not at that particular moment that FIFA would change the rules of the game, because that would be wrong. And there was a commitment on the part of the hon. Attorney General that there would be no *rétroactivité* on that piece of legislation. The Supreme Court has interpreted it retroactively. Fair enough. This is the same person, who was once upon a time Attorney General, who brought an amendment to this House, and deprived people who were challenging the constitutionality of the 45-year mandatory sentence, and made it possible for the Supreme Court to convert an unconstitutional sentence into one, which is appropriate according to law.

Today, that same person comes with a report, and says something else altogether. Why I think it is of utmost importance that I underline that fact is for posterity, for history. It is wrong for people to try to put themselves up as champions of a cause when they had the opportunity in an official capacity. What was done? Was it done, or was exactly the opposite done? That is why, in my intervention, I have said you have the opportunity today, and all of us hon. Members of this House have an opportunity to do what is politically correct as opposed to what is morally correct. I have chosen the moral ground because it concerns injustice and our love for justice. It concerns the tears of people who see their loved ones going behind bars when they are not *coupables* of anything. It concerns the pain of mothers and sisters who see

their loved ones behind bars, and long for the day when they shall see freedom. It concerns the tears of fathers who long to see their sons released, but sometimes die before that great day. It concerns any hypothetical situation. That is why I have chosen the moral one. What I recommend we should do is stop politicking. Why should we do that? It is because I commend the fact that the Opposition agreed to meet with the hon. Attorney General. I commend the fact that they both sat down together and tried to find consensus, but consensus is exactly consensus. It does not mean whatever you propose is agreed upon, and it does not mean whatever was our initial position, we stick to it; it means consensus. If that is the case, we are in power today, we are coming, and it is not obviously the intention of Government to do any harm to anyone. We want to thrive for justice. It is not the intention of the Opposition to want to do harm to anyone. They want to thrive for justice. So, let us, at least, see one another on this common ground as lovers of justice. Let us see one another on this common ground as soldiers in the cause of justice soldiers. Let us put aside what are issues that separate us, and let us concentrate on what unites us. We are, therefore, coming up with this proposal in this Bill, because it is a fundamental change to the concept of *autrefois* acquit, *autrefois* convict, as I have said.

Now that the hon. Attorney General is here and was not here earlier on when I made certain remarks about a commitment, which I would like, on his behalf, to repeat it, with the permission of Mr Speaker, because I think it goes to the essence and to the heart of the problem. There is a particular section of the law which is being proposed. The definition that is given to fresh evidence as far as clause 8 is concerned is -

“fresh evidence” means evidence which –

(b) could not, with the exercise of reasonable diligence, have been adduced at the trial.”

I talked just now in the absence of the hon. Attorney General of a situation which really would, I believe, iron out the differences between the Opposition and Government in the interests of justice. When we have an opportunity of that sort, we take it, we grab it; we don't let it go, both for the Opposition and both for Government.

Imagine a situation, Mr Speaker, Sir, where, in a hypothetical case, there is evidence in the hands of the Police, the Director of Public Prosecutions; the prosecutors have evidence in their hands, which they never communicated to the defence. I am not saying voluntarily or willingly or with malice or for thought. I am saying they did not communicate to the defence. *Ne faisons pas de procès d'intention*. If you only now find out that the evidence was in the possession of the Police, and they did not communicate it to us, it would, therefore, be open for the defence to come and knock at the door of the courts, or knock at the door of the Human Rights Commission; and it would not be proper for the

prosecution to come and raise any objection by saying that this is not fresh evidence, because had reasonable diligence been exercised, it would and should have been adduced at trial. It is impossible for anyone in the defence or any reasonable person to come and ask for material from the prosecution if they do not know that this material exists. *La plus belle femme du monde ne donne que ce qu'elle possède*. In other words, I must know exactly what you have, in order to tell you to give it. Now, you don't expect me...

(Interruptions)

Then again, I mean there are certain people who are magicians and know exactly without even looking; I've got ability, and we are mortals. Therefore, you cannot penalise the defence if the prosecution kept that evidence in a hypothetical case, such as video recordings, a lot of cameras on a scene of crime, or on another scene that is connected to a crime. If that video evidence is available, that they did not communicate it to the defence in a hypothetical case, and the defence could not, therefore, be expected to have known of its existence, it would be a miscarriage of justice. I say it again, it would be a miscarriage of justice being perpetrated anew by the prosecution if they are to stand up in any court and say that that particular clause is being used as an objection and a bar to knocking the door of the Human Rights Commission. I do not want to belong, and we all, I am sure, do not belong to a creed of people, of men and women who would partake in such a furtherance of miscarriage of justice. That's why we are here, and I say let us take the moral ground today. Let us do what this Government is trying to do, but with the Opposition, let us open the doors. Once upon a time, all the doors were shut, but now they are opened.

It is not an excuse to say in all those countries in the world like in the United Kingdom, they took 15, 16 or 20 years. If I am to use the say logic, it took 20 years to invent an aircraft or it took 20, 30, or 40 years to invent the wheel. Does it mean that I have to go for the 30 years again, or can't I just take the wheel and apply it? Why should I go through the whole process again? So, let us be serious, and let us not be political.

So, in my humble view, this is a great step forward for those who are lovers of justice. This is a great step forward; all those who believe that they have fresh evidence, which would also qualify as being evidence which the prosecution kept quiet about and did not communicate to the defence, because it is only now that the defence is being made aware of it. Even as far as new witnesses are concerned, the prosecution might have been aware of and did not tell the defence; this also would qualify as fresh evidence.

It is, therefore, compelling for all Members of Parliament, and it is compelling for the hon. Attorney General, in his summing-up, to commit to what I have just said. He has to commit that there is,

indeed, a level playing field, because he is a lover of justice. There is, indeed, not an uphill battle when one wants to try to achieve justice. One should not be put before road full of pebbles, broken glass and an uphill situation. We are for justice, and I stand by what I say.

Thank you.

(2.47 p.m.)

Mr R. Uteem (Second Member for Port Louis South & Port Louis Central): Mr Speaker, Sir, I am very happy that my learned friend, hon. Minister Mohamed, ended up by identifying, at least, one shortfall in that legislation, and that is the definition of fresh evidence, which, according to him – and we support that – is too tough a test, and will certainly exclude the situation where evidence has been hidden from the accused party. When he finds it and he agrees to it, it is not political. He can do it, that's fine. Because he is in Government, he can do it. But if, we, on the side of the Opposition, find other flaws, if we, on the other side of this House, feel that this legislation is too strict as to allow a proper retrial of all cases of miscarriage of justice, then, we are political; then, it is *politicaill*.

Mr Speaker, Sir, hon. Mohamed also made an appeal to the hon. Attorney General, and asked him to give an undertaking that in such situation, the prosecution will not object to the reopening of the case, the Police will not say that this was not fresh evidence. But, then, the lawyer that my hon. friend is surely knows *trappe au préparatoire* is no substitute to proper legislative drafting. If Parliament intended that unused materials that were not communicated to the defence should not fall within this definition of fresh evidence, then it must be in this Bill. Hon. Mohamed himself gave the example of what happened when the Criminal Procedure (Amendment) Act 2007 was debated in this House. He himself just mentioned that the then hon. Attorney General gave an undertaking that he will not have any retrospective application. What was the worth of that undertaking? He himself has conceded that the Supreme Court said that it was applicable in all cases, including retrospective legislation. I am very happy that the hon. Minister conceded that he was against...

Mr Speaker: Sorry to interrupt you! Was the amendment made before the case of Philibert v. The State?

Mr Uteem: Yes, that was before the Supreme Court gave the judgment.

Mr Speaker: The Bill was before?

Mr Uteem: Yes. Philibert was in 2007. Before the Privy Council case in Philibert, that Bill was passed.

Mr Speaker: Right! Thank you.

Mr Uteem: It was effective on 18 June 2007.

Mr Speaker: Yes. Thank you.

Mr Uteem: The hon. Minister conceded that he, himself, was then in Government, his own party, under the able leadership of the very same Prime Minister, and he did not listen to him. Why would the hon. Prime Minister now listen to the Opposition when it starts criticising this Bill? That is not the rule of the game. When there is a debate, you can only have a constructive outcome, if on the other side they are willing to listen, not when there is a one-way traffic, not when the majority is stuck on doing what they have already decided, come what may. Whatever criticism there may be, be it from the Bar Council, from the Judiciary or from anyone, they have decided they will pass this Bill before vacation; so, the Bill will be passed. Whatever happens to victims of miscarriages of justice is not their concern. The priority is to adjourn, and to go to London.

Mr Speaker, Sir, I was a student reading law in England in March 1991 when the Birmingham Six were released, after having spent 16 years in jail for having been wrongfully convicted of the murder of 21 people, following the bombing of two pubs in Birmingham. They had all along maintained that they were innocent. Following the opening of Police investigations, they were finally released. At that time, this case created such a huge impact on not only us, law students, but in the public in general in England. Especially after the miscarriage of justice in the Guildford Four and Maguire Seven, the Home Secretary, on the very same day, set up a Commission, which will eventually result in the setting up of the Criminal Cases Review Commission. This case exposed the abuse of power of certain Police Officers. The violence they use to extract confessions when they are under public pressure to resolve high profile cases, the extent they will go to secure convictions at all cost even if this entails fabricating evidence, forging statement, and hiding any evidence which does not support their case.

Mr Speaker, Sir, the Criminal Cases Review Commission was finally set up in 1997 after six years from the liberation of the Birmingham Six. And only last month, the Ministry of Justice stated and I quote -

“There is exceptionally strong support for the functions of the CCRC to continue. It is made clear that the functions are still required and for those functions to be carried out independently of Ministers.”

Previously it was the Home Secretary who could refer the matter, in England, for a retrial.

Mr Speaker, Sir, I have gone through great pain to explain the situation in England to show that when it comes to miscarriage of justice, the matter should not be treated lightly. We are after all talking

about a fundamental human right; the right to freedom, the right not to be punished for a crime which you have not committed. Mr Speaker, Sir, miscarriage of justice affects not only the person who has been wrongly convicted, but also society at large because it affects public confidence in the criminal justice system. For if the purpose of an efficient criminal justice system is to ensure that the guilty gets convicted, its purpose also is to ensure that an innocent is acquitted. Any efficient criminal justice system should strike the right balance between, on the one hand, public interest in the detection and punishment of crime, and on the other hand, the individual interest both, of the defended and of the victims of the crime. For let us not forget, Mr Speaker, Sir, that for every innocent who is behind bars, there is one guilty criminal out there on the loose.

Mr Speaker, Sir, mistakes happen. In Mauritius, we do not have Court of Justice; we only have Court of Law. A Court of Law is only interested in evidence which is before it. Our rules of evidence and procedure are not infallible. Sometimes, investigators and prosecutors are so obsessed about securing convictions that they miss out on their overriding duty to be fair and impartial. Some have called it the tunnel vision; the obsession of officers to gather, focus and use only those evidences which will sustain a preconceived idea as to who perpetrate the crime, and how it was perpetrated. Any evidence which does not support that prosecutorial theory is simply disregarded or discredited.

Let us not also forget, Mr Speaker, Sir, the pressure under which some of these officers work, the pressure to secure conviction, come what may; the pressure from the families of the victim, the pressure to quench the bloodthirsty hearts, whose demand for their pound of flesh very often is nourished by the *media en quête du sensationnalisme*. Once we agree that the persons who carried out the investigation, the persons who conducted the case or defended it for that matter, and the persons who judged it are all fallible human beings, with their weaknesses, their pride and prejudice, once we admit that miscarriage of justice happens, then a society has a duty to ensure that there is an adequate mechanism for correcting such miscarriage of justice.

In Mauritius, there is currently only a limited option available to the victims of alleged miscarriage of justice. They can appeal to all the courts, all the way up to the Privy Council if they are given leave and they have the financial means. But once they have exhausted all recourse to the appeal procedure, they can do only one or two things. First, apply to the President to refer the matter to the Commission on the Prerogative of Mercy, or ask the President to exercise his discretion under section 21 of the Criminal Appeal Act 1955, which, I understand, has never been used. The prerogative of mercy is not an altogether good solution, Mr Speaker, Sir, because it presupposes that the applicants were guilty but now worthy of pardon. Their convictions may be quashed, but their names will not be cleared.

So, Mr Speaker, Sir, I was, I have to admit, overwhelmed when I received the Order Paper one Saturday morning, and I read the Explanatory Memorandum to the Criminal Appeal (Amendment) Bill, paragraph (b) of which provides that one of the objects of the Bill was to permit the convicted person to apply to the Court of Appeal for a review of the proceeding relating to a conviction before the Supreme Court, and the Court of Criminal Appeal may quash the conviction and order a retrial. At last, I said, a glimpse of hope for all those innocents who have been wrongfully convicted.

But, Mr Speaker, Sir, when I read the substantive provisions of this Bill, it sent a shiver down my spine. I could not believe my eyes! The circumstances under which an innocent could apply for a review and retrial were so limited, that it was clear to my legal mind that most innocents would not be able to satisfy the required threshold. I hope I was wrong. But, unfortunately the same conclusion was reached by our finest criminal lawyers, including Ivan Collendavelloo, Senior Counsel. To make matters worse, the Bill which was circulated on Saturday morning was to come for the First, Second and Third Readings on Tuesday; only four days later. What was the urgency? We are talking about a Bill that affects fundamental human rights! A Bill which has constitutional implications! The hon. Minister of Labour, Industrial Relations and Employment, hon. Mohamed, seems to suggest that there are no constitutional issues with this Bill. I beg to differ, Mr Speaker, Sir. Yes, section 10 (5) of the Constitution provides that there is an exception to the rule of double jeopardy, where you can review a conviction through a Court Order either through an appeal or a review.

Yes, I admit this, but there are also other provisions of the Constitution. What about the provision which ensures that you must be tried within a reasonable time? What about impartiality of a tribunal? Would you have a fair trial? Can you ensure that the next jury will not be tainted by the thought that you had already been acquitted, but now re-brought again before the trial? What about the concept of proportionality that was given effect to in cases such as *Khoyratty* and *Philibert*, where the Privy Council held that even a provision of the Constitution can be unconstitutional if it is in breach of the overriding in section 1. The supreme guidance of this land – that Mauritius shall be a democratic State.

So, I beg to differ with hon. Mr Mohamed. I think that this Bill does raise a very serious fundamental constitutional issue, and I will not be surprised, the least, if some day this Bill is scrutinised by the Law Lords in the Privy Council.

Mr Speaker, Sir, we have, on several occasions, condemned the abuse made by this Government to rush Bills under a Certificate of Urgency, but of no avail. This attitude, Mr Speaker, Sir, reflects a total lack of respect of this Government not only to the hon. Members of this House who are called upon to debate and vote on the Bill, but also a total lack of respect vis-à-vis all stakeholders, including the families of victims, of the acquitted, and of the convicted. It took England six years to set up the Criminal

Cases Review Commission from the day the Commission of Criminal justice was set up. Six years of consultation, of planning of education, because the Police must be educated; there will be a new trial.

The Police should not use the same investigation techniques if confession has been thrown out because of Police brutality. Police must be educated not to extract confession out of brutality. Six years in England. In Mauritius, this Government wanted to do it in less than six days, and as was alluded too by the hon. Leader of the Opposition, it is eloquent to hear a Judge, no less than the Ag. Senior Puisne Judge, hon. Eddy Balancy, yesterday, go on air to criticise the lack of consultation surrounding such an important Bill. Like us, he too could not understand why Government wanted to rush this Bill through Parliament; a Bill, which, according to him, called for a public debate, and required close scrutiny. The Chairperson of the Bar Council told me that she officially wrote to the Attorney General, and asked him to postpone the debates. The Bar Council needed time to reconsider the Bill, and make recommendation. A panel of criminal lawyers improvised a press conference on Monday after the Bill was circulated, and criticised the Bill. On the eleventh hour, the Prime Minister acceded to the plea of the hon. Leader of the Opposition, and postponed the debate, but postponed it only for a week.

So, here we are today, debating a Bill with far reaching consequences; a Bill which, in the words of the DPP, represents a 'wind of change'. Yet, a Bill which, at the risk of repeating myself, is being rushed through Parliament without proper consultation.

Mr Speaker, Sir, when we look at the Bill, one cannot but wonder why Government chose to depart from the English model, and imposed a tougher test for convicted innocent to ask for a retrial. Why has the Government not agreed to set up an independent Commission like the Criminal Cases Review Commission in England, with full powers of investigation? And yet, last year, the former Attorney General requested the Law Reform Commission specifically to examine, and I quote –

“The desirability of having in Mauritius a Criminal Cases Review Commission such as the one in UK, which would be an independent public body mandated to review possible miscarriage of justice and which could refer appropriate cases to the proper forum for review”.

This Government and the former Attorney General referred the matter to the Law Commission, asking them to please tell if we can have an impartial Commission in Mauritius like we have in England to review the miscarriage of justice. And what did the Law Reform Commission do? After reviewing the mechanism that exists in several different countries to remedy the miscarriage of justice, the Law Reform Commission recommended in November 2012 the setting up of a Criminal Cases Review Commission as a statutory body to review cases of alleged wrongful conviction in respect of serious offences. This is not political; this is not the Opposition saying so. It is the Law Reform Commission telling Government what

we've been telling Government: please have an independent Commission akin to what happens in England. The Law Commission even recommended the composition of this Review Commission.

Mr Speaker, Sir, it is apposite to note that both the Director of Public Prosecutions and the Parliamentary Counsel are members of the Law Reform Commission. So, they also knew what the Law Reform Commission had decided, had recommended, and in a press article, on the very day the Bill was circulated, the DPP wrote, and I quote –

“It would be wise in order to prevent any abuse that a Criminal Law Review Commission be instituted to act as a screening body in all cases where convicted parties or victims’ families alleged any miscarriage of justice.”

The DPP is saying what this side of the House is saying, and surely no one in this House will say that the DPP is doing cheap politics, that what he is saying is political. But when we say it on this side of the House, then it is political. Mr Speaker, Sir, to create this new independent statutory body, with all the necessary power and resources to investigate into miscarriages of justice, would necessarily involve time. You will need to look at finances, you will need to come up with new legislation, and this is time which this Government again does not seem to hire. On Monday, the hon. Attorney General circulated the amendment he proposes to move at Committee Stage. Instead of setting up a full-fledged Criminal Cases Review Commission, Government is proposing that enquiry into an alleged miscarriage of justice be carried out by the Human Rights Division of the National Human Rights Commission.

Mr Speaker, Sir, having regard to its track record, there could have been no better way to torpedo the whole enquiry than to refer it to the Human Rights Division, as it is currently constituted. Answering to a PQ on 11 June 2013, a few weeks ago, the hon. Prime Minister conceded that there were delays in restructuring the Human Rights Commission because - and I quote -

“We cannot find people who are prepared to do the job for that position. We can find, but we want to have the best possible”.

Here we have the hon. Prime Minister telling us that this Human Rights Division is not working because he can't find the best people to man it, and today, we are told in this august Assembly, that this is that very same Division which is now going to help all the victims of alleged miscarriage of justice, and while the hon. Prime Minister is still reviewing this rare bird, maybe in London, these innocent are rotting in prison. For years, the Human Rights Commission has not been functioning properly, for years it has been understaffed, and we have been told there is no undertaking that things will improve. Section 3A of the Protection of Human Rights Act 1998, which sets out the function of the Commission, is not even being amended to cover investigation of alleged miscarriage of justice. Yes, the law is being amended,

there is the Consequential amendment, but, under section 3A, which sets out the powers, the function of the Human Rights Commission, this Government has not deemed it fit, has not deemed it important enough to include, as one of its functions, to review miscarriage of justice.

But, Mr Speaker, Sir, if the Human Rights Division will henceforth be empowered to investigate cases of alleged miscarriage of justice, then we will need some reassurance from Government.

First of all, the Government will have to ensure that the Division is properly staffed; vacancies have to be filled. Since this is a matter that cuts across party politics, I would like some reassurance that the staff will be truly independent, and not appointed based on any political allegiance.

Secondly, the Government will have to put the necessary financial resources at the disposal of the Division to enable it to carry out its functions efficiently. Investigation is timely and costly, but freedom is priceless. An innocent should not be allowed to rot in prison because the Division does not have the necessary funds to conduct the inquiry and enlist the services of experts.

Thirdly, in order to ensure the independence of any investigation, the investigation should not be carried by the same Police Officers who were involved in the original investigation leading to the conviction. The Human Rights Division must be able to insist that it approves the choice of officers appointed before an investigation takes place, and the Commissioner of Police will have to ensure at all times that there is no interference in the inquiry by those who were involved in the original enquiry.

Fourthly, and of utmost importance, appropriate measures will have to be taken to retain and preserve all evidence after conviction for the duration of the sentence, because it serves no purpose to try to reopen an investigation if you have already disposed of all the other evidence after trial. Now, with the advance in technology, this should not be a herculean task. Microfiche, for example, can be used to save space.

Mr Speaker, Sir, the Bill and the proposed amendment do not expressly provide any limitation period for the investigation into miscarriage of justice. As rightly pointed by hon. Bodha, section 4 of the Protection of Human Rights Act 1998 provides that the Human Rights Division shall not enquire into any matter after the expiry of two years from the date on which the act or omission, which is the subject of a complaint, is alleged to have occurred. It is not two years within the time of referral; it is two years within the time the offence has been committed.

I hope that the Government has given thought to this provision, and will move to make the appropriate amendments at Committee Stage, if it so thinks fit, to clarify the power of the Human Rights Division to investigate cases of alleged miscarriage of justice even for cases beyond two years, because otherwise people who have been convicted in 2000 in cases of arson will not be able to be retried.

Mr Speaker, Sir, the new section 19A(4), before the proposed amendment that was circulated on Monday, gives the Criminal Court of Appeal the power to quash conviction or acquittal, and order that the person be retried for the offence with which he was originally charged, or a lesser offence. Mr Speaker, Sir, if there is sufficient evidence, sufficient fresh and compelling evidence from the face of it to show that there is a blatant case of miscarriage of justice, if there is sufficient evidence, unchallenged evidence and the Court of Appeal agrees to quash the conviction, why should they necessarily order a retrial? Why shall the Court of Appeal - the word used here in the proposed amendment is 'shall' - refer the case for retrial?

I concede that there may be cases where new and fresh evidence will have to be tested in case that will be appropriate for a retrial. But why require an innocent to go through the ordeal of a new trial, where the nature of evidence is such that it is clear that a miscarriage of justice has occurred? In our humble opinion, the Criminal Court of Appeal should be allowed the discretion to quash the conviction and release the innocent, or order a retrial. This anomaly can be easily cured by a simple amendment to section 19A(4), by inserting the word "and/or" at the end of the semi-column after subparagraph (i), so that the Court of Appeal will then decide whether only to quash and release the prisoners, or quash and order a new trial.

With your permission, Mr Speaker, Sir, I would now like to come to what, on this side of the House, consider as the gravest injustice that this Bill will cause to this issue of miscarriage of justice, the grounds upon which a conviction will be quashed and a retrial ordered. According to the proposed section 19A(4), the Court will only quash a conviction and order a new trial where there is fresh evidence and compelling evidence in relation to the offence.

This test is very different, Mr Speaker, Sir, from what was proposed by the Law Reform Commission in its report in November 2012. At page 6 of its report, this is what the Law Reform Commission stated - and it is very important reading.

"The Commission has taken into account observation made about ways of improving the functioning of the CCRC in England. The Commission, therefore, recommends that, notwithstanding section 93 of the District and Intermediate Courts Criminal Jurisdiction Act and section 9 of the Criminal Appeal Act, a person convicted of a criminal offence should be afforded the right to appeal to the Supreme Court or to the Court of Criminal Appeal, as the case may be, against conviction or sentence where the CCRC is of opinion that a wrongful conviction of a factually innocent person might have occurred."

It is very important, Mr Speaker, Sir, to note what the Law Reform Commission recommended. It recommended that the Commission should be of the opinion that a wrongful conviction of a factually innocent person might have occurred. The Law Reform Commission did not talk about fresh and compelling evidence when it comes to miscarriage of justice, when it comes to reopening of a case after conviction. The Law Reform Commission does refer to fresh and compelling evidence when it talks about reopening – we will see it later – of an enquiry, re-trialing after acquittal. But, in respect to retrial after conviction, the Law Reform Commission never used the words “fresh and compelling evidence”.

Mr Speaker, Sir, the Law Reform Commission was fully aware that even in England, under current test, there was a lot of criticisms. Now, what is the test in England? In England, three conditions must be satisfied for the Commission to refer conviction to Court.

First, the Commission must consider that there is a real possibility that the conviction would not be upheld by the Court of Appeal.

Secondly, the Commission must consider that conviction would not be upheld because of an argument or evidence not raised in the proceedings. An argument or evidence not raised in the proceedings; not fresh and compelling evidence. Even if you had existing evidence, if you did not raise the argument, you can take it now.

Thirdly, you must have exhausted all your rights of appeal.

Again, in England, they have a saving provision that even if a convicted person does not fulfil these three conditions, the Criminal Cases Review Commission has the discretion. It may still refer conviction to the Court if it appears to the Commission that there are exceptional circumstances which justify making it. Again, they are giving powers to cater for exceptional circumstances. In other words, Mr Speaker, Sir, the real test in England is whether there is a real possibility that conviction will not be upheld by the Court; not whether there is fresh and compelling evidence. As the hon. Leader of the Opposition has mentioned, even then, in England, the powers of the Commission are seen to be too restrictive. At a recent symposium on the reform of the Criminal Cases Review Commission, hosted at Norton Rose, academics, practitioners and Human Rights groups argued that the Criminal Cases Review Commission should be allowed to refer conviction to the Court of Appeal, either because there is a real doubt about the safety of a conviction, or because the Commission thinks that the applicant is or may be innocent.

Mr Speaker, Sir, at a time where there is a general mood in this country to free innocent victims of miscarriage of justice, why does the Government come with a Bill which will seriously restrict the reopening of unsafe convictions? Why is this Government not following the recommendations of the

Law Reform Commission? Worse, the hon. Attorney General circulated the proposed amendment that he will move at Committee Stage. He makes it even tougher.

“(b) The Human Rights Division shall not refer a conviction to the Court unless it is satisfied, having regard to any fresh and compelling evidence, that there is a real possibility that the conviction will not be upheld if the reference is made.”

So, now, not only the Human Rights Division will have to make sure that it is fresh and compelling evidence, but it will also have to pass the real possibility test which is being criticised in England.

Mr Speaker, Sir, the definition of fresh and compelling evidence in this Bill is actually taken verbatim from the definition given to these terms in the UK Criminal Justice Act 2003. This highly probative text is used in the context of retrial following an acquittal in England. Parliament in UK has indeed chosen to apply a stricter test in relation to retrial following an acquittal done in a case of a retrial following conviction. A tougher test is applied in case of a retrial following an acquittal because of the rule against double jeopardy in respect of ‘*autrefois acquit*’, that is, the ancient principle that no person should be tried for the same offence, the same crime twice.

There are strong policy reasons for maintaining this rule against double jeopardy, including the need to have finality in the criminal justice process, so that a sword of Damocles does not hang over the head of an accused party who has been acquitted. There is a need to protect citizens from harassment. This is particularly true in respect of political opponents, and when there is a strong temptation among people in power to persecute their opponents. The rule also ensures that the Police and the prosecution are diligent and properly conduct an enquiry, as they will not have a second bite of the cherry. There is also the sanctity of the verdict justice.

Mr Speaker, Sir, whatever the reason may be, the fact remains that, in England, there are two standards applicable in a case of retrial; a more lenient one for retrial following conviction, and a tougher one for retrial following acquittal. In *Regina versus JNB* in 2009, a case which came before the court in England, the court held that the fresh and compelling evidence test was a high one and stated, and I quote –

“It is only where there is compelling new evidence of guilt of the kind which cannot realistically be disputed that the exceptional step of quashing an acquittal would be justified.”

In other words, the fresh and compelling evidence test is so high that it is only in exceptional cases that an applicant would be able to meet it. It is a matter of regret and serious concern, Mr Speaker, Sir, that the Government has chosen to impose such a high threshold of victims of alleged miscarriage of justice.

Mr Speaker, Sir, in the case of *Samudee v. The State* reported in 2004, the Court of Appeal rejected the application by the accused party for adducing new evidence, and the Court of Appeal applied the same principle that is applicable in England for retrial in the case of *R. v. Parp*. This threshold, Mr Speaker, Sir, is even more lenient than the fresh and compelling new evidence threshold that is being proposed in this Bill.

This is why, Mr Speaker, Sir, we believe that the definition of fresh evidence will prevent any convicted person from adducing evidence where the exercise of due diligence had been adduced at the time of trial. It is not enough that evidence was not adduced at trial. It is not enough that evidence was not available at trial. It must be evidence, under the new definition of fresh and compelling evidence, which could not have been adduced with the exercise of reasonable diligence.

So, if, for example, the lawyers of the accused party had been negligent and did not adduce any evidence which they have, did not request for unused materials, did not properly conduct their case, there is no new; there is no fresh evidence. They will not be able to reopen the case.

Mr Speaker, Sir, this Bill also brings two other changes. It allows the DPP to appeal against an acquittal on issues of facts, including the case of duly acquitted, and the hon. Attorney General rightly pointed out when he made his speech, and I quote -

“I agree that, as far as possible, the verdict of the jury should be respected unless it is manifestly perverse or unreasonable, or the learned Judge has given a substantial misdirection in the course of the summing-up. I propose to move an amendment to provide that the DPP should only be able to appeal against such verdicts on those limited grounds, (...)”

So, the hon. Attorney General realises the sanctity of verdict by the jury and, therefore, only allows the DPP to appeal against a factual acquittal by the jury under exceptional circumstances. He mentioned two in his address, but then when the proposed amendment was circulated on Monday, he added a third paragraph 3, subsection (c). A serious irregularity occurred in the course of, or in relation to the trial, or the acquittal is otherwise tainted.

Now, what is a serious irregularity? That is so wide. That opens up the door for any type of factual appeal. What is the meaning of ‘the acquittal is otherwise tainted’? No definition is provided as to the meaning of ‘otherwise tainted’ unlike what happens in other jurisdictions. For example, in Victoria, Australia, an acquittal is deemed to be tainted where the person or another person has been convicted of an administration of justice offence in connection with the trial resulting in the acquittal. Administration of justice offence is defined as cases such as perjury, subordination of perjury, perverting or attempting to

pervert the course of justice, bribery of public officials and similar offence. So, in Victoria, Australia, it is clearly defined what is meant by 'acquittal is tainted', but here the way the proposed amendment reads, it will open up the gate for the DPP to be able to appeal against a factual conviction.

Mr Speaker, Sir, lastly the Bill proposes to allow retrial after acquittal. Again, in England, when the law was amended in 2003 to allow for retrial of persons who had been acquitted, this was only done after extensive consultation. That was done after the setting up of the 1997 report which investigated into the death of Stephen Lawrence.

It came after the publication of the report of the Law Commission in 1999. It came after the recommendation of the report of Lord Justice Auld in 1999. It came after the publication of a White Paper on the matter, during which time people were able to comment and criticise and debate; a consultation process which lasted six years. In Mauritius, the Law Reform Commission *proprio motu* decided to examine the issue of wrongful acquitted, which comes as no surprise being given the composition of the Commission. After extensive review of the situation in England and in other jurisdiction, this is what the Law Reform Commission recommends –

“The Commission is recommending that legislation could be adopted, creating an exception to the rule against double jeopardy by providing for the retrial – upon the order of a superior court - of a person previously acquitted when there is compelling evidence of a "tainted acquittal" or "fresh and compelling evidence" as to guilt. There should be, however, sufficient safeguards to ensure that the power to quash an acquittal will not be abused.”

Very important, there should be safeguards! What are these safeguards? The Law Commission went to the pain of setting out what these safeguards should be. First, the reform only applies to acquittal of serious offences and not all criminal offences. This also was the subject of a big debate in the House of Lords and House of Commons. When do we relax the rule of '*autrefois* acquit'? But, then, the hon. Attorney General, despite what the Law Reform Commission states, expressly stated in his speech last week, and I quote –

“I should add that consideration will be given to providing in the forthcoming Judicial and Legal Provisions Bill for persons acquitted or convicted before the Intermediate Court or a District Court to make an application for review and retrial in the circumstances provided in the Bill.”

So, opening up the floodgate; not limited the exception to only serious offences.

The second safeguard recommended by the Law Reform Commission is that the consent of the DPP should be needed before the law enforcement agencies can reinvestigate acquittal cases. Same thing

in England, same thing in Australia, but not in Mauritius! Here, the consent of the DPP is not required; any Police Officer can reinvestigate any acquittal case.

Third, only the appellant Court will have the jurisdiction to quash the acquittal and order a retrial - this is covered in the Bill. New evidence which could have been found by the law enforcement agencies, acting with reasonable diligence, will not meet the "fresh and compelling" evidence exception - this is provided in the Bill.

Fifth, before quashing the acquittal and ordering a retrial, the appellant Court must be satisfied that it is in the "interest of justice" to do so – very important, even if there is fresh evidence, even if there is compelling evidence, the Court of Appeal will have to determine whether it is in the interest of justice to order a retrial. This, Mr Speaker, Sir, is not in our Bill. There is no safeguard, no safety net. Even if it is not in the interest of justice, you can go and retry the acquitted person.

Prohibitions on publication apply to protect the identity of the accused so as to prevent prejudicial publicity from affecting the fairness of any retrial; very important, because as I said at the beginning of my intervention, it would be a breach of the constitutional right to a fair hearing if adverse publicity is given to the retrial in the press. This is highlighted in the report of the Law Reform Commission, but not included in this Bill.

Lastly, the prosecution will only have one opportunity to apply for a retrial; this is covered.

Mr Speaker, Sir, the end result of this Bill is that it will be very tough for a convicted person in Mauritius to get a retrial, tougher than obtaining a retrial in England. At the same time, it will be easier for the DPP to secure retrial after acquittal, easier than is the case in England. This result was never recommended by the Law Reform Commission, and this is not a satisfactory result.

Mr Speaker, Sir, when the Criminal Appeal Bill which set up the Criminal Cases Review Commission was debated before the House of Commons, it received the support of both sides of the House; both the Conservatives, the Labour and the Social agree. It is a matter of great regret that the Government has not acceded to the suggestion made by this side of the House, which would have allowed us to support this Bill. It is a matter of even greater regret that the Government has decided to go ahead with this Bill in Parliament without proper consultation. It is simply unacceptable, Mr Speaker, Sir, that a Bill of such an importance, which has such far-reaching constitutional implication, is being rushed through Parliament.

Thank you.

(3.36 p.m.)

Mr C. Fakeemeeah (Third Member for Port Louis Maritime & Port Louis East): Praises be to Almighty and peace be upon all of us! Thank you, Mr Speaker, Sir, for giving me the opportunity to address the House on this issue, as I am looking at this issue in a different angle. I am looking in the angle where the people are looking, and I am looking in the angle of the sufferings of the victims, as I have been one of them.

At the very outset, I would like to pray that I do not speak, as we have been accused of, out of passion, neither out of politics. I never thought in my life, Mr Speaker, Sir, that I would see the day when this House would even analyse and debate such legislation like the one we are now debating, that is, the Criminal Appeal (Amendment) Bill, which relates to judgement. I ask myself – this is my opinion – who is more legitimate than the Almighty to judge? Is it not here an attempt to substitute ourselves to God in passing or quashing judgments? This piece of legislation, Mr Speaker, Sir, that is meant to empower the Director of Public Prosecutions, has, in fact, caused a major outcry in the country, and also among the legal profession.

Mr Ivan Collendavelloo, a Senior Counsel, and one among the most brilliant Barristers in our country, as well as a former Member of this House, said, on Sunday - and it calls our attention - *que c'est une loi vicieuse et dangereuse*. If we really love justice – these are my words – and that justice should be seen to be done, then let me speak my mind, and say this present Bill stands on the way.

Mr Ivan Collendavelloo went on to say that he was surprised with *l'étonnant empressement, au point où on a vu le DPP lui-même venir défendre un projet de loi du gouvernement presque comme un propagandiste du régime*. And most rightly, Mr Collendavello - who recently called for a press conference with his colleagues, Me Yousouf Mohamed and Me Raouf Gulbul - expressed his fears over the dangers of this legislation. Mr Speaker, Sir, these people are not inexperienced people. They have fought for our country, they contributed for our country, and they are very well experienced people. *Vous vous rendez compte quel instrument politique pourrait être cette loi pour un gouvernement qui veut faire taire un opposant qui aurait été acquitté !*

And what Justice Balancy said some days ago also call upon our rationalism to understand what is going on in this House, and what is going on in our country.

Mr Speaker, Sir, this is a very fundamental issue. There is no one in this august Assembly who can stand up and speak about as myself and my family has gone through with fake accusations! Everyone knows how difficult it is in this country for an accused to prove his innocence before judicial instances. Now, we want all innocents to walk *avec un boulet au pied*? This is most unjust, Mr Speaker, Sir. This is

called, according to me, moral tyranny. It is more than the most extreme infliction of pain and physical abuse that constitute torture, and can be considered as merely cruel, inhumane and degrading!

Government officials, Mr Speaker, Sir, including Ministers and the DPP, are accountable to abide by their oath of office and to uphold and defend our Constitution...

Mr Speaker: Hon. Member, I am sorry to interrupt you. I invite you to speak on the Bill proper! So, please!

Mr Fakeemeeah: Can we suggest that this piece of legislation is upholding and defending the Constitution? Simply no! Then, we can ask: why bringing such legislation? We all know that it is simply because Government has lost its face with the 'Michaela Harte' case! This is...

Mr Speaker: Please! I said earlier, possibly the hon. Member was not here, do not discuss this case at all. Okay? I said there are two cases that should not be discussed, namely the 'Legends' case and the 'L'Amicale' case.

Mr Fakeemeeah: Thank you. And this is why the DPP said that he was disappointed with the acquittal verdict of the two innocent Mauritian men.

Mr Speaker: I have said; the hon. Member should have understood what I said!

(Interruptions)

Mr Fakeemeeah: Mr Speaker, Sir, it is linked.

Mr Ganoo: Mr Speaker, Sir, on a point of order. Can the House know why any Member is not allowed to comment on these two cases? They have been tried. They are not presently undergoing any enquiry. So, no prejudice will be caused to these two cases. They have already been disposed of. We know what the rules of the Standing Orders are; we should not prejudice any enquiry that is going on. But, in these two cases, Mr Speaker, Sir, they have already been disposed of. They are past cases. In fact, in the article of the DPP, lengthy comments were made in the case of 'L'Amicale', as you would know. This is a debate, and I think that Members should be able to comment, without criticising the Judge and making personal comments on him, or trying to impute motives to the Judge. But, if it is by way of general comments, Mr Speaker, Sir, I think for the good of the debates and for the interest we are all giving today to this piece of legislation, we should be given a leeway.

Mr Speaker: Yes. Okay. I have got your point. This is precisely what I am saying; that these two cases have been judged, and judgments have been delivered. So, my opinion is that those two judgments should not be discussed in this Assembly. But, as the hon. Leader of the Opposition has said, the hon. Member may speak about them without imputing motives and without criticising the judgments.

The Judiciary is independent, and there will be nobody here to come and defend the Judges concerned. So, you got my point.

Mr Fakeemeeah: Thank you so much, Mr Speaker, Sir, yes. And regardless of putting an innocent or a culprit behind the bars, we should now come to satisfy the Government of Ireland, that same Government that has forgotten its role in the IRA and the Bloody Sunday! Now, they want us to take lessons from them! From 2005 to date, a series of legislation has been passed to deal either with a case or a person. That is a very dangerous situation, where fundamental rights and liberties are at stake! Unfortunately, Mr Speaker, Sir, far from holding Government officials accountable to abiding to the rule of law, the Attorneys General of each successive administration or regime have increasingly aided and abated the executive branch in its cutting end more often than not, flouting the law altogether, justifying all manners of civil liberties and human rights violations, and trampling the Constitution in the process.

Many people are arrested in this country on mere allegations, lies and fabricated evidences. I have myself been victim of such atrocities. I call it atrocity. Do you know why? Because you cannot feel what I felt on hearing the hon. Magistrate saying: “I have no other alternative than to dismiss all allegations against the accused.”

Mr Speaker: Hon. Member, I am sorry to interrupt you. I do not wish to interrupt you. But, please, if you could speak on the contents of the Bill, I would be thankful to you.

Mr Fakeemeeah: I will do my best, yes.

Many people are arrested on mere allegation, lies and fabricated evidences. The Police are quick there to lodge provisional charges. In the meantime, a trial by the press follows, as statements of the so-called suspects are leaked voluntarily in the media. When such suspects are remanded to cell, and the enquiry has taken eternity to be completed, justice is obviously delayed, thus denied.

In our country, in our young Republic, is there presumption of innocence? We arrest, and then we investigate. It is against such background. You see, I have to make my point, Mr Speaker, Sir.

(Interruptions)

It is against such background that the Criminal Appeal (Amendment) Bill is about to be voted in this Parliament. Many people, including myself, fear the worse for our democracy and the true separation of powers.

The only pretext for such amendments to the legislation is that they would ensure that offenders are brought to trial, and that convicted people are retried when there are fresh and compelling evidences. Is it really in the debate about the reopening of the ‘l’Amicale’ case that has triggered this hurry? No, I

do not believe! I will tell you why I do not believe. The definition that you are giving to the term ‘fresh and compelling evidence’ closes the door of the reopening of the ‘l’Amicale’ case, for which I stood here, I handed over to the hon. Prime Minister a popular petition duly signed by some 15,000 people!

In fact, Mr Speaker, Sir, this Bill not only closes, it double closes, it triple closes, and in fact, it closes it for eternity with your definition, and this is why we have to stand up and voice out what is going on in this House!

Mr Speaker: No, it is not my definition!

Mr Fakeemeeah: No, the definition of...

Mr Speaker: Please address the Chair! It is not my definition!

Mr Fakeemeeah: It is the definition of the one who presented the Bill here.

(Interruptions)

Now, I fear for our democracy and our young Republic. Yes, there is law and order crisis. Yes, there is. There might be innocent people brought to trial and unjustly sentenced. But it is the method used by the Police and the way evidence is extracted and obtained that needs to be changed. Why do our Police still rely on so-called confessions of suspects and third party witnesses? Why cannot it gather sufficient evidences, be it scientific, material, factual, verbal, recordings, etc. before charging a suspect? Mr Speaker, Sir, if the driver is not good, do we then change the engine of the car?

(Interruptions)

Or do we move instead for a competent driver to ensure a safe journey to destination? If the Police are not competent, then let us bring capable, qualified and dedicated Police Officers to do the job. I feel that this Bill ...

(Interruptions)

Mr Speaker: Let us have some order; don’t interrupt the hon. Member please!

Mr Fakeemeeah: I feel that this Bill is giving power to the DPP. When such powers were denied to him by founders of our Constitution, are we, by simple majority, going to vote for a law that will have disastrous consequences on fundamental constitutional rights that can only be taken away by a three-quarter majority? Are we slowly moving towards a form a dictatorship of the State? Are we putting civil liberties at risk? It looks like it, Mr Speaker, Sir.

If people outside are not careful, they might be enslaved *jusqu’à ce que l’anarchie* takes over. I am surprised, Mr Speaker, Sir, in all good faith and in a real sense of responsibility for my country, that

the hon. Prime Minister has had discussions with the hon. Leader of the Opposition but not with other parties like the FSM to hear our proposals.

(Interruptions)

Mr Speaker: No laughing!

Mr Fakeemeeah: Why then are we being deprived of the right to be heard, at least? I, therefore, recall that I, the Leader of the FSM, historically and democratically elected Member of this House, enjoy the complete freedom to speak my mind. Subsequently, I have never practiced party politics or cheap politics. Rather, I have, all throughout these past three years, been enriching the debate, insisting objectively for a change of paradigm in our system. Make your own assessment; you will conclude that I am right to claim my right to be heard.

I fear that the hon. Prime Minister is in the illusion of unawareness that only the MSM and MMM form remake 2000, not the FSM. This is why we should not laugh, but we should listen. We are living in a dangerous time, Mr Speaker, Sir. *Nous sommes arrivés dans une conjoncture difficile et dangereuse. Le peuple a le droit d'être bien informé. Le système est totalement payé par l'argent public. Pourquoi donc imposer, avec cette précipitation, une loi antidémocratique, une loi anticonstitutionnelle ?* Let us look well before we leap, let us return to those who elected us, their rights. Remember well all sacred books of God, to whom we, here in this House, uttered - 'so help me God'. We are commanded to return to the people their trust, *et dans cette impasse, particulièrement la voix du peuple serait sans doute la voix de Dieu.* Shakespeare said -

"Beware the Ides of March".

And I would say -

'Fools rush in where angels fear to tread.'

I, therefore, appeal to all rational mind to fear God as he ought to be feared, and do not impose on our people, *ce peuple admirable, le fardeau de ce projet.*

Merci.

(3.54 p.m.)

The Minister of Business, Enterprise and Cooperatives (Mr J. Seetaram): Mr Speaker, Sir, allow me, at the outset, to take this opportunity to congratulate my colleague, the Attorney General, for introducing this Bill to the House.

Mr Speaker, Sir, the aim of this Bill is to enhance and further establish the concept of fairness on the same level for both the defence and the prosecuting parties. This Bill strengthens the legal arsenal to ensure that not only justice is done to victims of crimes, but also to those who have a case and have been wrongly convicted. And also, Mr Speaker, Sir, the aim of this Bill, as has been stressed by the Attorney General, is to amend the Criminal Appeal Act, so as to allow the DPP to appeal to the Court of Criminal Appeal not only against a sentence by the Supreme Court, but also against a final decision of the Supreme Court or a verdict of the Jury.

We have, as it is rightly pointed out, a charge that has been dismissed, or a person who has been acquitted, a person who has been convicted of a lesser offence than the one which he was formerly charged, or he is of the opinion that the sentence passed is wrong in law. The second aim of the Bill, Mr Speaker, Sir, is to provide to the Director of Public Prosecutions or a convicted person the right to apply for a review of proceedings in relation to an acquittal, or a conviction before the Supreme Court.

Mr Speaker, Sir, I totally subscribe to the proposed amendments brought forward, and the explanations given by the hon. Attorney General, which are convincing for this Bill to go ahead. I will not wish to repeat what has already been said in the Bill. However, I wish to emphasize on two aspects of the Bill, which, in my opinion, are matters desiring serious considerations. This Bill, as it stands, has been adjudged as a controversial one. We had so many opinions that have been echoed before this House. We just had an opinion from hon. Fakeemeeah, echoing maybe voices of counsel or defence lawyers; we also had echoes from the Opposition. Whereas, since its introduction to this House, there have been many debates in all quarters, we have to see whether we are asking the right and important questions. Some have expressed their opinions in favour, some have shown their resistance, and a few have reserved their views. Mr Speaker, Sir, this Bill has to do with a change of law, and we have it that those who have expressed their opinion against, we have to respect their opinion because opinions do matter.

However, due to the utmost respect that I owe to all academics, be it counsels or Members of Parliament who have expressed their opinion against, I shall beg to differ. Indeed, legal minds do differ, but it is important, Mr Speaker, Sir, that one shall be able to express his concern on a change in law and bring some strong arguments to justify the concerns. The first aspect on which I would focus is the right of appeal of the Director of the Public Prosecution against an acquittal by the jury, or a dismissal of a charge by the Supreme Court.

Mr Speaker, Sir, in every criminal trial the accused party is always at the centre stage. Every time we are told about rights of the accused. Rightly so, Mr Speaker, Sir, you have been a Senior Counsel, and you have numerous colleagues, learned friends in this House. We are taught at the very beginning, when we read law at the University and even practising at the Bar, that we elaborate in terms

of rights of the accused cases upon cases concerning fundamental and constitutional rights of the accused, obviously offenders, or accused parties have their rights and rights are rightly safeguarded. But, today, in this august Assembly, it is the turn of the rights of the victim, the complainant, as we often say, and the rights of victim or victims, as victims may be numerous, maybe direct or indirect. We should not be oblivious to the fact that a criminal offence has been committed upon an individual, obviously to the prejudice of that individual. But, at the same time, when considering the rights of the individual, we should put the right of the victim on the same level. They should be on the same or equal footing.

Mr Speaker, Sir, this Bill today is doing away with an anomaly that has been in our criminal law for decades. As the Criminal Appeal Act stands now, more particularly the Right of Appeal, under Section 5(1) –

“A person convicted before the Supreme Court may appeal under this Act against his conviction or sentence”

Whereas Section 5(2) –

“The Director of Public Prosecutions may appeal only against in position of a sentence before the Supreme Court.”

Today, we are adding to the pillar of Human Rights, that is, the rights of the victims, that is, giving the power to the DPP to be able to appeal in favour of the victim, because if you see the law as it is, it is a blatant injustice towards the rights of the victim. On one side, a convicted person has the right to appeal against his conviction, whereas on the other side there is no corresponding right of appeal against on acquittal. As you know very well, Mr Speaker, Sir, at the level of inferior courts, even District Courts or Intermediate Courts, the right of appeal exists for the accused or even for the prosecution. Concerning the right of appeal on the part of the prosecution at the Supreme Court level, it is not catered for concerning against conviction before the jury, and also concerning, for example, offences at random. Let us take a drug offence before the District Court or Intermediate Court. In the event, there is a judgment, there is the right of appeal for the accused that he can appeal, and at the end of the day, he wins his case. Also, if the DPP feels that he can appeal against such a sentence, he may also appeal at inferior court level, District Court or Industrial Court, whereas if there is an acquittal at Supreme Court level before a Judge, for example, let say at random, an importation of heroine case, big case, drug offence. Is there a right to appeal against such an acquittal?

Is the DPP empowered to appeal against such an acquittal where, for example, you have a huge importation of heroin charged? The answer is no, Mr Speaker, Sir. Such right has not been written black on white in our laws till today, and today we are discussing such right before this august Assembly, and

such rights need canvassing, need to be explained to the whole public, to the population, because it is the wish of the population for the right of victims to be safeguarded. We all know here, over the years, how many times we have heard over the public radios, newspapers, online, how many concerns came up concerning rights of victims, and there were strong concerns and complaints about nothing is being done concerning the rights of the victim. But, today, this Government is coming before this House to propose such an amendment to be voted in favour of those victims, and such has not been echoed in the media. That is precisely my point, Mr Speaker, Sir; the right of victims has been as if diluted. We are solely concentrating whether the test comprising of fresh and compelling evidence, whether that benchmark will be crossed over or not, how stringent or tough that benchmark is; I shall come later on this point. But let us not divert on the initial focus of the Bill.

Mr Speaker, Sir, there might have been a reason why the Director of Public Prosecutions did not have the right of appeal, because it is considered that the verdict of the jury is sacrosanct, because the jury is the representative of the cross-section of the society, and that is one argument. We have learnt it while we read law, all of us, and also we have it from several quarters, whereas it is very possible that a trial Judge misdirected the jury.

Let talk about misdirection in the course of the summing-up, because we should not forget, at the end of the day, that the direction of the Judge to the jury is vital and fundamental for the jury to reach a verdict, whatever it may. So, in such circumstances, the Judge tells the jury that they only have to follow his direction in law, and if the Director of Public Prosecutions considers that a direction was wrong in law, and this has led to the acquittal of an accused party and consequently the accused party is roaming in the environment, then, Mr Speaker, Sir, it should not offend anyone for that matter that the law should provide for the right to appeal against such a misdirection, and precisely to cure such an injustice.

Such a point has, very conveniently, let's say, been forgotten by most academics, whereas this is precisely a very practical point for all counsel, for what I know. In the same vein, Mr Speaker, Sir, having regard to the evidence that has been adduced during a trial, the Director of Public Prosecutions is of a considered view that an accused party should not have been acquitted by a jury. Why should he be denied such a right of appeal against such an acquittal? It is his right as well. So, at the end of the day, Mr Speaker, Sir, it is an issue of fairness over rights of parties concerning appeals. All rights of appeals have to be on the same equal footing. It is unfair to have a right of appeal for the accused party at the level of the Supreme Court, whereas we do not have a right for the victim at the level of the same Supreme Court. It is only fair. So, I fully support this amendment to give the right of appeal to the DPP in such a case.

This amendment is being made in the interest of justice and in the interest of people of this country. The citizens of this country should know that an offender should not be allowed to go, to walk scot-free, where there might have been serious irregularities in the course of trial. This amendment, Mr Speaker, Sir, will give more confidence to our people in our criminal justice system.

Just now, there has been the point raised by hon. Uteem concerning that *il faut corriger les cas de* miscarriage of justice, as has been put also in newspapers by the Opposition, but my view, Mr Speaker, Sir, is that same is catered in this Bill. One clearly reads amendment 2(a), section 6 of the principal Act, and it has been inserted (2A) where it says -

(2A) On appeal against –

(a) the dismissal of a charge, the Court may –

(i) (...)

(ii) declare the trial to be a nullity and order a fresh hearing where the Court is of opinion that a serious irregularity has occurred;

Talking about miscarriage of justice, we are talking about serious irregularities. Obviously, it is up to the court to assess the terms and conditions, or the ‘in and outs’ of the miscarriage of justice, or the irregularity, how serious it is. We are not here to come and dispute the *modus operandi* of the Judge or the court, how he should deal with assessing the cases where he considers there has been the miscarriage of justice, whether there has been a serious irregularity. So, on the same issue, I would like to eliminate some apprehensions that may have been put in the minds of the public. The mere fact that the DPP is being given the power to appeal against an acquittal does not mean at all that the Director of Public Prosecutions will always succeed in an appeal. It will be up to the Court of the Criminal Appeal to decide whether the Director of Public Prosecutions can be successful in an appeal or not. It is not as if we are taking the decision concerning the conclusion of the appeal or the review. Obviously, the final decision will lie in the hands of the court and not the DPP. I believe there are strong safeguards against vexatious and frivolous appeals.

I will come to the second issue of review, that is, the review proceedings that are being brought in this Bill, and more particularly concerning the concept of compelling evidence and fresh evidence. Mr Speaker, Sir, the new section 9(a) is being inserted in the Criminal Appeal Act so as to provide for an application for review and retrial. In cases where a person has been acquitted or convicted, in such review cases, the court will have regard to fresh evidence and compelling evidence.

While looking at the definition itself, fresh evidence or compelling evidence in an application for review before the Supreme Court. Obviously, the Supreme Court will have to assess what is fresh; whether it is new - new or fresh; what is compelling evidence. They will obviously have to verify its cogency, and secondly, besides fresh and compelling evidence, we also have whether a retrial will be fair in the eye of the court, Mr Speaker, Sir. We have apprehensions from the part of the Opposition, and also strong observation made by several hon. Members that the review proceeding concerning fresh and compelling evidence is too high a benchmark, it is too stringent a criteria to be fulfilled and so on. Mr Speaker, Sir, it is clearly laid down that it is up to the court to decide whether a retrial will be fair besides the point of fresh and evidence. Before the court finds out whether retrial will be fair or not, the court will have to assess all the circumstances of the case, and it says here 'having regard to the circumstances'. So, it has to look at the circumstances of the case, and there is no way out of it.

So, all the circumstances of the case are being looked at. If there is any drawback or any deficiency in the evidence, lack of cogency, all the aspects of the case are being looked at; the circumstances of the case are being looked at. So, it means clearly that the case will be looked at thoroughly by the court in the review proceedings before concluding. Such an argument has been diluted, Mr Speaker, Sir. It has not been put before this Assembly. So, my point is: in the event that one thinks that the benchmark is too high, or too stringent, or tough like hon. Uteem has put it, I would beg to differ.

Like any appeal that has been going on for years and years, for so many decades in this country, the same conditions are being applied, the same *modus operandi* are being applied to analyse the cases, to look at the cogency. So, I don't see anything exceptional today that has been highly dramatised before this House.

Also, concerning the test, hon. Fakeemeeah put it that the doors have been closed, doubly closed, or triply closed. But if the circumstances of the case are being looked at, the fairness, whether it would be fair for a retrial to occur, and such is being done by an already established bench before the Supreme Court, and the circumstances of the case are being looked at, or the aspects of the case are being looked at, which door are you saying that has been closed? So, what I am saying is that there is an argument of fear as to whether some drastic - in my opinion, hypothetically, because such argument has come up so passionately.

There is a political, collateral damage lying ahead if this Bill goes through! That is my only conclusion. All the provisions for fairness over a review or a retrial have been provided in the Bill. Some false pretention concerning stringency or toughness, a high benchmark to be able to fulfil the criteria of review is being plastered all over the place. My opinion is that, at the time the court would review its decisions; all the parameters and conditions concerning a safe procedure have been laid down in the Bill.

Again, I would like to bounce upon what also Members of Parliament have mentioned with regard to the definition of fresh evidence. One thing that has struck me, Mr Speaker, Sir, is that fresh evidence also is evidence which could not, with the exercise of reasonable diligence, have been adduced at the trial; meaning that if this evidence was in the possession of the prosecution at the time of trial, before the jury, but for some reason it has been withheld, then this evidence will not be treated as fresh evidence on the part of the prosecution. I totally agree with this definition of fresh evidence. If the prosecution has failed to adduce such evidence, which was in its possession, then this should rightly not be treated as fresh or new evidence. In this sense, the prosecution will have to act in due diligence and not prosecute anyone through its review procedures.

Therefore, Mr Speaker, Sir, this shows that the amendment being proposed is not motivated by any hidden agenda, as strong safeguards are already inbuilt in the law. It will be the duty of the court to examine not only whether the evidence is fresh before it is adduced at the trial before the jury, but also whether it could have been adduced, and the reason why it has not been adduced.

Let me go to some press articles, whereby some counsels have expressed their fears in relation to the review. The main arguments are that a person who has been acquitted by the jury or following appellate proceedings will have a Sword of Damocles hanging over his head, where he will be living in fear that he may be retried one day. Again, I completely do not subscribe with such line of thinking because simply, Mr Speaker, Sir, this review proceedings will only happen in exceptional cases. We are not discussing that anyone who has been acquitted and who applies for a review of proceedings, obviously the review is going to be granted! No, this is not the case! So, my point is that we have to look at it in a way where we take into consideration all the provisions that have been made for the Bill to be able to go smoothly.

There have been other remarks concerning amendments that are *totalement insatisfaisants; la loi reste inchangée*. Mr Speaker, Sir, as per definition, law is a dynamic process. The law cannot be static; it has evolved throughout the years, since Magna Carta till today. Today, we are bringing some amendments to further strengthen, to put our criminal justice system on a new level of fairness, to adapt, to consolidate the rights of the victim at all levels, all stairs of justice. It is only right, only fair, only clear that the law is changing. It is a dynamic process, and that's how it has been so.

Again, coming from the Opposition side, we had so many arguments like we should have adopted further provisions as regards to the English law, we are rushing into things and coming with a Certificate of Urgency. But, Mr Speaker, Sir, the Opposition was in power from 2000-2005! Was there any legal impediment or any impediment whatsoever not to bring such an amendment? Now, when we are bringing it, it is a level of urgency. Also another point which came up is that...

(Interruptions)

Mr Speaker: No interruption!

Mr Seetaram:...there has been no respect towards families of victims or otherwise. But not bringing the law from 2000-2005 when they had the chance, that is being disrespectful to the families! So, my point, Mr Speaker, Sir, is that this is coming at a critical juncture, and we should think about the rights of the victim, which are being consolidated and preserved. Never has it been that this law is anti-constitutional. Section 10 (5) is clear -

“No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that 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.”

So, this is clear, Mr Speaker, Sir. Like I said, law is never static. It has always been changing, and it is in this spirit that the amendments are being brought today. This new philosophy of bringing confidence in the criminal justice system that not only accommodates the right of a person or anyone who has been wrongfully convicted, but the right of the victims, as I said, who have had to suffer.

Before I end, Mr Speaker, Sir, I would like to refer to a recent press article, whereby mention was made that one wrongful acquittal or one wrongful conviction is one too many. But, Mr Speaker, Sir, this is the main reason this Government is proposing these amendments, and that is to avoid a wrongful acquittal or a wrongful conviction, and the Bill is about right of victims and victims of unjust convictions as well as victims of unjust acquittals.

With these words, Mr Speaker, Sir, I fully agree with the proposed amendments, and I support the Bill.

Thank you.

Mr Speaker: This is a proper time to break. I suspend for half an hour.

At 4.31 p.m. the sitting was suspended.

On resuming at 5.15 p.m. with the Deputy Speaker in the Chair.

Mr S. Obeegadoo (Third Member for Curepipe & Midlands): M. le président, en abordant ce projet de loi aujourd'hui, je ne peux que regretter que jusqu'à présent ce ne sont que les juristes, semble-t-il, qui se soient vraiment impliqués dans ce débat, alors que ce projet de loi soulève des questions fondamentales comme l'a bien compris l'honorable Fakeemeeah. Mais le temps écoulé avant que nous ne

débattions le projet de loi n'a pas permis vraiment que l'opinion publique, en général, s'implique dans la discussion de ces questions, ô combien importantes, soulevées par le projet de loi.

Je pense qu'au centre du débat, M. le président, il y a trois notions clés : celle de la justice d'abord, celle du droit, et celle de la vérité.

J'aurais souhaité - bien que ce soit très difficile - d'essayer d'aborder ce débat d'une manière non technique. Si je puis me permettre de simplifier à l'extrême, la justice c'est une certaine conception de la morale de ce qui est évidemment juste ou injuste, de ce qui est bien ou mal, de ce qui est approprié ou inapproprié, lié à la manière dont les humains gèrent les relations entre eux, leurs relations avec les biens, et la façon de gérer la société en général. Donc, forcément, la justice évolue selon l'évolution culturelle, selon que les us et coutumes évoluent.

Si vous considérez les discriminations contre les femmes, la loi régissant le divorce, que vous considérez la loi concernant les drogues douces dans certains pays, l'homosexualité - aujourd'hui le mariage homosexuel est légalisé dans certains pays développés -, de différentes manières l'on constate que la justice est un concept qui évolue, qui est dynamique, et là-dessus je rejoins mon prédécesseur qui disait exactement la même chose. La justice et la conception de la justice évoluent, et le droit, les lois qui représentent une codification approximative de la notion et de la perception de la justice sont obligées de suivre le droit, car le droit, n'est-ce pas, édicte ce qui est permis, édicte les règles sociales et l'ensemble des règles régissant la société. Donc, la justice n'est pas un concept immuable. Bien au contraire. La conception de la justice évolue. Le droit évolue. Ce qui ne change pas c'est la vérité. Si la vérité est définie comme ce qui est conforme au réel, ce qui correspond aux faits, la vérité elle n'évolue pas. A travers la justice qui évolue, à travers le droit qui ne cesse de changer dans le temps, on cherche toujours à atteindre la vérité, à connaître les faits, à connaître la réalité.

Par rapport à la vérité, ce qui peut changer, ce sont les moyens d'y accéder. Par exemple, les formidables progrès dans le domaine de la science médico-légale, *forensic science*, nous permettent de nous approcher un peu plus de la vérité dès lors que nous traitons de la criminalité. Et donc, si le présent projet de loi reflétait cette idée, comme a voulu nous la communiquer le précédent orateur, que ce projet de loi reflète la volonté du gouvernement de suivre l'évolution dans les conceptions de la justice, que la loi devrait refléter donc cela, et que même la vérité, il y a d'autres moyens, des moyens autrement plus efficaces de l'atteindre, l'on aurait pu trouver la démarche du gouvernement intéressante.

Toutefois, cette initiative qui théoriquement aurait pu permettre, en cherchant à élargir le champ des possibilités pour quelqu'un qui se serait retrouvé condamné à une peine d'emprisonnement d'établir la vérité, d'établir son innocence, qui aurait pu théoriquement permettre à une personne coupable qui

aurait échappé à la condamnation, aurait permis donc à l'État de rétablir la vérité, et donc de s'assurer que tout crime soit puni, que tout délit soit sanctionné. Pour que ce soit ainsi, il aurait fallu équilibrer les choses, parce que dès lors qu'il s'agisse de questions aussi complexes et délicates dans la loi, en cherchant à corriger les injustices, en cherchant à soulager la souffrance qui en découle, il faut aussi des garde-fous.

Il faut aussi bien réguler ; il faut des critères très précis pour éviter les conséquences dramatiques qui peuvent être le résultat de tout chambardement précipité et non mûrement réfléchi de nos lois. Et c'est là précisément où le bât blesse. Et le premier - c'est ce qu'ont dit tous les orateurs de l'opposition avant moi, et je vais essayer de ne pas répéter - des impératifs aurait été d'avoir un grand débat, non pas seulement ici, à l'Assemblée nationale, non pas seulement parmi les juristes, mais que toute l'opinion publique soit impliquée, et que l'on mesure, à juste titre, les conséquences de cet amendement à la loi en débattant de la portée des dispositions particulières de cet amendement, afin de bien comprendre où elles risquent de nous mener. Et lorsque l'on considère que - je ne prends que cet exemple - le *Bar Council*, le *Bar Association* qui regroupe tous les avocats pratiquant à Maurice n'a jamais été consulté quant à ce projet de loi, n'a jamais vu ce projet de loi avant qu'il ne soit circulé aux députés de l'Assemblée nationale il y a 10 jours, vous comprendrez combien nous estimons que le gouvernement a failli et totalement failli dans sa tâche de soumettre aux débats démocratiques, aux débats publics ce projet d'amendement. Ce projet d'amendement comme l'ont fait ressortir mes collègues avant moi concerne deux cas de figure : ceux qui auraient été injustement trouvés coupables et condamnés, et ceux qui auraient été injustement acquittés.

Donc, rapidement, je souhaiterais revenir sur les faits saillants de chaque cas de figure. Injustement condamné. Vous savez, M. le président, évidemment tous les députés ici en intervenant ont une affaire particulière en tête : la fameuse affaire de 'l'Amicale', dont bien évidemment je ne souhaite pas commenter le bien-fondé ou pas du jugement. Mais tout le monde a cette affaire en tête. Tant nous avons été ces derniers mois, ces dernières semaines témoins du débat public, des rapports, des opinions diverses exprimées à ce sujet, et dès lors qu'il y a un projet de loi qui prétend offrir une main tendue à ceux qui pourraient s'estimer injustement condamnés, cette affaire de 'l'Amicale' revient en tête, et l'on se pose la question. Comment ce projet de loi pourrait trouver sa pertinence par rapport à cette affaire ou d'autres ? Cette affaire, vous la connaissez aussi bien que moi. C'est un crime horrible qui a eu lieu en 1999, un peu plus de 10 ans, et qui avait créé un émoi considérable au sein de toute la population, et tout le monde souhaiterait que justice soit faite. Il y a eu un procès ; il y a eu une décision des instances judiciaires. Ne voilà-t-il pas que ces temps derniers il y a des questions, des interrogations qui ont souligné des zones d'ombre !

L'on évoque la possibilité de rouvrir un procès, et avec cela en tête l'on se tourne vers ce projet de loi en se disant : mais qu'est-ce qui va changer ? A présent, nous savons tous que dans la situation actuelle de la loi, le Directeur des poursuites publiques ne peut faire appel de la condamnation d'une personne, sauf en ce qui concerne la peine qui est imposée.

Quant au condamné qui s'estime injustement condamné, lui n'a aucun recours, sauf la Commission de Pourvoi en Grâce, et vraiment ce recours est un recours limité. Il est très rare que la Commission de Pourvoi en Grâce intervienne dans une situation pareille. De toutes les manières, je soulignais mardi dernier, encore aujourd'hui, cette Commission ne peut répondre; elle n'a pas les moyens logistiques, elle n'a pas de moyens en termes de ressources humaines de répondre à cette multitude de demandes auxquelles elle est confrontée.

Ce que propose le projet de loi pour changer c'est que le Directeur des poursuites publiques, d'une part, a le droit de faire appel. Donc, si une personne a été trouvée coupable d'un délit moindre - si je puis m'exprimer ainsi - que celui dont il était accusé - ça c'est tout à fait nouveau - mais aussi et surtout qu'une personne qui s'estime injustement condamnée peut faire appel de sa condamnation si elle remplit deux conditions, qui étaient longuement expliquées et élaborées par les orateurs de ce côté de la Chambre. Et ne voilà-t-il pas qu'avec le dernier amendement circulé, désormais elle a cette possibilité, suite à la suggestion faite par l'opposition, de se référer à la Commission des Droits Humains qui se chargerait, si elle estime que la demande est fondée, de référer l'affaire à la Cour d'appel.

Ce qui nous paraît acceptable dans cette proposition c'est le principe général que tout condamné qui s'estime injustement condamné ait un recours autre que la Commission de Pourvoi en Grâce. Sur ce principe, personne ne pourrait objecter, mais ce à quoi nous objectons - et je vais parler de trois points qui, je pense, résument ce qui a été dit par l'opposition - c'est d'abord, l'absence de moyens - car une personne dans cette situation, qui est à la prison de Beau Bassin, et s'estime injustement condamné - de faire rouvrir son procès. La deuxième objection fondamentale c'est le *standard of proof*, le niveau de preuve à apporter pour faire rouvrir le procès. Et troisièmement, la question de compensation évoquée brièvement par le *Leader* de l'opposition pour ceux qui ont été injustement condamnés. Je pense que ce sont là les trois objections fondamentales. La première, l'absence de moyens. Un détenu à la prison de Beau Bassin n'a ni les moyens financiers, ni le soutien légal pour entamer une enquête approfondie permettant de réunir les éléments, afin de convaincre qu'il y a matière à rouvrir un procès.

C'est pour cela que l'opposition - et là, je voudrais rendre hommage quand même au grand absent, mais qui nous inspire tous, l'honorable Paul Bérenger qui, alors que nous avons reçu nos documents, dans le meilleur des cas, tard le vendredi soir il y a dix jours, avait tout de suite pu déceler les failles dans ce projet de loi, le danger que représentait ce projet de loi, et qui nous a alerté, qui a alerté

l'opinion publique. Il était le premier à nous rappeler que l'Angleterre, le pays dont nous nous inspirons, dont nous avons hérité notre système légal, a inventé ce qui s'appelle la *Criminal Cases Review Commission* pour recueillir les demandes, pour mener les enquêtes de manière tout à fait indépendante, et, dans les cas appropriés, référer l'affaire au tribunal approprié pour que tous les cas soient reconsidérés.

Comme l'ont souligné les précédents orateurs de l'opposition, pour ce qui est de cette question d'un *Criminal Cases Review Commission*, nous n'avons pas été les premiers à l'évoquer à Maurice. Dès la fin de 2012, c'est l'honorable ministre de la Justice lui-même qui avait référé l'affaire à la *Law Review Commission*. Vous savez, M. le président, cette instance qui est chargée de temps à autre de se pencher sur certains aspects particuliers de notre système légal, du fonctionnement de notre système légal, pour émettre des recommandations. Et la *Legal Reform Commission* avait, en des termes on ne peut plus clairs, recommandé justement qu'il y ait cette possibilité pour ceux qui s'estiment injustement condamnés de demander à ce que soit reconsidéré leur procès, et que pour cela il y ait, comme en Angleterre, une *Criminal Cases Review Commission*.

Par la suite, le Directeur des poursuites publiques – je me réfère à un article qu'il a écrit le 13 juillet, juste avant que le projet de loi ne soit circulé – évoque lui aussi sa conviction qu'il faudrait qu'il y ait une *Criminal Cases Review Commission* qui agirait un peu comme un filtre, si vous voulez, pour filtrer toutes ces demandes, parce qu'évidemment le risque serait que dès qu'un projet pareil soit voté, tous les prisonniers de Beau Bassin demandent à ce qu'on rouvre leur procès. Donc, c'est un peu un garde-fou, *safeguard*, qui permettrait de filtrer toutes ces demandes, mais qui, en même temps, là où il y aurait matière, pourrait entreprendre une enquête en profondeur qui doterait cette personne qui serait peut-être injustement condamnée de vraiment être en position de convaincre la Cour suprême de rouvrir son procès.

Et surprise, lorsque le projet de loi est circulé, il y a dix jours, nulle mention n'est faite de cette *Criminal Cases Review Commission*. Je dois vous dire que tout le monde s'en est étonné dans l'opposition, et parmi les juristes qui ont été alertés. Et je repose la question aujourd'hui, parce que j'aimerais que l'honorable ministre de la Justice, si ce n'est l'honorable Premier ministre, nous éclaire. Si les objectifs du gouvernement sont tout à fait honorables, alors pourquoi est-ce qu'en 2012, l'honorable ministre de la Justice confie cette tâche à la commission ? La Commission émet une recommandation précise. Nous savons comment font les anglais, et ils ne sont pas les seuls. Il y a d'autres pays qui ont suivi, l'Ecosse et certaines provinces de l'Australie qui ont suivi, en instituant une commission, la *Criminal Cases Review Commission*. Pourquoi - alors même que le DPP, à la veille de la circulation de ce projet de loi, et j'en conclus qu'il ne fut pas mis au parfum de ce que le gouvernement souhaitait faire, ce qui est pour le moins étonnant, ou alors qu'on ait choisi d'ignorer ses recommandations à lui aussi - donc, ce projet de loi ne faisait aucune référence à cette *Criminal Cases Review Commission* ? Par contre,

l'opposition, immédiatement, a demandé qu'une telle Commission soit instituée. Elle s'est référée à l'exemple anglais, et l'honorable *Leader* de l'opposition, avec force détails, a rappelé comment cette Commission avait été instituée suite à un rapport qui avait été commanditée, si je ne me trompe pas, en 1991, dont le rapport avait été fait quelques années plus tard. Le projet de loi, après un grand débat public, voté en 1995, la Commission entre en opération en 1997. Comment elle est composée d'un minimum de onze personnes ?

Mon collègue, l'honorable Nando Bodha, en a fait état tout à l'heure, dont la majorité sont des personnes qui ne sont pas des légistes mais qui reflètent l'opinion publique. Un tiers seulement des légistes. Comment cette Commission fonctionne de manière tout à fait indépendante ; qu'elle n'est nullement redevable ? Cela est prévu dans la loi. *She is neither a servant nor an agent of the Crown*. Elle n'est pas redevable au gouvernement, et elle est dotée de moyens financiers, elle est dotée de ressources humaines qui permettent à cette Commission elle-même de mener ses enquêtes, ou dans des cas particuliers demander à la police de le faire pour elle. Mais elle a tous les moyens. Et l'honorable *Leader* de l'opposition avant moi a donné des statistiques comment elle agissait efficacement comme filtre pour bien distinguer les cas qui méritent une attention particulière, des cas qui ne sont pas vraiment méritoires, et octroyait aux gens qui s'estimaient victimes d'une injustice les moyens vraiment d'aller de l'avant pour faire rouvrir le procès éventuellement, et obtenir l'acquittement. L'honorable Ganoo parlait de 4% des demandes. C'est quand même un filtre qui n'est pas uniquement là pour faire plaisir à tous les prisonniers du pays, mais qui peut, d'une part, aider l'État, le système judiciaire, mais, d'autre part, aider aussi ceux qui réellement seraient peut-être victimes d'une injustice. Donc, les trois conditions essentielles sont la composition de cette Commission, son indépendance, et les ressources appropriées afin qu'elle puisse fonctionner.

Nous avons fait cette proposition au gouvernement, comme l'a expliqué l'honorable *Leader* de l'opposition, et je dois dire que nous avons été favorablement impressionnés par l'oreille attentive de l'honorable ministre de la Justice. Alors, il y avait cette contre-proposition pour nous dire pourquoi aller exagérer les dépenses ; il y a déjà une Commission des droits humains. Pourquoi ne pas confier cette tâche *to the Human Rights Division* de la Commission ? Et nous avons dit pourquoi pas, à condition que ces trois critères soient satisfaits : composition, indépendance, et les ressources appropriées. Nous avons dit à l'honorable ministre de la Justice que nous sommes prêts à travailler avec lui, avec ses cadres, pour faire l'unanimité par rapport à ce projet de loi qui est tellement important pour l'avenir de notre pays, et pour combattre toute injustice qui pourrait être créée ou avait été créée par le passé.

Mais lorsque l'amendement revient vers nous, il y a donc cette idée qui a été acceptée, une *Criminal Cases Review Commission*, mais appelée tout simplement *Human Rights Division* - donc

référence à la *Human Rights Division* - mais après rien ne change. Nous savons tous, dans l'expérience mauricienne, que la *Human Rights Commission* ne fonctionne pas. Vous vous souviendrez, M. le président, des débats ici, en 2012, lors du projet d'amendement qu'avait présenté le Premier ministre pour restructurer cette Commission.

Depuis, cet amendement n'a jamais été proclamé je crois. Le Premier ministre nous disait le mois dernier qu'il allait être proclamé. Pourquoi ? Par manque de personnes compétentes qui pourraient remplir ces fonctions. Résultat, nous avons un président à la Commission qui est en fonction depuis très, très longtemps, qui a excédé les mandats prévus par la loi. Il n'y a pas d'autre membre de cette Commission. La Commission opère avec un personnel à temps partiel souvent. Demandez à n'importe quel avocat ici qui essaie de prendre contact avec la Commission des droits humains à Maurice, et vous aurez la réponse. Tous les jours, ceux qui font du droit pénal, font la même expérience. La *Complaints Investigation Bureau* basée à Rose Hill, qui est censée enquêter dans tous les cas d'allégations d'abus de la part de la police, ne travaille pas. Ce sont des gens très gentils, très aimables, très sympathiques, mais qui fonctionnent dans un état d'esprit sachant que ce *Complaints Investigation Bureau* va être aboli. Depuis deux ans, trois ans, on sait que cela va disparaître.

Donc, les enquêtes n'avancent pas. M. le président, je ne vous le souhaite pas, mais imaginons que vous vous fassiez tabasser demain par des policiers mal élevés, et que vous alliez vous plaindre à la *Complaints Investigation Bureau*, eh bien, vous attendriez pendant des mois, des années peut être avant qu'il y ait un procédé d'identification pour que vous identifiiez vos agresseurs. Alors, essayez de faire appel à la Commission des droits humains, rien n'y fait. Il n'y a personne pour assurer le suivi.

Donc, aujourd'hui, sans même débattre avec nous - et nous aurions été disposés à travailler avec le gouvernement pour parvenir à l'unanimité - on nous dit : eh bien, confiez cette tâche à cette Commission des droits humains qui n'a ni l'indépendance requise, ni les moyens voulus...

(Interruptions)

M. le président, n'importe quel député est libre de quitter la Chambre si mes propos ne lui plaisent, n'est-ce pas? Alors, je disais donc que...

(Interruptions)

The Deputy Speaker: Hon. Minister Jeetah, don't interrupt the hon. Member.

Mr Obeegadoo: Je disais donc, M. le président, nous savons pertinemment bien que la Commission des droits humains n'a ni l'indépendance, ni les moyens, et ni la composition requise pour

jouer ce rôle du *Criminal Cases Review Commission*, comme nous l'avons souhaité ; comme la *Law Reform Commission* l'a souhaité; comme le Directeur des poursuites publiques l'a souhaité.

Deuxième problème c'est le niveau des preuves à atteindre pour pouvoir faire ouvrir un procès. Je ne vais pas m'étendre dessus, je pense que cet argument a très bien été expliqué avant moi par le *Leader* de l'opposition, par l'honorable Uteem, par l'honorable Bodha, entre autres. Ce qui est clair c'est qu'aujourd'hui ce qui y est proposé à Maurice place la barre plus haut qu'en Angleterre, et là aussi nous nous attendons à ce que ou le ministre de la Justice, dans le résumé des débats à la fin, ou le Premier ministre, vienne nous expliquer pourquoi. Pourquoi, si l'on veut réellement faire justice, passer quelques cas exceptionnels, mais ô combien important, de personnes qui se trouvent injustement incarcérées peut-être depuis des années? Alors, expliquez-nous pourquoi il a fallu placer la barre plus haut que ce n'est le cas en Angleterre, ce qui va, dans les faits, empêcher une personne, que ce soit dans le cas de 'l'Amicale' ou dans d'autres cas, de faire rouvrir son procès s'il le souhaite. C'est là notre deuxième objection fondamentale.

Le troisième élément, M. le président, qui nous trouble c'est l'absence de toute disposition pour une compensation. Si jamais, exceptionnellement, d'ici quelques années, une seule personne injustement condamnée arrivait à obtenir justice, cette loi ne prévoit absolument rien, comme le soulignait le *Leader* de l'opposition avant moi, pour que ces personnes soient compensées, alors qu'en Angleterre, dès 1988, la *Criminal Justice Act* prévoyait que, et je cite -

'When a person has 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 beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result (...)'

Et il y a tout un mécanisme qui est explicité pour déterminer le montant de cette compensation, et ainsi de suite, alors qu'ici l'on se demande si le gouvernement est vraiment animé de bonnes intentions, si le gouvernement croit sincèrement en ce projet de loi et prévoit qu'il y aura des cas où la vérité sera rétablie, et que des gens sortiront de prison, parce qu'on reconnaîtra qu'ils ont injustement été condamnés. Alors qui va compenser ? Evidemment la souffrance ne peut être compensée, M. le président, mais ces gens auront besoin de moyens pour assurer leur réinsertion dans la société. Alors, pourquoi l'Etat, dès à présent, dès ce projet de loi, n'a pas proposé cette idée d'une compensation, avec le même projet de loi ou avec un amendement dans un autre projet de loi existant approprié ?

Voilà les trois objections fondamentales qui font que nous ne pouvons croire en la bonne foi du gouvernement, dès lors que ces dispositions concernant ceux qui sont théoriquement injustement condamnés sont présentées. Est-ce un coup d'épée dans l'eau en pensant à l'affaire 'l'Amicale'? Non, c'est bien pire, M. le président. En fait, c'est un recul, parce qu'alors que la société a évolué, alors que nos conceptions de la justice ont évolué, alors qu'aujourd'hui notre pays, notre société demande à ce qu'il y ait un moyen réel pour que ceux qui s'estiment injustement condamnés puissent avoir recours à la justice, à la vraie justice, à la vérité, ce projet de loi vient leurrer tout le monde en faisant croire que ce recours existera, mais qu'en fait, dans les faits, en réalité, ce recours n'existera pas.

Donc, c'est pire qu'un coup d'épée dans l'eau. C'est une mystification, c'est leurrer les gens, parce que l'objectif, je vous le suggère M. le président, est tout autre. Il y a un autre motif, il y a un autre dessein.

Prenons la deuxième dimension ; et c'est peut-être ce qui nous permettra de voir un peu plus clair - la question de ceux qui ont été injustement acquittés. Nous avons tous en tête la fameuse affaire 'Legends', où certaines voix s'étaient élevées après le jugement pour dire que le système des jurés demandait à être revu. Vous vous souviendrez sans doute de la déclaration du Premier ministre, au sein de cette Chambre, lorsqu'il avait été interrogé par le *Leader* de l'opposition quant à l'avenir des procès devant les jurés, et qui avait parlé des sources d'insatisfaction ici et là, qu'il fallait revoir le système, que cette question serait référée à la *Law Review Commission*. Donc, tout comme lorsqu'on parle de ceux qui auraient pu se considérer injustement condamnés, l'on songe à 'l'Amicale'. De même, lorsqu'on considère la dimension de ceux qui ont été injustement acquittés, l'on songe au cas 'Legends'. Qu'est-ce qui change dans la loi ?

A présent, le Directeur des poursuites publiques ne peut faire appel d'un verdict d'acquittement, sauf pour ce qui est de la peine imposée. Donc, quand il y a acquittement, il ne peut pas le faire. C'est vrai qu'il a le pouvoir de le faire pour les tribunaux inférieurs, mais pas au niveau des délits les plus graves, les crimes les plus sérieux. Ce qui est, donc, proposé, c'est que désormais, le DPP pourra faire appel, il pourra aussi demander la révision des procès, *review proceedings* au-delà du délai d'appel. Deux options qu'aura le Directeur des poursuites publiques, qui seront sujettes à des conditions très précises. Là aussi, sur le principe général ; que si de toute évidence, il y a quelqu'un qui est coupable, mais qui a été acquitté, parce qu'il y a eu une erreur en droit, parce que certains éléments n'avaient pas émergé au moment du procès, qui pourraient être contre ?

D'ailleurs, le *Leader* de l'opposition actuel *does not like to blow his own trumpet*. Donc, moi, je vais le dire : il est parfaitement cohérent. Il y a presque 20 ans – 1994 – lorsque le gouvernement d'alors avait proposé un amendement à la loi, l'honorable Alan Ganoo avait pris position. Il avait dit, de manière

tout à fait claire, qu'il n'avait aucune objection à ce que l'on puisse créer cette possibilité, donc, de revoir un acquittement, mais à condition qu'il y ait des garde-fous, des *safeguards*. Cela, il l'avait dit, et il exprimait notre point de vue. Déjà, il y a pratiquement 20 ans de cela. Donc, nous sommes parfaitement cohérents.

Nous sommes pour la recherche de la vérité. Si vous demandez aux gens dans la rue, ce qui importe pour eux c'est la vérité. Qu'une personne se juge, s'estime injustement condamnée, ou que la police, l'Etat, le Directeur des poursuites publiques estime qu'une personne a été injustement acquittée, ce qui importe c'est la vérité, et nous sommes d'accord là-dessus, sauf que nous disons qu'il faut des garde-fous, pour qu'en ouvrant toutes les possibilités à la poursuite, l'on n'aille pas créer de nouvelles injustices. Ce fut, donc, la position qu'avait prise déjà le *Leader* de l'opposition actuel en 1994, au sein de l'Assemblée nationale.

Le Directeur des poursuites publiques, dans une interview qu'il a récemment donnée dans le "*Mauritius Times*", c'était vendredi dernier, dit exactement la même chose. Il dit exactement la même chose dans le sens que, il faut donner cette possibilité, mais qu'elle devrait être sujette à un mécanisme, à des garde-fous. Cela est, donc, très clair. Sur le principe général, nous sommes tous d'accord. Mais là où nous avons des objections, et des objections fondamentales, c'est justement l'absence de ces garde-fous. D'abord, ce qui nous gêne, je dois dire un peu, c'est qu'il n'y a pas de limite dans le temps. On pourrait théoriquement, après le passage de cet amendement, après que cet amendement ne soit adopté, ouvrir un procès à l'encontre d'une personne qui a été acquittée, 30, 40, 50 ans après son acquittement. Lorsque ce débat eut lieu ici, en 1994, le *Leader* de l'opposition d'alors, le Dr. Navin Ramgoolam, disait ceci –

"I also feel that perhaps I should draw the attention of the House that there should be a time limit on when the trial will be asked for, because you cannot have a sort of Damocles Sword – l'Épée de Damoclès – hanging on top of somebody's head indefinitely. We have seen what can happen in such cases, and I think this is a wrong way to proceed, and perhaps Government will consider limiting the time."

C'est vrai que c'était en 1994. Le Premier ministre actuel était *Leader* de l'opposition, mais je souhaite vivement qu'il vienne nous expliquer au sein de la Chambre pourquoi il aurait changé d'avis depuis.

Voyez-vous, M. le président, nous ne vivons pas dans un monde idéal, nous ne vivons pas dans une République de Maurice idéale. Les agissements, parfois de certaines sections de la police, ont créé de vives inquiétudes ces derniers temps au sein même de la majorité gouvernementale, comme au sein de l'opposition. Les agissements de la police ont donné lieu à une perception : qu'il y aurait une police à deux vitesses, si je puis m'exprimer ainsi, dès lors qu'il s'agit d'un sympathisant de la majorité, ou d'un

sympathisant ou d'un membre de l'opposition. Comme le disait Ivan Collendavelloo, dans son interview, dimanche dernier, dont les propos ont été repris tout à l'heure par le député, l'honorable Cehl Fakeemeeah, imaginez, demain, comment cette possibilité de rouvrir n'importe quel procès, n'importe quand, pourrait être dangereuse pour le pluralisme politique, pour la démocratie. Comment cela pourrait se transformer en un instrument de persécution politique. Cela est valable pour toute opposition, à n'importe quel moment. C'est pour cela que je demande aux membres de la majorité de réfléchir à cela. Donc, cette absence de limite, ce caractère absolu de la possibilité de rouvrir des procès, dès lors qu'il y a eu acquittement, même des dizaines d'années avant, est peut-être dangereuse. De ce côté de la Chambre, que nous soyons légistes ou pas, elle est source d'une profonde inquiétude.

Notre deuxième objection fondamentale, M. le président, c'est encore une fois *the standard of proof*, où l'on place la barre. Alors, ici aussi, je crois qu'avant moi, les collègues de l'opposition ont fait une comparaison des dispositions précises de la loi en Angleterre, et des propositions qui nous sont faites devant l'Assemblée.

Sans entrer dans ce débat technique qui a déjà été entrepris par mes collègues, au sein de l'opposition, je voulais simplement rappeler que les dispositions de l'amendement aux clauses 5(3) et 19(A) ne correspondent pas aux dispositions de la *Criminal Justice Act* de 2003 en Angleterre aux clauses 78 et 79. Encore une fois, ce que vient faire le gouvernement c'est d'ouvrir les possibilités d'abus. D'ailleurs, M. le président, il y un élément qui a été évoqué par l'honorable Bodha qui m'a aussi interpellé. C'est qu'en Angleterre, avant que l'on ne procède à cet exercice d'aller enquêter à nouveau sur des gens et des affaires où il y a eu acquittement des années auparavant, nécessite une autorisation écrite du Directeur des poursuites publiques, qui vient affirmer en écrit que les critères sont satisfaits. Je n'arrive plus à retrouver le texte de loi en question, mais des critères très précis. Je me réfère donc au texte de loi en Angleterre.

L'essentiel c'est cet argument que la responsabilité du Directeur des poursuites publiques est engagée, prévue explicitement par la législation avant même qu'une enquête est redémarrée. C'est un autre garde-fou pour s'assurer que ce Directeur des poursuites publiques, qui est censé être indépendant, qui détient un poste constitutionnel, engage sa responsabilité. C'est un garde-fou important, M. le président. Cela n'a pas été prévu dans notre proposition d'amendement, et l'on se demande pourquoi. Si, comme nous le dit le ministre de la Justice, l'on est en train de suivre une tendance internationale, l'on s'inspire de l'exemple anglais, alors pourquoi, à chaque fois, choisit-on de se distancer de ce qui a été mis en œuvre en Angleterre depuis des années, dont nous pouvons tirer les leçons, dont nous pouvons bénéficier de l'expérience?

De même, ce *Criminal Justice Act* anglais, à la clause 87, prévoit explicitement les règles pour ce qui est de la liberté provisoire ; le *bail*. Ce serait trop facile, M. le président, 20 ans ou 30 ans après, d'aller arrêter un opposant politique, de l'emprisonner, sans qu'il ait de possibilité de retrouver la liberté. Donc, la législation anglaise prévoit de manière claire et explicite, encore une fois, des garde-fous, des principes qui vont régir l'accès à la liberté provisoire en attendant que soit rouvert éventuellement ce procès. De la même manière, dans la législation mauricienne, l'on ne retrouve pas ces dispositions, et l'on se demande pourquoi. Pourquoi l'Etat mauricien, le gouvernement choisit de ne pas suivre l'exemple de l'Angleterre sur cette question si importante ?

Ensuite, il y a la question du procès devant jury. Et là, je vous dirai que personnellement, M. le président, sans engager nécessairement toute l'opposition, je suis profondément troublé. Le présent ministre de la Justice et moi avons entrepris nos études à la même époque. Nous avons repassé nos leçons ensemble avant l'examen du barreau anglais.

(Interruptions)

Et je crois que ...

(Interruptions)

... nous avons dû être inspirés par les mêmes principes d'intégrité, d'équité, qui fondent le système légal anglais dont nous nous sommes inspirés. Le système des procès devant jury est un élément fondamental de ce système. C'est un élément qui date de centaines d'années, M. le président.

(Interruptions)

Je me souviens de Lord Devlin qui disait que -

"The trial by jury is more than an instrument of justice and more than a wheel of the Constitution. It is the lamp that shows that freedom lives."

Nous connaissons tous les avantages des procès devant jury, dans la mesure où la justice qui est faite reflète le point de vue de la société, que les faits peuvent être déterminés sans nécessairement une formation légale ; la garantie d'indépendance totale qu'offre un procès par jury, dans la mesure où les jurés ne sont redevables envers personne. Nous savons tous combien le système dans le procès par jurés est un véritable baromètre des sentiments de l'opinion publique quant aux dispositions légales.

Aujourd'hui même, dans le journal '*The Independent*,' journal anglais, le débat est relancé suite à un acquittement d'une personne en Angleterre. L'ancien Premier ministre Tony Blair - et on cite souvent Tony Blair comme un de ceux qui disent qu'il faut revoir le système du procès par jurés ; gardons en tête l'affaire 'Legends' - déclarait aujourd'hui -

“We should be careful of making law on the basis of one decision before we have investigated the matter properly.”

Il faudrait peut-être que j’explique. Aujourd’hui, l’on ne peut remettre en question un acquittement par un jury à Maurice. Mais, avec cet amendement, il y aura la possibilité de faire appel par le Directeur des poursuites publiques contre une décision d’acquittement des jurés, et cette question sera donc déterminée en appel par un juge.

Donc, on va faire appel des jurés à un juge. C’est vrai que passé le délai d’appel, il y a le processus, comme j’en discutais tout à l’heure avec le ministre de la Justice, d’un *review* en vue d’un *retrial*, d’un nouveau procès, encore une fois devant jury. Mais, pour ce qui est de l’appel, c’est la première fois à Maurice qu’on va donc demander à la cour d’appel des juges de revoir une décision des résultats d’un procès devant jury.

Et, encore une fois, dans le journal *‘The Independent’* d’aujourd’hui même, il y a une déclaration du professeur Michael Zander. J’ai eu l’occasion de suivre des cours de l’éminent professeur Zander qui, je crois, n’est pas un inconnu pour tous les juristes qui siègent au sein de cette Chambre. Michael Zander, qui est aujourd’hui encore membre de la *Royal Commission on Criminal Justice*, disait ceci –

“The Royal Commission on Criminal Justice considered the question of appeals against jury verdicts very seriously. It came out unanimously against (...)”

contre des changements dans la loi –

“It had concluded that the only time acquittals should be open to challenge was when the jury was shown to be bribed or intimidated.”

C’est ce qu’on appelle *tainted verdict* dans la loi anglaise.

“We have had the jury system for hundreds of years. Sometimes a jury appears to get it wrong. But the traditional role of the jury is to stand for the citizen against the State. This means sometimes having a verdict which appears to be against the evidence.”

By voting this amendment, Mr Deputy Speaker, Sir, I believe we are heralding the beginning of the end for the jury system in Mauritius. C’est le commencement de la fin, et cela, je le dis en mon nom personnel, et sans engager toute l’opposition - je sais que ce point de vue est partagé par d’éminents juristes en dehors de cette Chambre. Cela m’interpelle, et m’inquiète profondément. Il y a là un élément fondamental de notre système légal, de notre tradition légale, qui est en train d’être abandonné. Le commencement de la fin. Et les paroles du Premier ministre au lendemain du verdict ‘Legends’ me revient à l’esprit, lorsqu’il disait qu’il y avait insatisfaction, qu’il faudrait que la question soit référée au

Law Reform Commission. Mais attention, M. le président - je ne voudrais pas oublier de le dire - lorsqu'il l'a dit, il avait pris la peine de dire que tout changement à la loi viendrait après que tout le monde aurait été consulté. Voilà, j'ai retrouvé la citation, il disait –

«There has been for some time dissatisfaction with jury trials in Mauritius. I am contemplating referring the matter of the review of trial by jury to the Law Reform Commission for its recommendation after consultation with all stakeholders.»

Et n'en déplaise à l'honorable Shakeel Mohamed qui pense qu'un débat national c'est un débat uniquement parmi les députés ! Le Premier ministre disait -

“(...) after consultation with all stakeholders, including the legal profession, the judiciary, members of the public including Parliamentarians and the Police, any review of the jury system would be considered in the light of these recommendations”.

Il n'y a pas eu de débat public, il n'y a pas eu de consultation, il n'y a pas eu de recommandation de la *Law Review Commission*. A la place, il y a dans les faits, les premiers pas d'une remise en cause du procès devant jury dans notre pays. M. le président, en admettant qu'il faut laisser la porte ouverte à ce que l'on puisse remettre en cause un acquittement injuste, il y avait trois possibilités, et il serait encore possible - bien que je ne pense pas que le gouvernement soit dans un état d'esprit pour écouter les suggestions de l'opposition - de sauvegarder les principes essentiels des procès devant jury.

La première possibilité serait de laisser tomber la possibilité d'appel, mais de préserver le *retrial* uniquement, de sorte qu'un appel contre un verdict livré par un jury serait revu par un autre jury.

La deuxième possibilité serait de limiter les appels uniquement à des questions en droit.

Et la troisième possibilité serait d'avoir un *Criminal Cases Review Commission* fonctionnel, avec une majorité de personnes qui ne seraient pas des légistes.

Il y a, donc, encore aujourd'hui, avant que nous ne votions cet amendement, la possibilité de ne pas remettre en question le principe fondamental de la justice fait par le peuple et pour le peuple à travers le système des procès par jury.

Voilà, donc, M. le président, les objections fondamentales, et je ne veux pas répéter tous les arguments qui ont été dits par mes collègues avant moi : l'absence d'un *time limit*, d'une limite dans le temps, le niveau de preuves à apporter, l'absence d'une responsabilité conférée au DPP, l'absence de condition précise pour l'arrestation et la libération provisoire des gens dont les procès seraient rouverts 20, 30, 40 ans après, la remise en question du système des procès devant jury. Toutes ces questions font que nous ne pouvons qu'objecter à la disposition de l'amendement devant nous.

M. le président, s'il fallait conclure et résumer ce que je crois être notre position par rapport à ce projet d'amendement, je voudrais revenir au point de départ. Oui, les conceptions de ce qui est la justice évoluent ; oui, la loi doit suivre; oui les moyens de parvenir à la vérité avec les formidables progrès de la science médico-légale ont évolué, ont avancé, et que l'on peut légitimement prétendre aujourd'hui redéfinir les conditions permettant de rouvrir des procès dans le cas de condamnation injustifiée et d'acquittement injustifié, mais à la fois la manière dont ce projet d'amendement nous a été présenté, et certaines dispositions particulières, nous inquiètent profondément.

Pourquoi, d'abord, n'y-a-t-il pas eu débat, M. le président? Cette question nous taraude, et je n'ai pas eu de réponse satisfaisante jusqu'à présent, ni de la part du ministre de la Justice, ni de la part du ministre Mohamed, et nous verrons bien si l'orateur de la majorité, qui prendra la parole après moi, viendra nous donner une réponse, sachant que le *Bar Council* n'a jamais été consulté, sachant que le Directeur des poursuites publiques a demandé qu'il y ait un débat national, sachant qu'un membre du judiciaire s'est exprimé hier - en son nom personnel, c'est vrai - sur les ondes d'une radio, pour dire qu'il ne comprenait pas non plus pourquoi il y avait un tel empressement, pourquoi l'on ne pouvait pas débattre de cette question - sachant que l'opposition s'est dit disponible pour revenir ici dans un mois, deux mois, trois mois après qu'il y ait eu un vaste débat public. Je repose la question : pourquoi ? Quelle est la raison de l'empressement ? Qu'est-ce qui changerait si ce projet de loi était débattu après mûre consultation avec tous ceux concernés ? Ce projet de loi concerne l'homme de la rue ; les citoyens mauriciens doivent être informés de ce que dit ce projet de loi.

C'est aussi cela l'éducation pour tous. C'est aussi cela le principe du *open Government*. Que tout le monde comprenne ce qui se trame, ici, au sein de l'Assemblée nationale, et non pas, comme disait l'honorable Mohamed, qu'une fois qu'on a un mandat pour cinq ans, l'on résume le débat national à ce qui se dit ici, et on se sent libre de prendre n'importe quelle décision ! Non ! Ce projet d'amendement devrait être porté devant le tribunal de l'opinion publique d'abord, et ensuite éclairé par l'opinion publique. Nous serions mieux à même de définir nos positions respectives. Pourquoi cet empressement? Pourquoi éviter sciemment un débat national public ? Les dispositions concernant ceux qui auraient été injustement condamnés, je le répète, ce n'est qu'un leurre, tout comme la *Human Rights Commission* n'est qu'un leurre, M. le président ! Rien ne sortira de cet amendement pour ceux qui ont été injustement condamnés. En ce qui concerne les dispositions pour ceux que l'on estimerait injustement acquittés, nous les estimons tout simplement dangereuses. La présomption d'innocence, qui est un fondement même de notre système légal, de la philosophie légale, est mise à mal.

Vous savez, tout le monde connaît la fameuse déclaration de 'Blackstone'. Mes collègues juristes le savent. Je pense que c'était au 17^{ème} siècle déjà, Blackstone qui disait qu'il vaut mieux que neuf

individus coupables s'en aillent libres qu'un seul innocent aille croupir au fond d'une prison. Je prends les libertés avec la phrase exacte, mais en gros c'était cela. Qu'il vaut mieux que 10 personnes qui soient coupables puissent échapper à la justice qu'un seul innocent aille croupir au fond d'une prison. C'est pour cela qu'il y a, ce que je peux appeler, une asymétrie qui place l'obligation d'établir les preuves sur la poursuite, et qui offre, donc, à la personne potentiellement innocente une possibilité réelle de faire valoir son innocence si la poursuite n'arrive pas à prouver les charges contre elle.

Aujourd'hui, à travers les dispositions de cet amendement proposé, mon sentiment c'est que nous sommes en train d'effacer cette asymétrie. Nous prétendons vouloir dire que la poursuite et la défense seront à armes égales dans un procès au pénal, mais dans les faits, cela va entamer, donc, ce principe de la présomption d'innocence, et placer les accusés dans une position de faiblesse vis-à-vis de la poursuite. Ce qui importe c'est que la vérité triomphe en remettant en question ces principes qui datent de centaines d'années. J'estime que nous empruntons une voie tout à fait dangereuse.

L'honorable ministre de la Justice, dans son discours mardi dernier, nous citait des exemples à l'international. Mais il faut faire très attention. Ce n'est pas du tout clair. Aujourd'hui, nous savons que nous n'allons pas dans la stricte ligne de ce qui se fait en Angleterre. Beaucoup de pays - des Caraïbes que nous a cités l'honorable ministre de la Justice, et je ne prendrai pas le temps de la Chambre pour faire la liste détaillée de ces pays - se basent essentiellement sur la position britannique quand il s'agit de faire exception à la fameuse *double jeopardy rule* à laquelle s'est référé longuement l'honorable *Leader* de l'opposition. L'Australie, Hong Kong et le Canada sont autant d'exemples qui ne vont certainement pas aussi loin que ce que cherchent à faire nos collègues de la majorité ici à Maurice. Donc, le gouvernement ne peut prendre appui sur la pratique internationale en venant proposer ces amendements très dangereux.

Et c'est pour cela, M. le président, qu'alors que sur le principe de la quête de la vérité l'on ne saurait être en désaccord, vue tout le mystère entourant l'empressement dans la présentation de ce projet de loi, vue ces dispositions particulières dangereuses de ce projet d'amendement, l'on ne peut que s'interroger sur le véritable dessein qui se cache derrière cet amendement. Quelles sont les motivations du gouvernement ? Quels sont les véritables motifs ? Quel est le véritable dessein ? Qui viendra nous le dire ? Qui aura le courage de venir nous le révéler ? Qui viendra percer ce mystère ? Qui viendra expliquer à l'opinion publique pourquoi, alors que nous siégeons depuis le début de l'année, depuis mars à peu près, tout à la fin – alors que nous n'aurons plus de séances parlementaires, malheureusement, paraît-il la semaine prochaine - l'on vient nous imposer à nous, l'opposition, à nous la profession légale, à nous l'opinion publique mauricienne, ce projet de loi, vue tout ce mystère, vue les prises de position de la *Law Reform Commission*, du Directeur des poursuites publiques, d'un membre et non des moins du judiciaire, hier à la radio, vue la prise de position du *Bar Council* - je crois que le *Bar Council* a écrit lundi

au ministre de la Justice pour demander qu'on ait du temps, pour demander un délai afin que tous les membres du barreau, que tous les juristes à Maurice soient consultés - vue les prises de position au sein de l'opinion publique, tel qu'on le constate dans nos journaux et sur les ondes des radios privées jour après jour ?

L'opposition, M. le président, n'a d'autre choix que d'opposer un non catégorique à ce projet d'amendement. Nous sommes prêts à assumer pleinement nos responsabilités vis-à-vis de l'histoire de notre pays, vis-à-vis de nos concitoyens, vis-à-vis de notre pays lui-même, pour dire un non catégorique à un projet d'amendement éminemment dangereux pour la justice, pour la démocratie, et c'est pour cela que nous, de ce côté de la Chambre, les députés du MSM et du MMM, nous voterons contre ce projet de loi, M. le président et j'en ai terminé.

(6.27 p.m.)

The Minister of Information and Communication Technology (Mr T. Pillay Chedumbrum):

Mr Deputy Speaker, Sir, allow me, first of all, to congratulate the hon. Attorney General, my good friend, hon. Satish Faugoo for presenting these amendments to our present legislation before the House today. At the same time, I would like to commend our Prime Minister who, in his quest to modernise the country, is leaving no stone unturned by encouraging introduction of new amendments, new legislation in order to answer the needs of the current development that we have in the country.

Mr Deputy Speaker, Sir, I must say that I am not shocked, but I am disappointed with the stand adopted by my friends in the Opposition. You will agree with me that all the time all the hon. Members of the Opposition who have been talking on that particular amendment have been blowing hot and cold at the same time. Mr Deputy Speaker, Sir, at times, we are tempted to believe that maybe they are going to vote for the amendments. There is such an incoherence in the way the debate has been going on that, at the end of the day, we can safely say that all the hon. Members in the Opposition have said the same thing, except for my friend, hon. Obeegadoo, who has said same in French.

(Interruptions)

M. le président, on a entendu ce que notre ami, l'honorable Reza Uteem, a dit concernant le *right to freedom*. Il a parlé sur les citoyens qui ne peuvent pas être punis, *who cannot be punished for a crime that he has not committed* quand il est d'accord qu'il peut y avoir des *miscarriage of justice*. Mais qu'est-ce qu'on fait, M. le président? Est-ce qu'on s'assoit, on ne fait rien comme ils ont l'habitude de faire, ou bien on prend des positions qu'il faut pour répondre à l'exigence des développements qu'il y a dans ce pays ?

M. le président, à chaque fois, on a entendu les honorables membres de l'opposition parler de la *Criminal Cases Review Commission*, et qu'on aurait dû passer par cette Commission au lieu de venir directement avec les amendements.

Vous allez tous être d'accord avec moi que souvent des fois, ils disent qu'on est un peu lent à faire bouger les choses, et là, quand il y a un cas qui requiert célérité et qu'on doit aller vite, ils ne sont pas d'accord.

M. le président, avant que ces amendements aient été apportés par l'honorable *Attorney General*, il y a beaucoup de travail qui a été fait, beaucoup de recherches ont été faites, et finalement on est prêt avec la nouvelle législation. Quand l'opposition nous a demandé du temps la semaine dernière après que notre ami, l'honorable ministre, a fait sa plaidoirie sur les amendements, le gouvernement a ajourné le débat pour cette semaine-ci ; hier. Hier, il y a eu ce malheur pour Monsieur Bérenger, on a fait ce qu'il fallait, donc le débat a été renvoyé pour aujourd'hui, et ils ont eu le temps pour pouvoir faire ce qu'il faut faire. Il est bon de faire ressortir une chose, M. le président. Le *Criminal Appeal Act* a été introduit à Maurice par l'Acte 9 de 1954, et il y a une chose qui est très importante. On a dit que les lois ne sont pas statiques ; il y a beaucoup d'évolution, et depuis 1954, il y a eu des amendements qui ont été apportés à cette loi. Comme l'a si bien dit mon ami, l'honorable Seetaram, le dernier amendement a été apporté était en 2000 par le gouvernement travailliste qui était à cette époque au gouvernement. Entre 2000 et 2005, *when they were in office*, M. le président, on a vu une chose. Il n'y a eu aucun amendement apporté à cette loi. Nos amis de l'opposition - on a pu constater cela - quand ils sont dans l'opposition, ont beaucoup d'idées, mais quand ils sont au gouvernement, il y a une panne d'idée quelque part ; allez savoir. Le chef de l'opposition aussi a parlé de *wind of change*.

Effectivement, M. le président, you know when the wind of change blows, some people build walls, others build windmills. This is what this Government is doing Mr Speaker, Sir, when they are closing the door to amendments, to bring new legislation, to modernize our system, our judiciary. These people are criticising.

M. le président, mon ami, l'honorable Obeegadoo, avait parlé de l'Épée de Damoclès qui repose sur la tête des gens avec cette législation.

(Interruptions)

Tout à l'heure, quand notre ami, l'honorable ministre, parlait en même temps, vous n'étiez pas content, et maintenant quand je parle, vous faites la même chose.

M. le président, quelque part, je crois que la mémoire fait défaut de l'autre côté de la Chambre. Ils oublient qu'à une certaine époque, M. le président, quand le *Leader du remake* était Premier ministre de

ce pays, comment il a fait venir la police à son domicile pour faire arrêter Sir Gaëtan Duval à l'aéroport. Il ne faut pas oublier cela. Là, il n'y a pas d'Epée Damoclès qui clignote sur la tête des gens.

(Interruptions)

A sa résidence, s'il vous plaît ! Sous quelle législation il a agi à cette époque ? Tout récemment, M. le président, quand notre Premier ministre était le chef de l'opposition, qu'est-ce que le *Leader du remake* avait fait à cette époque ? Convoquer le parlement à neuf heures du matin pour lui faire perdre sa place. Là, vous n'avez rien à dire. Mais de quelle vérité finalement vous parlez ? Je me demande, M. le président, de quelle vérité ces personnes parlent.

M. le président, nous avons un mandat...

(Interruptions)

Vous vous rendez compte ; et cela est vraiment horrible. C'est un crime comme l'avait si bien dit notre ami tout à l'heure. Le chef de l'opposition n'est pas à sa place, on convoque le parlement à neuf heures du matin. C'est infect. Ce n'est pas possible, et aujourd'hui nous avons ces mêmes personnes qui sont là. C'était le même MMM/MSM qui était au gouvernement à cette époque. Aujourd'hui, ces personnes vont venir nous donner des leçons. Cela ne va pas. M. le président...

(Interruptions)

The Deputy Speaker: I want some order in the House.

Mr Pillay-Chedumbrum: *M. le président, je voudrais entrer dans le vif du sujet maintenant.* Let us see our system as it presently stands. I think it is good to know and it is good for our friends to know the very purpose of these amendments, but before going through these amendments, it is good to know what our system presently stands for. You know, Mr Deputy Speaker, Sir, in criminal cases, it is possible to appeal from decision of subordinate courts, that is, District Courts and the Intermediate Court, and from the decision of Supreme Court, that is, of a judge sitting alone. So, in a nutshell, Mr Deputy Speaker, Sir, an appeal from a subordinate court will lie to the Supreme Court sitting in its appellate jurisdiction. Such an appeal is usually heard by two judges. The case can be further appealed to the Judicial Committee of the Privy Council if it involves questions of great or general public importance. An appeal from a decision of the Supreme Court lies to the Court of Criminal Appeal, and such an appeal is heard by three judges, including the Chief Justice. The case can be further appealed to the Judicial Committee if it involves a point of great or general public importance.

Now, let us see what the right of appeal to the Court of Criminal Appeal looks like at present. At Assizes, Mr Deputy Speaker, Sir, that is, the situation where a criminal case is heard by a judge with or

without a jury, an accused can be convicted and sentenced, or he may be acquitted. Where he is convicted and sentenced, he can appeal to the Court of Criminal Appeal against his conviction or sentence. The prosecution represented by the DPP, however, can only appeal against the sentence imposed on him. As things stand, the DPP cannot appeal against the acquittal of an accused.

Mr Deputy Speaker, Sir, what are the main changes that we are bringing in the Bill? First, the right of appeal. The present Bill seeks to add to the powers of the DPP to appeal to the Court of Criminal Appeal. Once the Bill is passed, in addition to an appeal against sentence, the DPP will be able to appeal against, firstly, the dismissal of a charge, and secondly, the conviction of a person for a lesser offence than the one which he was charged. The Bill, also Mr Deputy Speaker, Sir, expressly sets out the powers of the Court of Criminal Appeal in a situation where the DPP exercises his powers to appeal.

In a sense, it can affirm the decision of the Judge at Assizes, reverse it and substitute, therefore, the appropriate determination, sentence, order a new trial, or where a serious irregularity has occurred, declare the trial to be a nullity and order a fresh hearing.

Mr Deputy Speaker, Sir, we have also the right to apply for a review in those new amendments. The Bill also seeks to introduce a review procedure in the Criminal Appeal Act. The review procedure can intervene after a trial before the Supreme Court or after an appeal to the Court of Criminal Appeal. The applicants for review can be the DPP in relation to an acquittal, or a convicted person in relation to his conviction.

Mr Deputy Speaker, Sir, the grounds on which an application for review can be made are where there is fresh evidence and compelling evidence. And it is likely that a retrial will be fair, having regard to the circumstances, including the length of time since the offence is alleged to have been committed. Both the terms “fresh evidence” and “compelling evidence” are defined in the Bill, and will assist the Court of Criminal Appeal in its task when it carries out a review. The Bill further states the powers of the Court of Criminal Appeal where there is an application for review. In appropriate cases, the Court of Criminal Appeal will be able to quash the acquittal or conviction of an accused person, and order a retrial for the offence with which the person was originally charged or for a lesser offence, and it may further make any order which it considers appropriate.

Now, let us see the constitutionality of the Bill. Mr Deputy Speaker, Sir, section 10(5) of the Constitution provides -

“No person who shows that he has been tried by a competent Court for a criminal offence and either convicted or acquitted shall again be tried for that 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.”

Mr Deputy Speaker, Sir, the last words of the provision just quoted make it clear that the concept of *autrefois* acquit or *autrefois* convict is subject to orders of a Supreme Court in the course of an appeal or review proceedings relating to a conviction or acquittal. The changes sought to be brought by the Bill, therefore, falls squarely within the ambit of section 10(5) and, therefore, are constitutional.

Mr Deputy Speaker, Sir, let us see the reasons behind the changes brought by the Bill. Government is deciding to bring forward the changes enshrined in the Bill after careful consideration of what obtains in other jurisdictions. The hon. Attorney General has already expatiated on this, and I will refer the House to his learned and detailed speech. We have also what we call checks and balances. It is true that the Bill increases the powers of the DPP in relation to appeals, but it is equally true that accused parties as well are given further rights as a result of the changes brought by the Bill. In any case, Mr Deputy Speaker, Sir, whereas the powers of the Executive - in this case the DPP - are being increased, ultimately, the decision as to whether these powers have been properly exercised remains with the Judiciary. There is a system of checks and balances in place. Our Judges of the Court of Criminal Appeal who are senior Judges will, no doubt, exercise their powers independently and impartially to curb the excessive zeal by the Executive should that take place.

Mr Deputy Speaker, Sir, let us see the last part, the Judicial Committee of the Privy Council. It must also be borne in mind that, as the law stands, in a limited number of cases, the DPP or accused person dissatisfied with the decision of the Court of Criminal Appeal will still be able to appeal to the Judicial Committee of the Privy Council, provided that their cases satisfy the relevant criteria, that is, it involves a question of great or general public importance. It is to be noted that the Judicial Committee of the Privy Council is made up of senior and experienced Judges who will be in a position to correct any injustice resulting from a final decision of the Court of Criminal Appeal. Therefore, Mr Deputy Speaker, Sir, for all those reasons, the changes brought by the Bill are welcome. I, therefore, commend the Bill to the House.

At this stage, Mr Speaker took the Chair.

(6.51 p.m.)

Mr P. Jugnauth (First Member for Quartier Militaire & Moka): Mr Speaker, Sir, the Bill before the House is another vivid example of this Government’s habit to put the cart before the ox, and gives the impression that it is acting with all seriousness of purpose in its so-called reform process.

In the Second Reading speech of the hon. Attorney General, he told us that the Bill comes to add on the reform process already started in our legal and justice systems, and brings about the necessary changes in our law in order to modernise our criminal appeal system. I must say there have been impressive statements to show that a very serious job has been done. I must say, Mr Speaker, Sir, in view of the deep implications of the amendments that are being proposed, we would have expected that in preparing this Bill, all necessary care had been taken in the drafting process, that all the required consultations had been held, and that expert advice would have been sought before bringing this Bill to the House. This is what a serious Government with a serious and a genuine motive would have ensured for such serious amendments with far-reaching implications.

Once again, we have seen a Bill that is being rushed before the National Assembly with a certificate of urgency, without even prior consultation held with the parties directly concerned, in this case, particularly, the Bar Council and members of the legal profession at large. It should not have only been limited to the Bar Council. Of course, we have the Law Society, the Law Reform Commission and the public at large.

I am surprised, Mr Speaker, Sir, because I still remember when the Bill was circulated to be debated through all stages on a Tuesday, it was on the very Tuesday when the Bar Council had convened members of the Bar for an urgent meeting in the afternoon to express their opinion with regard to this Bill. The meeting was held, and when the Opposition pleaded with Government to have time, the Bill was then postponed for Tuesday last. Again, another amendment to the amendment has been circulated. I received it on Monday evening. I would have expected Government would have given, at least, due consideration to members of the Bar to have a look at this amendment to the amendment, and to be able to have expressed their views! Up to now, the hon. Attorney General has not, I am sure, received the views of the Bar Council, for example. Up to now! For a simple reason: it takes time. This is a matter which has fundamental impact on issues which pertain to the liberty of a citizen, and I must say, even for Members of the National Assembly, we need to have consultation in order to be able to take a stand before this House.

Donc, un projet de loi, M. le président, qui a été présenté en quatrième vitesse, et je dis, en agissant de la sorte, le gouvernement est en train d'insulter les membres de la Chambre, la profession légale, et les représentants du peuple de cette auguste Assemblée. J'ai aussi fait la même remarque que mon collègue, l'honorable Obeegadoo, lorsque j'ai regardé la liste des intervenants. *All those who have so far intervened, except* hon. Fakeemeeah, sont des juristes. Tout à l'heure, le Premier ministre - qui est aussi juriste - va intervenir. Il ne peut pas y avoir un débat qui a pour effet un projet de loi qui va avoir un

impact sur la vie de tout un chacun, et que, déjà, au niveau de l'Assemblée nationale, il n'y a que les juristes qui interviennent, comme je l'ai dit, à part de l'honorable Fakeemeeah.

Même pour nous, les juristes, ce n'est pas facile de faire les recherches appropriées, de vérifier les amendements qui sont proposés dans tous les détails, quel sera l'effet au niveau de nos lois et au niveau de ce qui est obtenu à ce jour. Face à la réaction de l'opposition et des légistes - y compris des légistes qui sont très proches du Parti travailliste - le gouvernement a fini par accepter l'ajournement des débats à mardi dernier. Nous voilà de nouveau, donc, dans cette Chambre, aujourd'hui, pour donner nos points de vue sur le projet de loi, et ses plus récents amendements. Mais le mal est fait, et la preuve encore une fois vient établir que nous avons affaire à un gouvernement qui veut, dans tout son empressement, aller de l'avant avec un projet de loi qui, pour moi, aurait pu attendre. Qu'ils viennent avec un projet de loi, qu'ils veulent amender la loi pour donner des pouvoirs, que ce soit au DPP, ou comme ils le disent, donner le droit à ceux qui sont condamnés de pouvoir faire revoir leurs cas, je ne comprends pas l'empressement, parce qu'on aurait pu circuler le projet de loi, et en débattre. Si nous partons en vacances aujourd'hui, on aurait pu débattre du projet de loi à la reprise des travaux. Je trouve que ce n'est pas une façon de faire !

Plus grave encore, M. le président, l'agenda immédiat du gouvernement n'est pas de moderniser notre *criminal appeal system*. L'agenda est dicté, d'ailleurs selon l'*Attorney General* lui-même, par des représentations faites suite à des cas récents, en vue de permettre au DPP de faire appel contre des acquittements et des condamnations en Cour suprême, et réclamer la réouverture d'un procès. Je cite les mots de l'*Attorney General*. *I quote –*

“Following recent cases, representations have been received from the Director of Public Prosecutions for amendments to be made to the relevant law to allow him to appeal against acquittal or a conviction for a lesser offence, and to apply for a retrial where fresh and compelling evidence comes to light.”

Très clairement, comme cela a été déjà dit dans plusieurs articles de presse, c'est l'acquittement de Monsieur S. M. et Monsieur A. T. dans le cas de 'Harte' qui est le souci immédiat du gouvernement, en raison des perceptions négatives suscitées en Irlande après le jugement en Cour d'assises. Moi aussi, je cite certains légistes, à l'instar de Me Ivan Collendavelloo, qui n'ont pas hésité à dire que, pour certains, il fallait à tout prix trouver une voie pour faire plaisir aux Irlandais. Peut-on ainsi comprendre que c'est cela la vraie motivation et l'explication derrière cet empressement à venir avec le *Criminal Appeal (Amendment) Bill* en fin de session parlementaire, et le présenter comme une étape dans le processus de modernisation de nos lois criminelles? Comme je l'ai dit, M. le président, même si c'est cela la motivation, on aurait dû avoir recours à des *extensive debates*, et laisser toutes les personnes

concernées, les autorités, les institutions, les associations, et le public en général, donner leurs points de vue.

Mr Speaker, Sir, had the motivation really been the modernisation of our criminal appeal legislation, Government would have, at first instance, addressed, in fact, the shortcomings in the process of Police enquiry, the gathering of evidence, the preparation of case file to be submitted to the DPP, and the decision of the DPP to charge a suspect and refer the matter to the court. In fact, in the ‘Harte’ case, the suspects have gone through all the stages of Police enquiry and legal proceedings in court...

(Interruptions)

Mr Speaker: Let us have some silence, please!

Mr Jugnauth: ...and in the finality of the process, based on existing Police and judiciary procedures, the accused have been acquitted by jury at the assizes. So, it is not their fault if the Police have committed blunders in their enquiry, and if the matter, in spite of all this, when looking at the evidence at that time, was referred to the court, because I must say the accused have stood the test of our Police and legal systems, and they have come out totally whitewashed. The institutions and the current law, as it stands, have done their job, and instead of accepting this verdict, now Government comes with this tainted Bill; I must say with a tainted agenda. But, anyway, we will see how things will unfold in the future. Again, I say, Mr Speaker, Sir, had the modernisation agenda really prevailed, Government should have enacted, in fact, the new Police and Criminal Evidence Bill first, established codes of practice for Police enquiries, provided designated lawyers to assist the Police in their enquiries, reinforced resources at Forensic Science Laboratory, at the State Law Office and the office of the DPP. All this should have preceded the proposed amendments to the Criminal Appeal Act, and not the other way round. That is why I said at the beginning of my intervention that Government is placing the cart before the ox.

Now, let me come to what is at stake. The principle of double jeopardy, we all know, has been a cornerstone of criminal law for at least 800 years. The rule against double jeopardy ensures that –

- (i) there is finality to criminal proceedings;
- (ii) investigations are carried out diligently and professionally, as the prosecution has only one attempt to prove its case;
- (iii) the citizen is protected against oppressive conduct by the Executive, and
- (iv) the citizen is protected against wrongful conviction, as repeated attempts at prosecutions increase the likelihood of an accused party being eventually found guilty.

The rule against double jeopardy is enshrined in Article 14, subsection 7 of the International Covenant on Civil and Political Rights of 1966, which came into force on 23 March 1976. This Article states that, and I quote –

“No one shall be liable to be tried or punished again ...

(Interruptions)

Mr Speaker: No cross talking!

Mr Jugnauth:

“(...)for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

By the way, Mauritius has ratified the ICCPR on 12 December 1973. We also have the Protocol No. 7 to the European Convention on Human Rights, as has been amended by Protocol No. 11, which states at Article 4, and I quote –

- “(i) no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state;
- (ii) the provisions of the preceding paragraph shall not prevent (...)”

And this is important –

“(...) the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case, and
(iii) no derogation from this Article shall be made under article 15 of the Convention.”

Significantly, the only Member state of the Council of Europe which has not sign Protocol 7 is the United Kingdom. And in Mauritius, what is there as a rule against double jeopardy? It has been mentioned section 10, subsection 5 of our Constitution, which I quote –

“No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that 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”.

I will come to that exception later on, Mr Speaker, Sir.

I see the logic and how we have come with this Bill to the House, because it seems that the Bill has been partly inspired by the English legislation on double jeopardy. The definitions of ‘compelling evidence’ and ‘fresh evidence’ in section 8 of the Bill have clearly been inspired by section 78 of the

British Criminal Justice Act of 2003. It is, therefore, important to refer to the developments in English law. Under the Common Law, a defendant could not be tried more than once for an offence for which he had been convicted or acquitted. The concept of *autrefois convict* and *autrefois acquit*. There were only three exceptions to the double jeopardy rule -

- (i) the prosecution could appeal against acquittal in summary cases if the decision appeared to be wrong in law or in excess of jurisdiction;
- (ii) a retrial was permissible if in the interest of justice it so required following an appeal against conviction by defendant;
- (iii) in a case of a tainted acquittal such as where there has been interference with a juror or witness.

In the case of *Connelly v. DPP* ([1964] appeal cases AC 1254), it was decided that –

“A defendant could not be tried on the same set of facts relied upon in a previous charge of which he had been acquitted unless the prosecution could prove special circumstances such as new evidence.”

In the case of *R & Thomas* ([1951] Queen’s Bench AC 26), it was decided that –

“A defendant who had been convicted of an offence could be tried again for an aggravated form of that offence, if the facts constituting the aggravation were discovered after the first conviction.”

However, in the case of *R v. Betty* ([1998 Queen’s Bench AC 356), it was held that –

“A person who had been acquitted of an offence could not be tried for an aggravated form of that offence even if new evidence became available”.

Following the Stephen Lawrence murder and the ensuing public enquiry that was chaired by Sir William Macpherson, the Macpherson Report recommended that ‘An exception to the double jeopardy rule should be allowed’. In its Report titled ‘Double Jeopardy and Prosecution Appeals’, published in 2001, the Law Commission also made recommendations in favour of exceptions to the double jeopardy rule. In 2003, the British Parliament enacted the Criminal Justice Act of 2003, and section 75 of the Criminal Justice Act contains provisions for the retrial of certain offences when a defendant had been previously acquitted.

This was, however, Mr Speaker, Sir, limited to serious offences referring to as qualifying offences that were listed in part (i) of Schedule 5 of the Criminal Justice Act. These offences are serious offences against the person, serious sexual offences, and serious criminal damage such as arson endangering life, war crimes, terrorism and conspiracy. If the Criminal Appeal Amendment Bill before the House was enacted, section 3 subsection 2 of the Criminal Appeal Act would read as follows –

“For the purpose of hearing appeals and applications for review under this Act, the Court shall be duly constituted by three judges.”

Now, the first question I ask myself is – and probably I would be enlightened by the hon. Attorney General - if at the first instance, that is, before the Supreme Court, you have one judge who has listened to the case, the case goes on appeal and you have three judges sitting on appeal, you already have four judges who are concerned with the case. Now, if that person is unsatisfied with the judgment, he comes for a review. I will speak on whatever mechanism we should have brought into place, but let's say, the Human Rights Division, and then the matter is referred, let's say, to the Court again. As it stands today, we would need to have three other judges to hear the case. So, Mr Speaker, Sir, you would imagine probably, first of all, what problem will arise at the level of the Supreme Court, in terms of finding the appropriate judges to sit. I really don't know how many judges right now are available, because some are sitting before the Commercial Court, Family Court, and there have been judges dedicated to a particular Court. So, of course, that will be for the Chief Justice and for the administration of justice.

Mr Speaker, Sir, I would like to take another point with regard to what has been stated earlier. Review proceedings, to me, would not be seen as being totally independent from the Supreme Court which, itself, adjudicated upon the case being reviewed. Mr Speaker, Sir, you will surely remember that in considering the setting up of a separate Court of appeal, Lord Mackay stated the following in the report of the Presidential Commission, to examine and report upon the structure and operation of the judicial system and legal profession of Mauritius. I will quote, because it is important and the same reasoning will apply here –

“At present the Judges of the Supreme Court exercise appeal jurisdiction in civil, family, and criminal matters in accordance with the provisions of the Constitution, but the Judges who sit on appeals are themselves Judges of the Supreme Court.

A consequence is that a judge, today, may be sitting on appeal against the judgement of a Judge who, in a week's time, will be sitting on appeal from him or her. It has been suggested to us that this causes in the legal profession, and perhaps more generally, a feeling that the appeal work is not sufficiently separate from the work at first instance and that it may inhibit a Judge sitting on an appeal from being as for aught as he or she otherwise would, in criticism of the judgment, appeal from by the consideration that in some short time in the future, the Judge appealed from may be sitting in judgement on an appeal from him or her.”

Let alone the situation where you have instances – so many of them anyway – where a judge who has given a judgment, of course, which is either quashing a judgement or dismissing an appeal and then sitting again together with another brother judge to hear a case. It could create a situation of malaise.

This is what, in fact, Lord Mackay pointed out when he made those remarks, because we should not forget that judges sitting in appeal are, in fact, selected from the same pool of judges who sit at first instance. There is the other side of the coin also, that of the public point of view where there can be a perception of bias. The same would be true if section 3 (2) of the Criminal Appeal Act were to be amended in the manner that is being prescribed by the Criminal Appeal Amendment Bill. It is, therefore, of utmost importance, Mr Speaker, Sir, that the review of criminal cases be carried out by judges other than those who had sit either at the first instance of the hearing or at the appeal stage as it is today. In fact, I am making a case also for the setting up of a separate Court of Appeal.

In the UK, the criminal cases are reviewed by the Criminal Cases Review Commission, which is an independent public body that was set in March 1997 by the Criminal Appeal Act of 1995. Its purpose is to review possible miscarriages of justice in the Criminal Court of England, Wales and Northern Ireland, and refer appropriate cases to the appeal court. It is comprised of experienced criminal prosecutors, experienced defence counsels, and experts such as accountants for fraud cases. Therefore, it is important to note, Mr Speaker, Sir, that in its report entitled ‘Mechanism for Review of Alleged Wrongful Convictions or Acquittals’ that was published in November 2012, the Mauritius Law Reform Commission stated the following, and, in fact, they have been inspired also by what obtains in England, and I quote –

“The Commission has examined at the request of the hon. Attorney General the desirability of having in Mauritius a Criminal Cases Review Commission such as the one in UK which could be an independent public body mandated to review possible miscarriage of justice and which could refer appropriate cases to the proper forum for review.

The Commission has reviewed mechanisms for review of alleged wrongful convictions from a human rights and comparative perspective and is recommending that a Criminal Cases Review Commission could be established by Statute”

This is the recommendation following the request of the hon. Attorney General. It is also important to note that in the monthly legal update newsletter of July 2013, in the article entitled ‘The Retrial of Criminal Cases: The Winds of Change’, the DPP stated - why I say this, why I have to repeat again is because, unfortunately, Members on the other side, at least one Member has been saying that, in the Opposition we are politicking, and we are trying as if to delay things and we are coming up with

suggestions that any institution that should be set. These are the people not connected with the Opposition who have made those suggestions - and I quote

“I am of the considered view that we should go down this route eventually to remedy any miscarriage of justice. It can only buttress the public confidence in our criminal law system. But it would be wise in order to prevent any abuse that a Criminal Law Review Commission be instituted to act as a screening body in all cases where a convicted parties or victims’ family alleged any miscarriage of justice.”

Clearly then, Mr Speaker, Sir, there is consensus and convergence on the way forward as regards the setting up of a Criminal Cases Review Commission.

Let me now come to section 5 of the Criminal Appeal (Amendment) Bill. Section 5(2) of the Act would state the following -

- (2) The Director of Public Prosecutions may appeal to the Court against a final decision of the Supreme Court where –
 - (a) a charge has been dismissed;(...)

I won’t go into the different sections, but the rule against double jeopardy is only applicable if the defendant has been put in jeopardy or peril by having been prosecuted for the same offence before.

Now, I would like to quote also what has been the situation in the United States; the Fifth Amendment (Amendment V) to the United States Constitution. I will not read the whole thing, but suffice for me to say that, and I quote -

‘No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;(...)’

There have been cases also. I would like to just cite a few. There is the case of *Crist v. Bretz* (1978): ‘The U.S. Supreme Court has held that jeopardy attaches when a jury is empanelled. Witnesses are sworn or a plea is accepted.’ In the case of *Serfass v. United States* (1975), it was decided that the defendant was not put in jeopardy when the prosecution appealed a successful pre-trial motion to dismiss the case. The Supreme Court held that the prosecution could appeal the pre-trial dismissal of a charge. The case of the *United States v. Scott* (1978): the Supreme Court held that the prosecution could appeal the dismissal of a charge if the dismissal was not on the merits. The recent development in English case

law also followed these principles: the case of *R v. GFG* (2013) – a charge of assault occasioning actual body harm was dismissed as part of the reorganisation of the prosecution case. It was ascertained that a defendant was in peril when, firstly, the court was competent to try him for the offence. Secondly, the trial was on a good indictment on which a conviction could be entered, and thirdly, the acquittal was on the merits. Finally, in this case, it was concluded that the defendant had never been in peril and, therefore, could not be deemed to have been *autrefois* acquitted.

Now, section 5(2) (a) - probably we would like to be enlightened by the Attorney General - reads as follows -

5. Section 5 of principal Act amended

- (2) The Director of Public Prosecutions may appeal to the Court against a final decision of the Supreme Court (...)

Now with the amendment –

“or a verdict of the jury”;

where subsection (a): a charge has been dismissed - “or a person has been acquitted”.

First of all, probably we need to be enlightened on cases where a charge has been dismissed or in a case where a person has been acquitted, I mean the difference between those two cases because in the case of where a person has been acquitted Mr Speaker, Sir, there is a section 5(3) which provides that -

- (3) No appeal shall lie against an acquittal following a verdict of not guilty except on the ground that –

And it lists three instances where -

- (a) the trial Judge gave a substantial misdirection in the course of his summing-up to the jury;
- (b) the verdict is unreasonable or cannot be supported having regard to the evidence; or
- (c) a serious irregularity occurred in the course of or in relation to the trial, or the acquittal is otherwise tainted.

Now, this is in a case where a person has been acquitted and the DPP is not satisfied; he appeals, and section 5(3) has limitations. What about section 5(2) (a), where a charge has been dismissed? The way I

look at it, the DPP can simply just appeal against that. There are no qualifications. Probably the Attorney General would enlighten us on this issue.

As regards section 5(2) (b) of the Bill, it relates to ‘convicted of a lesser offence than the one with which he was charged ;(...)’. Now, what is the definition of lesser offence? In this case, probably we know what is a lesser offence logically speaking, but there is no specific definition of a lesser offence in this case.

It is also worth noting that in the case of *Green v. United States*, the United States Supreme Court held that a conviction for a lesser offence was to be treated as an implied acquittal of the offence charged, and thus attracted protection against double jeopardy.

Mr Speaker, Sir, there have been especially in UK a number of criticisms against those amendments that have been brought, and a number of articles also have been written, but I will just limit myself to only what I consider to be a few important ones - changes to the double jeopardy rule which have attracted serious criticisms. The civil liberties and human rights organizations commented, and I quote –

‘Removing the protection of double jeopardy may well help convict a handful more serious criminals. Unfortunately, it will also lead to the repeated prosecution of many more innocent people. For innocent people, even once acquitted, their ordeal won’t be over, and Police and prosecutors, knowing they can have a second batch, won’t have to tackle real problems of incompetent investigation in the first place’.

In its full response to the White Paper circulated at that time, Liberty expressed the views that the handful of cases used to justify the change more often made a compelling case for better criminal investigation and prosecution that it was unlikely that someone prosecuted again would receive a fair trial, and that any trial of the Stephen Lawrence suspect would be stopped by the judge as an abuse of process. With respect to the retrospective aspect of the changes to the jeopardy rule, Liberty made the following remarks, and I quote: ‘If there were retrospective retrials, the effect would be even more prejudicial to a fair trial.’ What is being said is: we are so certain that you are guilty, that the law has been changed to bring you to justice. Quite simply, no one can have a fair trial in these circumstances, as every jury will be aware of the circumstances which lead to the retrial. Because there is bound to be publicity; there is going to be a number of articles which will be written in the press, in the media generally. That is why this organisation was very sceptical about whether eventually there would be a fair trial. Now, in the “Daily Telegraph”, Peter Lilley, Member of Parliament said, and I quote –

“The double jeopardy rule persisted for eight centuries for four very good reasons. It protects the individual from harassment by the State; it forces the prosecution to get all its ducks in a row before taking a case to court; and it reassures all innocent people, once acquitted, that they will not face a second trial. Finally, any second trial would inevitably be prejudiced if a judge first ruled that the new facts were "compelling evidence" of guilt.”

The “Observer” was also highly critical, and I quote –

“This Government's attitude to rights is further demonstrated in the proposal to abolish the 'double jeopardy' rule. This is a most cynical exploitation of the case of Stephen Lawrence. Of course, it was humiliating and frustrating for the Lawrence family, after so many years of struggle to highlight the injustice they had suffered, to see the alleged killers of their child defiantly flaunting the fact that they were now outside the law's reach. Yet, a rule which has served us well over so many centuries should not be jettisoned because of one experience - however dreadful. The potential consequences are even graver. The assumption at a retrial, brought about because of the emergence of 'new and compelling' evidence, would be that the defendant(s) was necessarily guilty. How would such a natural assumption square with the idea of innocence until proven guilty? How would the publicity of a previous trial be dispelled? It is suggested that such a power would only be exercised in a small number of cases, but it is precisely in the high-profile cases where an acquittal results that the public clamour for a retrial would be greatest. How would the jury at the retrial dismiss from their minds the publicity surrounding the first trial?”

This is squarely what is going to be the situation here, Mr Speaker, Sir.

So, after all these serious comments and arguments, which call for caution, they cannot just be dismissed outright. Have they been taken on board during the preparation of the Bill? Has Government considered the fact that in the UK and in Hong Kong as well, specifically designated commissions had been set up, and those commissions had worked for years before recommending changes to the Criminal Justice legislation? Has Government also taken into account that in the UK, there has been a hot debate on the Criminal Justice legislation and the questioning of the jury system? Is Government aware that in the UK, Police inquiries are done diligently and professionally, using the latest technological means to adduce evidence?

Mr Speaker, Sir, it is not merely because of, as some would say, Irish Erk, following the acquittal two suspects at the Assizes that we should rush with the amendments to the Criminal Appeal legislation. I agree that we should not forego reforms when they are in the interests of the population and of our society, but I strongly condemn sinister agendas that have been, unfortunately, the cornerstone of this

Government reforms' initiatives. The way this Bill proposes to alter the rule against double jeopardy is very much questionable and dangerous, as has been highlighted by Members of the Opposition, by eminent lawyers practising at the Bar. The rule against double jeopardy is a rule of constitutional importance, recognised throughout the common law world, and applied in virtually all developed legal systems.

With the amendments being proposed, there is a real risk – I say there is a real risk – of harassment from the State where both believed that acquitted defendant should be retried. There can also be harassment from the press; I mean that could happen. There is a danger of fabricated evidence also, but now we are told that, of course, any evidence will go before the Court, it will be for the Court to assess and to weigh the value of those evidence, but I say that I am very sceptical about people fabricating and coming up with all sorts of stories.

There is also a risk that disappointed investigators, particularly in high profile cases, may well wish immediately to recommence investigations after an acquittal, particularly if there is pressure, pressure either from the public, the media, the politicians also. Those with previous convictions known to the investigating officer would also be target. An officer with the personal *animus* against an accused may also wish to pursue him despite an acquittal. Moreover, there is a very serious risk that any new trial might be unfair.

The Law Reform Commission, in its consultation paper, acknowledged this at paragraphs 5.49 and 5.50. With the Government's proposals, any Tribunal trying the defendant would know that the case had already been to the Court of Appeal, and that the Court of Appeal was satisfied that there was new and compelling evidence. This is likely again to be used in high profile cases, and will run the risk that a fair subsequent trial will be impossible.

Mr Speaker, Sir, in any event, the prosecution will also then have precise knowledge of the defendant's case, and be able to review and strengthen its own case in the light of that knowledge. Whilst Government's proposals that fresh evidence should only be taken into account where it could not reasonably have been available for the first trial, it is my view that such situations are likely to be also commonplace because of inadequate and incompetent investigation in the first place. It is likely that prosecutors will be able to satisfy the Court of Appeal that there was no reason to suspect that a particular witness could give material evidence. Also, the abolition of the rule against double jeopardy is liable to encourage unreasonable expectations also in victims, and create media campaigns and rob the process of finality.

Mr Speaker, Sir, let me come to an issue which was raised about the constitutionality of this proposed reform. I must say, despite the assurance that has been given by the hon. Attorney General, when he refers to the meaning of the word ‘review’ in section 10(5) of the Constitution where it states –

“(...) except upon the order of a superior court in the course of appeal or review (...).”

Can we say with certainty that this cannot be challenged in Court? Why I say this is because I believe that our Constitution, in fact, did not envisage the dramatic and unprecedented proposals that are presently being brought before the National Assembly, although open-mindedly. I recognise the fact that a true reform is necessary.

But we are now passing a law *qui va être appliquée sous l’exception de la section 10 (5). Le principe général de la section 10 (5) c’est que there cannot be another trial when somebody has already been before a court and has been acquitted. C’est le principe général. Mais quand on lit la suite, il y a l’exception qui est the review. Ce projet de loi est en train de s’appliquer à ce review et aura pour effet rétroactif. Cela veut dire que cela s’appliquera pour les cas qui ont été jugés avant la passation de cette loi. Je ne suis pas un constitutionnaliste, je ne suis pas un expert, mais cela me dérange parce qu’au moins si ce projet de loi passe le test de la constitutionnalité, I think it would have been fair for it to apply as on the very day that it is being proclaimed, so that it will apply to future cases. So, I fail to see now why suddenly we are coming with this amendment and making it apply to previous cases.*

There are two other issues that I want to address. The first one is the issue of miscarriage of justice, the remedies for miscarriage of justice. That requires, according to me, a separate solution and the use, as I have said earlier, of an intermediate Body to evaluate claims. In fact, this is a practice where such reforms have been undertaken and to allow, under section 19 (2) -

‘Any person convicted following a trial to apply to the Court for a review (...)’

This is, in fact, inviting for an avalanche of applications as every person will automatically apply. But, following the discussions that have been held with the hon. Attorney General, initially the first proposed amendment did not contain any such Body. Now, it is being proposed that it should go through the Human Rights Division. I will not repeat what my colleagues on this side of the House have said. I fully concur with the fact that it is not serious. I must say it is not serious because we know the functioning of the Human Rights Commission. They do not have the resources and the proper funding. It is not fully constituted even to perform their objectives right now, and now, we are adding this workload. I must say this workload because the number of cases that will come to them. I wonder how they will be able to look at each case. We are not talking about just looking at a case, Mr Speaker, Sir. What we have suggested is that in a case where they are not satisfied that there have been convincing evidences - let me put it that

way - but which shows that there are, at least, some evidences that could lead to a Court eventually to have a reconsideration, they should be able to enquire further because we know that an accused party is in a very different situation from the prosecution. The prosecution has all the means. I mean they are not at arm's length. They have all the means to go not only for investigation but for analysis of samples, for calling experts and sending exhibits for analysis, whereas in many cases, an accused party is not able to have the required resources to be able to prepare his defence correctly.

I fully subscribe to what hon. Mohamed has said earlier. We know that after investigation, in many cases, not all the materials are given to an accused party. We have been practicing at the Bar, and we know how it is. We know how prosecutors are, as if their object is not that the truth must be found before a Court of law, but they should go at all cost for a conviction. This is their aim unfortunately. But, with that kind of attitude, we know that there can be miscarriage of justice and, unfortunately, innocent people can find themselves behind bars.

The other point I want to make is with regard to retrial. Again, the current proposal for retrials allows the DPP to apply to the Court for a review for any acquittal in any case. This is far-reaching, because in other jurisdictions they all have limits with regard to the reviews, namely as regards category of serious offences. As the Bill stands, it will serve to encourage negligence and incompetency in the investigative and prosecutorial process. Investigators and prosecutors will all know that they can have a second bite of the cherry. As the amendments currently stand, the prosecution gets a second chance to make up for the incompetence of the Police and the prosecutors. As I said earlier, we should have taken this opportunity with regard to unused materials, that is, Police should, in fact, communicate all materials to an accused party.

Let me go quickly on the issue of tainted trials. What is the meaning of tainted? There is no definition. Is it where there is evidence? I am sure there is evidence of corruption where there has been perjury or other attempts to pervert the course of justice. We have also a big issue with the appalling stage of this issue of provisional charge. Mr Speaker, Sir, I seize this opportunity, because I consider this very scandalous. Mauritius is the only place where we have provisional charges. In England, it is for the investigative authority to carry out the proper investigation and when they can establish a case against an accused, they come with a formal charge. There is no provisional charge. It is only in Mauritius that you can have a provisional charge laid against somebody in spite of the fact that you do not have any evidence at all. The fact remains that a citizen of this country will have, *comme on dit en créole, la queue fer blanc qu'il est en train de trainer jusqu'au jour où la Cour* will call the case - after so many months - and will have this charge struck out. In fact, there is an abuse, and I would have thought - that is why I said earlier - that this Government would have come with the Police and Criminal Evidence Bill first. Let us, in fact,

assure the citizens of this country that investigations are being done in the best possible way and that, at least, somebody who is taken to task before a Court of law is given the real chance of putting up his defence, so that then we would have looked at the issue of whether there should be any amendment with regard to this Bill that is being brought before the House.

Mr Speaker, Sir, I would not want to go into depth with regard to the other sections of this Bill, section 5 (2) where the DPP is –

“(...) of opinion that the sentence passed is wrong in law or unduly lenient”.

Again here I have certain qualms with this - the issue of section 8, now, the issue of section 8 of the Bill, which creates a new section 19A regarding ‘Applications to Court for review and retrial’.

This deals with an application for review, which is dealt with by the Court, and there are two major issues with this section. The first is that it reads that the review of a conviction is in the same manner as the review of an acquittal. There should be, according to me, two separate sections; one dealing with the review of the conviction by convicted persons, and another section dealing with the review of an acquittal by the DPP. The second issue is in the way that the section is construed; the new section 19A (4) states that -

“A review will be granted by the Court where there is fresh evidence and compelling evidence in relation to the offence or a lesser offence”.

The wordings of section 19A (4), and the definitions of fresh evidence and compelling evidence, in fact, have been clearly inspired from section 78 and section 79 of the Criminal Justice Act of 2003 in England. However, there are clear differences between the English law and the present Bill. Firstly, the Criminal Justice Act of 2003 only deals with the reopening of cases where a person has been wrongly acquitted and not the case where a person has been wrongly convicted. Secondly, the Criminal Justice Act of 2003 contains a section 79 which is titled ‘Interest of Justice’, which contains a number of provisions, of which I won’t go through, but except for me to mention that section 2 subsection (c) states –

“(...) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person, but for a failure by an officer or by a prosecutor to act with due diligence or expedition”.

Now, this is where the reasonable diligence of the Bill comes from, and regarding this requirement for diligence this is what the crown prosecution service website has to say, and I quote –

“Failing to exclude evidence which the Police could reasonably have found during the original investigation might be seen as an incentive to poor investigations. To safeguard against this,

section 79(2) provides a specific element of due diligence into the 'interests of justice' test the Court of Appeal must apply in considering applications for a retrial. No court would allow the prosecution a second chance of prosecuting a person to make up for the incompetence of the prosecution (...)"

In other words, if the evidence was not adduced at the trial because the evidence was botched, the DPP cannot ask for an order quashing an acquittal. This is the case in England, and this will have to be the case if the Bill is enacted. But most significant issue with this Bill, Mr Speaker, Sir, is that the procedure and the requirements to request a review are the same for an acquittal or a conviction. For example, in the case of an acquittal, the DPP will have to produce evidence which is 'compelling and fresh'. In other words, the DPP will have to show, in the course of the review proceedings, that the investigation was carried out diligently, and that the evidence could not have been adduced at the time despite the best efforts of the Law Enforcement Officers. Now, if the DPP can satisfy, *inter alia*, the reasonable diligence test, he will obtain an order quashing the acquittal and ordering a new trial. But what happens when a person who has been wrongly convicted, asks for a review of his conviction?

According to section 19A (4), he will have to produce evidence of his innocence, and as with the DPP, when the latter challenges an acquittal, he will have to satisfy the Court that this evidence is 'compelling and fresh'. That is the same test will apply meaning that the convicted person will have to show that the fresh evidence could not have been adduced with the exercise of reasonable diligence. In other words, the convicted person would have to show that the investigation was carried out properly, and despite the good work of the Police, the exculpatory evidence was not obtained. Now, this approach makes absolutely no sense.

Before I conclude, Mr Speaker, Sir, let me pass a few remarks on the case of 'l'Amicale'. The case of 'l'Amicale', we all know, has been referred to the President of the Republic to seek mercy, and under Article 21 of the Criminal Appeal Act, the President has the right to direct the Supreme Court to review the case. Now, my question is this: suppose it goes through that route and there is still a conviction that is maintained, will it be possible for the accused party to avail itself of the right under this Bill, which is going to become law, to ask for a review? I put the question because there is already one route which is now being followed. Eventually, what will happen? Will they be able to avail themselves of this right?

Mr Speaker, Sir, last point – the Bill is silent as regards the Privy Council, or probably I will get an explanation from the Attorney General. Let me take two examples. Firstly, the case of a convicted person whose request for appeal on the basis of fresh and compellable evidence has been accepted by the Human Rights Division, and where retrial before the Supreme Court has confirmed the conviction. The question is whether that person can still appeal against that judgement before the Privy Council. I should

think so, but what about in the second case where there has been a judgement of the Privy Council against a convicted person, and that afterwards there is fresh and compellable evidence which is adduced in his case. The question is whether that person can still go to the Human Rights Division to make a request for appeal and retrial before the Supreme Court. I would wish that the Attorney General will provide an answer to this question.

Therefore, Mr Speaker, Sir, by way of conclusion, let me repeat what I have said earlier. This Bill is being rushed with a tainted agenda. Of course, on this side of the House, we have condemned the attitude and the agenda altogether. I am not against true reforms that have taken into account previous experience and lessons that are drawn from other jurisdiction. Let me make it very clear. I am not against true reforms, but we cannot pretend to cure the ailment when we do not treat it from its source.

I mentioned what should be done at Police and DPP levels to ensure respectively that enquiries are held with diligence and professionalism, using latest technologies to adduce evidence, and that cases submitted to the court have stood the test against possible blunders and errors.

Mr Speaker, Sir, a serious Government with a genuine reform and modernisation agenda would not have gone ahead with this Bill. I have given enough arguments to sustain what I am saying. A responsible way forward is to set up a specific Commission to look deeply into the issue of double jeopardy, as has been the case in the UK and in Hong Kong, and subsequently takes stock of the conclusions and recommendations of that Commission before proceeding with necessary changes at Police, DPP, court levels, and making subsequent amendments to the law.

Mr Speaker, Sir, it is our duty in the Opposition to express our opinion, and to try to convince Government on the pertinence of our arguments. We think, on this side, that there are more important reforms to bring in our Police and legal systems before coming with reforms as regards criminal appeal legislation. However, in this case, Government intends to go ahead with this tainted Bill, with a tainted agenda. It is our duty to suggest safeguards against what is being proposed, so as to prevent a chaotic situation.

The setting up of a Human Rights and Criminal Cases Review Commission - I would call it the Criminal Cases Review Commission - with extended powers and necessary resources or a full-fledged Commission is mandatory as a safeguard. We regret that Government has decided not to listen, and to do it their way in spite of all our appeals. They will have to assume their responsibility.

Let me end by quoting London's Mayor, Boris Johnson, in the writings in UK, 'The Spectator', and I quote -

“The harder we cudgel our brains, and try to work out what counts as new post-acquittal evidence, the more we appreciate the clarity of the rule against double jeopardy.”

I leave these comments to the appreciation of one and all.

Thank you.

Mr Speaker: I suspend for one hour and fifteen minutes.

At 8.06 p.m. the sitting was suspended.

On resuming at 9.31 p.m with Mr Speaker in Chair.

The Prime Minister: Mr Speaker, Sir, I think we all agree that no judicial system can remain frozen in time. It has to respond to current realities. As hon. Obeegadoo said earlier, justice is dynamic and must evolve.

In 1997, I appointed Lord Mackay, the former Lord Chancellor of England, to review the structure and operation of our judicial system and the legal profession. It was the first major review of our judicial system ever. This Bill, Mr Speaker, Sir, is a continuation of the reform process with a view to modernising our judicial system.

I have listened with great attention, Mr Speaker, Sir, to what the hon. Leader of the Opposition and other hon. Members had to say about this amendment Bill. And let me respond straightaway to a comment made by - unfortunately he is not here - the Second Member of Constituency No 2., hon. Uteem. He said that Government is trying to push this Bill through without listening to the views of the Opposition. Nothing, Mr Speaker, Sir, could be further from the truth, as has been acknowledged by the hon. Leader of the Opposition himself.

I had two meetings with the hon. Leader of the Opposition. One together - I think he mentioned it also - with the Attorney General, the Solicitor General and the Parliamentary Counsel. Then, the Leader of the Opposition, with some of his legal colleagues from the Opposition, met again in the Attorney General's Office, together with the Solicitor General and the Parliamentary Counsel.

So, the question would be: why would we have all these meetings if not precisely to consider what the Opposition had to say? As the hon. Leader of the Opposition himself has acknowledged, we have given more time for views to be expressed, and we have taken on board some of the suggestions of the Opposition. But let us be very, very clear - I think hon. Mohamed also made reference to this. Government decides on policies and what legislation to bring to the House.

We listened to the Opposition as in a real democracy, but it does not mean that we have to accept all the proposals of the Opposition. That cannot be the case, Mr Speaker, Sir. What did the Opposition

want? From what I see, there are two major requests. First, they said we should have given them more time - I will come to this later - and second, they are insisting on this Criminal Cases Review Commission; we should have one as in the United Kingdom.

Mr Speaker, Sir, I again say we have gone some way to accommodate the demands of the Opposition. Let's start with the Commission. We did not think it was necessary. I said that, in fact, to the hon. Leader of the Opposition. We were of the view that this would be creating yet another institution with all the costs implication for the public purse. We felt that, in any case, any application for review or for retrial has eventually to be made to the Supreme Court. So, we thought why put another obstacle in the way of the appellant.

In fact, in our view, the so-called filter puts another obstacle to whoever wishes to have a review or trial. As I said, Mr Speaker, Sir, the ultimate decision to have a review and retrial rests with the Supreme Court. I think I did mention that to the hon. Leader of the Opposition. We also thought there was going to be inherent difficulty in choosing the members of that Commission. This is a subject that should be above party politics, but inevitably there would be some influence there. Already we have seen the criticism about the Human Rights Commission. Someone went as far as to say that the Chairperson is not an independent person. I noted that.

Mr Speaker, Sir, given the importance of this Bill, we decided, in order to allay the fears of the Opposition and some members of the Bar, to go ahead with the idea of a Commission, but instead of having a full-fledged Commission, as requested by the Opposition, we are of the view that the Human Rights Commission can very well discharge this duty itself.

The hon. Leader of the Opposition, himself, said during his speech that they did not disagree with the idea of having the Human Rights Commission dealing with this. In fact, he was agreeable for review and retrial. He was also sensitive to the necessity of avoiding the creation of costly new public bodies. However, he said - I agree with that also, and he has repeated this morning - that it should be given the necessary logistics and the means to be able to discharge its duty, which we are doing, Mr Speaker, Sir.

In fact, we think the Opposition by asking for such a Commission, as I said, is putting another obstacle in the way of the applicant. Mr Speaker, Sir, we were suggesting that the applicant could go direct to the Supreme Court because ultimately it is the Supreme Court which will decide to acquiescence for a review or retrial. Some hon. Members, I must say, have felt that the Judges of the Supreme Court might not be inclined to review a decision taken by their brethren.

I believe the mistrust of our Supreme Court Judges is misplaced. A Judge of the Supreme Court, I am sure, will always have the interests of justice in mind, and will consider each case on its merits. He

cannot consider it on anything else; besides the proof of the pudding is we have seen so many judgements of lower Courts being reversed by the Supreme Court many times. In any case, be that as it may, in order, as I said, to allay the fears of the Opposition and some members of the Bar, we have agreed to have a Human Rights Commission to play this role.

Mr Speaker, Sir, I should add, this policy of avoiding multiplicity of public bodies in the interest of public funds is obvious from what we have done recently. People will criticise that there are too many institutions. We have been trying to lessen the number of institutions. This is evidence by the merging - not so long ago - recently, of the multiple institutions of the Mauritius Cane Industry Authority. I think there were six service-providing institutions which have merged into a single authority. That is the policy. We want as far as possible not to have duplicity. I have been saying that about all the institutions, as well tribunals and even the Police were looking into that. I mentioned that the other day when I was answering questions on the Ponzi scheme.

We have also, as I said, Mr Speaker, Sir, while keeping this Human Rights Commission, kept the option of an applicant for this possibility to go direct to the Supreme Court. In other words, the applicant now will have two options: one, either go to the Commission, which will then have to give its views to the Supreme Court, or go direct to the Supreme Court. I should point out also – perhaps some Members have not fully looked into this – that the decision of the Commission can be judicially reviewed, which would mean another procedure and more delay.

Let me come to the charge also that we are rushing this Bill through, and that we should have allowed more time for a national debate. In fact, as the hon. Leader of the Opposition, himself, acknowledged, we did give some extra time perhaps not as long as the Opposition would have liked. We did give some extra time, but let me remind the Opposition of the very important Bills that were read a ‘first, second and third’ time at a go when they were in Government. For the benefit of new Members of the Opposition, and perhaps to refresh the memory of those who seem to have conveniently forgotten, let me remind them of a few. In 1990, the Constitution (Amendment) Bill to make of Mauritius a Republic, change of status: First, Second, Third reading at one go. The House debated until the early hours of the morning.

(Interruptions)

I am sure some Members of the MMM would not have agreed to this, but they were bound. The Government then failed to get the required majority. The same Bill was again brought to the House in 1991. We were only, Mr Speaker, Sir, a few of us in Opposition. We received the Order Paper on 06 December 1991, which was a Friday, and the debates were held, believe it or not, not even on Tuesday,

on Monday 09 December 1991, and all in one go. We are speaking of a Bill to change our status to that of a Republic. Again in 1992, a Constitutional (Amendment) Bill, Mr Speaker, Sir, this time – I'll ask the new hon. Members to hold their breath - to retroactively validate the results of the 1991 Election.

(Interruptions)

And also when the case was already in Court, it was in front of the Judicial Committee of the Privy Council. Well, this is happening here. You know, Mr Speaker, Sir, I was following the case with the Privy Council. When we heard of this, they told us: "how can you continue with the case now?" They were amazed! Retroactively, when the case is before the Privy Council! I must tell you, Mr Speaker, Sir, the Order Paper to do this retroactive amendment of the Constitution came out on 17 June 1992. And when do you think the debates were held? The very next day, 18 June 1992! The very next day! Retroactive amendment of the Constitution while it is being contested - the validity of the elections! The very elections were being contested before the Privy Council. One day; over!

Again, Mr Speaker, Sir, in 2001, the same Government – I am sure many of the Members of the MMM would not have agreed, but what could they have done, they were in the remake; at the time it was 'make', not 'remake' - came with a Constitutional Amendment Bill, this time to get rid of the Economic Crime Office and its Director, because it had become a threat to the then Government, as it was investigating corruption charges against them. And this time, Mr Speaker, Sir, concerning that amendment to get rid of the Economic Crime Office - and these people are talking about corruption, fighting corruption - we received our Order Paper on Tuesday 18 December 2001, after the lunch break. Hon. Dr. A. Boolell and hon. Dr. Bunwaree were there; I think hon. Duval also was there – a few of us. We came to Parliament, we asked questions...

(Interruptions)

You were there, I think, Mr Speaker, Sir.

(Interruptions)

Hon. Obeegadoo would like to listen to this! We came to Parliament, there was the Order Paper; we asked our questions, questions were answered. We went for lunch. When we came back, the Order Paper was amended, and we were going to discuss how to abolish an institution, which was given guarantees under the Constitution by the then Leader of the Opposition, who asked me that the Director should have the guarantees under the Constitution so that the Prime Minister cannot meddle with his affairs, and I agreed to it because we were serious about the Economic Crime Office. And here you are! Lunch time; when we came back, the amendment was on the table, and the debate started straightaway. The debates were held, went on, and were concluded. Again, Mr Speaker, Sir,...

(Interruptions)

I am just giving a few examples. In 2002, concerning the Prevention of Terrorism Bill, suddenly the Government, the same partners...

(Interruptions)

Mr Speaker: Silence!

The Prime Minister: Yes, I wish he was here! He is a young Member, he does not know anything! The same Members ...

(Interruptions)

Mr Speaker: Order!

The Prime Minister: Suddenly the then Government discovered that there were terrorists in Mauritius; it was very urgent, there were terrorists in Mauritius! They were targeting one community in particular, and they rushed the Bill through in all its stages. There is a last one – Minister Pillay Chedumbrum referred to it – the colourable device that was used by the then Prime Minister to deprive me of my seat in the Assembly as Leader of the Opposition.

Mr Speaker, Sir, in 1993, Parliament was to resume on 23 March 1993. They had already adjourned, they had fixed the date. I was doing my Bar exams in London. Parliament was supposed to resume on 23 March 1993. I decided, because of the requirement that we should be here for three months - I did not get the leave I wanted - that I would come in December at the last session of Parliament. Before taking the plane, I was told they have closed Parliament one week earlier. I knew there was something, but I still came, and I took the precaution – now he is the President; I think we spoke – and I still decided I would go and swear an affidavit in Court to say that I knew that Parliament would close on such a date; I had come for that, and Parliament had been closed one week earlier; just as a precaution, because I felt there was *anguille sous roche*. And then, Parliament, instead of resuming on 23 March, as was when it was adjourned, the then Prime Minister called Parliament on 26 January 1993 at 9.00 a.m. They were worried of my taking a plane on the last minute. What they didn't know is that I already knew, and I said: "Well, do what you want to do; I will do what I have to do, because I had exams to pass."

A special, indeed a very special session, was called to debate on a frivolous and flimsy amendment of the SIE Act. It was so flimsy, in fact, that the session ended, I think, I was told, within half an hour. It was so urgent that they finished in half an hour! And then, Papers were circulated, Mr Speaker, Sir, on 23 January 1993 at 23.30 hrs, and the House was then adjourned to 02 February 1993.

The Machiavellian strategy to try to get rid in a democratic country of the Leader of the Opposition on such a flimsy ground was sharply rebuffed by our Supreme Court in no uncertain terms, that is, when they used the terms 'colourable device'.

There are other examples, Mr Speaker, Sir, but I think I have made my point. Before I move on...

(Interruptions)

Mr Speaker: I want some silence!

The Prime Minister: Before I move on to another point, Mr Speaker, Sir, I feel bound to say this after the comments I have heard by some of the members of the Bar, making adverse and misplaced comments about the Attorney General's Office and the State Law Office.

Let me be absolutely clear, Mr Speaker, Sir. Government decides on policy, and then asks the State Law Office to draft a Bill according to what we want. The State Law Office and the Attorney General's Office are there to guide the Government, to give their views. This is how any Government operates or ought to operate, I should say. We seek and heed advice from our legal advisers, but Government is ultimately responsible for a Bill which we present to the House.

Mr Speaker, Sir, as you, yourself, know – you have been Attorney General of this country - any Bill is drafted by the Attorney General's Office in the light of instructions given by Government. If and when consultations are held with the Opposition, advice on any legal implications is sought from the Attorney General's Office and the State Law Office; we have to look at all the implications. At the end of the day, the decision of any amendment to be made is taken by Government and Government alone.

This is elementary, Mr Speaker, Sir, but I felt I had to remind some of this basic rule in the light of the cheap and veiled attacks that have been made, both inside and outside this House, against the Attorney General's Office.

Indeed, this is not the first time that such uncalled for attacks are being made against the Attorney General's Office by this Opposition. They have managed the unbelievable feat of criticising the Attorney General's Office, even when they were in Government! Forget the Opposition; they were in Government, and they were criticising! They even went as far as bypassing the State Law Office's advice and seeking advice from outside the State Law Office - an unprecedented event. I can't remember so many comments from the press then. I can't!

For my part, Mr Speaker, Sir, I want to put on record Government's respect for the sound, objective and non-partisan advice it obtains from the Attorney General's Office despite – despite, I must say – all the resource and other constraints that this Office has been facing.

In a democracy, Mr Speaker, Sir, it is healthy to have a debate. This is the very essence of a democracy; that you may be able to say what you think. However, we must be careful not to exaggerate and utter misplaced comments. The hon. Leader of the Opposition as well as other Members - most of the Members, in fact, of the Opposition - also made reference to a Judge who made comments on this Bill on the radio - I believe a few, and not just one radio. Now, I feel bound to have to say this, Mr Speaker, Sir. Anyone who is entrusted with judicial functions should exercise restraint in making public comments on a

legislative measure which is being introduced by the Executive and is the subject of some public controversy. It cannot be otherwise!

(Interruptions)

In constitutional democracies, it is settled law that the three branches of the State, that is, the Executive, the Legislator and the Judicator are separate, and each of them must be mindful of the constitutional limits within which each has to operate. Judicial independence must not, even in the slightest manner, be perceived to have been compromised, bearing in mind that a Judge might well be called upon to decide upon such cases.

Mr Speaker, Sir, what is the defect that we want to cure? That is the question, I think, that hon. Members should have asked. Perhaps, if I might be allowed, for the sake of clarity, to look at the Mauritian criminal appeal system in order to understand the rationale behind the amendments being brought to the Criminal Appeal Act with regard especially to the power being given to the DPP to appeal from Supreme Court judgments.

All criminal cases, as many Members know - perhaps those who are not lawyers will not know - tried by our inferior Courts, that is, the District and Intermediate Courts, are determined by Magistrates, as triers of both law and fact. As the District and Intermediate Courts (Criminal Jurisdiction) Act stands, it entitles a convicted person to appeal against his conviction or sentence, whilst at the same time conferring on the Director of Public Prosecutions (DPP) a correlative right to appeal against the dismissal of a charge or an unduly lenient sentence.

On the other hand, Mr Speaker, Sir, cases heard at first instance before the Supreme Court fall into two categories: one is trials before a Judge without Jury for offences listed, I think, in the Fifth Schedule of the Criminal Procedure Act (drug trafficking offences, piracy offences, gang rape and so on) and Jury trials in relation to other serious offences, including murder and manslaughter, which are commonly referred to as "Assize" cases.

Having said that, Mr Speaker, Sir, whilst a person convicted before the Supreme Court may appeal against his conviction or sentence, the DPP may at present only appeal against the imposition of an unduly lenient sentence by the Supreme Court. This state of affairs gives rise to a blatant anomaly which cries to be rectified.

Mr Speaker, Sir, Judges are human beings too, just as Jury members are. Judicial fallibility is no more but no less than human fallibility. The right to a fair trial is a cardinal requirement of the rule of law. But fairness means fairness to both sides – both to the convicted person as well as to the accused who has been acquitted. We should not forget - very often we do this - the victims and the families of the victims

in all this. They too have rights. The families of a murdered person also suffer. They too have rights, Mr Speaker, Sir.

If we look at what the South African Law Reform Commission on the Right of Appeal of the DPP on questions of fact says, and let me quote, Mr Speaker, Sir –

“To err is human and protection against error is necessary. Judicial officers are fallible with regard to the findings of fact and of law. A court once removed from the heat of a trial is often better able to judge the rationality of factual conclusions, the correct finding of the law and the fairness of the proceedings. Through appeal and review proceedings consistency and uniformity in the application of the law may be achieved. It furthers equality before the law. A right of the prosecuting authority to appeal, although seldom if ever protected in constitutions, recognises these realities and values and it is therefore an essential component of a deliberate and rational decision-making process, a core characteristic of a judicial system which gives expression to the value of the rule of law”.

As the House will be well aware, the majority of cases being prosecuted before the Supreme Court are drug trafficking cases, which are heard before a Judge without a Jury. Judges deliver reasoned judgments in the same manner as Magistrates would, sitting in the lower Courts.

When the Supreme Court dismisses a drug trafficking case and the judgment is considered to be wrong in law or on the facts without the DPP being able to appeal against same, very often - we see it also in the articles in the press; the public does not know the workings of the system - the public comes to the conclusion that not enough is being done to address efficiently this scourge of drug trafficking. The perception is there.

As far as Jury trials are concerned, they date as far back as the 13th century and were recognised in the *Magna Carta*. At common law, the findings of fact of the Jury have long been regarded as sacrosanct to the extent that no appeal could be made against such findings, most probably due to the peculiarity inherent to the trial by the Jury system wherein the Jury is not required to give reasons for its findings. However, with the advent of modern technologies, advanced scientific investigative methods and complex documentary information which are more and more being adduced as evidence in criminal trials, it is not uncommon for jury verdicts to be seen as palpably untenable, unreasonable and perverse. It is not uncommon! Extensive pre-trial coverage of an enquiry in the media, which is within the reach of all of us, may also have an incidence on verdicts. The potential unreliability of jury verdicts reinforces the need to confer a substantive right of appeal against the acquittals on the DPP.

I was listening to hon. Obeegadoo and I said at long last he is reading my speeches because he quoted me extensively about the shortcomings of jury trials. Rightly so! He quoted me rightly and I did say that we intend to look at this again. But today, we are not speaking about jury trials. We are not! This is another debate. In fact, I must say, Mr Speaker, Sir - perhaps hon. Members will not know - the former Attorney General has already referred the matter of jury trial to the Law Reform Commission. We will see what they say. But, today, we are debating a right of appeal against acquittals being given to the DPP – for the sake of justice.

As was to be expected, there has been a *levée de boucliers* against this new power being conferred on the DPP. While I am satisfied - and we have taken legal advice as well - that the amendment is in line with international human rights treaties and our Constitution, I have carefully considered all the objections raised, and in particular those expressed by senior members of the Bar.

Now, as the hon. Attorney General intimated to this House last week when he moved for Second Reading, he did say he will move appropriate amendments to the Bill at Committee Stage, in order to provide for the DPP to be conferred a limited substantive right of appeal against an acquittal following a jury trial in the following specific circumstances -

- (a) first, when there has been a substantial misdirection by the Judge in the course of the summing-up;
- (b) where the jury's verdict is palpably untenable, unreasonable or unsupported by evidence, and
- (c) where a serious irregularity has occurred in the course of the trial, or the acquittal is otherwise tainted.

These limited grounds of appeal, Mr Speaker, Sir, will surely allay the apprehensions of members of the Bar, and strike an adequate balance between the sanctity of a jury verdict, and the need to protect the interests of society and upholding public confidence in the criminal justice system by ensuring that offenders are brought to trial.

Mr Speaker, Sir, some have expressed the fear that the entitlement of the DPP to appeal against a conviction mainly to the violation of the principle of *autrefois acquit* in that an acquitted person ought not to be tried anew for the same offence, that is, no person shall be liable to be tried again for an offence for which he has already been convicted or acquitted.

Hon. Obeegadoo does not have the patient to stay; again he quoted me. He said that I said that no one should have *une Epée de Damoclès sur sa tête* forever. I still stand by this, Mr Speaker, Sir. But I ask hon. Members to look at the Bill carefully again. We are speaking of fresh and compelling evidence. As I

have just said, Mr Speaker, Sir, there have been ground-breaking advances in science. Today, for example, DNA analysis has made it possible to establish to a very high degree of probability, the human source of even a minute quantity of biological samples - be it blood, semen, saliva, hair and so on.

We have seen many such cases in the United Kingdom. I am talking about the United Kingdom, because I see hon. Members now want us to copy completely London.

Hon. Uteem spoke of the Birmingham Six; he said he was there when he was a law student. But I don't know whether he knows the facts. He mentioned it, but does he know what happened. The Birmingham Six were six men, in fact, who were sentenced to life imprisonment in 1975 for pub bombings. They appealed to the Court of Appeal. They were condemned in 1975; they were found guilty. They appealed to the Court of Appeal in 1976, but their appeal was dismissed.

Following a book published in 1986 - some 11 years later - by a journalist, Mr Chris Mullin, called 'Error of Judgment: The truth about the Birmingham Pub Bombings', where the author set out a detailed case supporting the men's claims that they were innocent. What is more, the author went further. He said he actually met some of those who were actually responsible for the bombings. Not dissimilar from 'l'Amicale' case! Hon. Fakeemeeah mentioned it many times. Not dissimilar to that! With this book the Home Secretary then decided he will refer the case back to the Court of Appeal. What we are interested in is justice. Not falsehood but justice. The Home Secretary, following the publication of this book, referred the case back to the Court of Appeal. In January 1988 - remember they were in prison in 1975 - the Court of Appeal, after hearing it, held that these convictions were safe and satisfactory. So, back to square one!

Over the next few years, newspaper articles, television documentaries, other books brought forward new evidence to question the safety of the convictions. Campaign groups were then formed calling for a retrial - similar to 'l'Amicale' case. There was a new trial in 1991. This time, evidence of Police fabrication, new forensic evidence were brought forward. The new evidence were so clear that the Crown itself decided in the face of this startling new evidence, not to resist the appeals, and the six men who were sentenced to life imprisonment in 1975 after multiple attempts finally regained their liberty in 1991, that is, 16 years later, Mr Speaker, Sir.

Who would wish to have the innocent languish in jail? The same thing happened in the case called the Guildford Four and the Maguire Seven. They were also convicted in 1975 and 1976. I won't go into the details of who they were. But these convictions were, after a similarly long campaign, eventually declared unsatisfactory, and reversed in 1989 and 1991 respectively, that is, after they had served 15 and

16 years in prison. We are talking about the United Kingdom, where innocent people who served these long sentences in prison while they were not guilty!

There is a recent case, not so long ago, of a 14-year old girl attending High school who was murdered. Her name was Nanine Grimes. She was murdered, others were arrested, but the guilty was never found. The guilty was only found 25 years later, Mr Speaker, Sir, thanks to a blood sample obtained from him who identified him through the DNA database. We had the debate about the database, whether we should have one, and you see the importance. He had another completely different incident, his blood sample was taken. I can't remember whether it was a drink-driving or whatever. His blood sample was taken, and eventually he was caught 25 years later! The girl was 14, and the murderer was 16 at the time when he murdered the girl. He was caught at the age of 41. So, I ask hon. Members of the Opposition: would it have been right to allow the innocent person to languish in jail and the guilty to be free? Even for one day it is not right. So, according to what I heard, injustices must be allowed to continue. The answer is a resolute no, Mr Speaker, Sir.

Some barristers have spoken of the dangers of fabrication of evidence. A Senior Counsel has made reference to the notorious case of Shamoogum - a notorious habitual criminal who gave a statement at the then Prime Minister's residence - now leader of the remake - who made an allegation of murder against the then former Deputy Prime Minister, Sir Gaëtan Duval.

The Senior Counsel, himself - I reread the article in the interview he gave - went so far as to say that Sir Gaëtan Duval could have been hanged on the basis of fabricated evidence. He knows what he is speaking about. He knows very well who was the instigator behind this fabricated evidence. I am surprised, as a barrister, he has apparently no qualms about socialising with this very person, even pushing him forward as the new leader.

Mr Speaker, Sir, this is precisely such gross injustice that the Criminal Appeal (Amendment) Bill seeks to avoid. We cannot allow injustices to go on if we know there are fresh and compelling evidence, there are fabricated evidence and all these things. Some have made reference to the double jeopardy rule, and questioned the unconstitutionality of this Amendment Bill.

Although, I must say Mr Speaker, Sir, the reference to the query about the constitutionality of this Bill was made timidly. I didn't hear a lot - maybe they have realised. But let me say we have looked at this very carefully, and we are satisfied that the constitutionality of this Bill is beyond doubt.

Indeed, there is a judgment of the Judicial Committee of the Privy Council in the Trinidad and Tobago case of *Boyce v State*, which lays rest to any contrary proposition. The Judicial Committee was of the view in that case that the qualification in the Constitution of Trinidad and Tobago which says

‘except upon the order of a Superior Court’ was sufficient to uphold the constitutionality of the DPP’s right of appeal against an acquittal in that it did not infringe the *autrefois* acquit principle. Now, the very words ‘except upon the order of the Supreme Court’ are mirrored in section 10(5) of our Constitution. So, I hope even this timid argument will be put to rest.

As pointed out, Mr Speaker, Sir, by the hon. Attorney General in his speech, many Commonwealth jurisdictions have enacted legislation to provide for the conferment of a substantive right of appeal against acquittals on the DPP. In the South African Law Reform Commission, it says –

“For the most comprehensive power of all, one turns for example to Singapore whose law provides for an appeal by the Public Prosecutor against acquittal or sentence "on a question of fact or a question of law or on a question of mixed fact and law" without any need for leave”.

The extensive comparative study of the South African Law Reform Commission of Commonwealth – I think somebody mentioned commonwealth countries - African, Asian and American jurisdictions on the subject was instrumental to the Commission’s conclusion that a substantive right of appeal, both in the law and on the facts, ought to be conferred on the DPP. That is the conclusion and they have done so in South Africa.

Therefore, there are cogent and adequate reasons for conferring on the DPP a right of appeal against acquittals.

Mr Speaker, Sir, in this modern international era, one must not lose sight of the victims and the families of the victims. Indeed many States around the world are promoting and fostering the rights of victims, even to the extent of giving statutory recognition to these rights. I am proud to say, Mr Speaker, Sir, that we are also moving in that direction. The House will surely recall that the Police and Criminal Evidence Bill, which was introduced in this Assembly earlier this year at First Reading, contains many provisions to guarantee the rights of victims, and we have plenty of time to look at the Bill. Any wrongful acquittal definitely has an adverse impact on the right to justice of victims.

Mr Speaker, Sir, there is another point which I wish to raise, because I see some - I am not saying hon. Members - I think, confuse this with the Commission on the Prerogative of Mercy. The Commission on the Prerogative of Mercy simply ‘forgives’ or affords clemency to a ‘wrongly’ convicted individual. That individual has an undeniable right to seek redress by having such wrongful conviction quashed. What the Commission does is simply to forgive; it is not quashing it. It is giving clemency. Indeed, with the rapid evolution of science, evidence that was not available at the time of a trial may become available so many years later. I have just given so many examples. In addition, documentary evidence and

testimony may also become available at a later stage. It is against this background that the new section 19A is being inserted in the Criminal Appeal Act.

Mr Speaker, Sir, one hardly needs to be reminded that section 10(5) of our Constitution, which provides for the possibility of retrials upon the order of a superior Court – it already provides this. It is similar to Article 6 of the European Human Rights Convention. Protocol No. 7 to the ECHR, Article 14(7) – because hon. Jugnauth mentioned the ICCPR - and its interpretation thereof by the United Nations Human Rights Committee, it can safely be said that clause 8, from what the interpretation is of the Bill, will meet the test of constitutionality, and does not offend the rule against double jeopardy rule.

However, the review of acquittals must not be made in a haphazard way either. There must be appropriate safeguards in any legislation catering for such review. We have done so in clause 8 of the Bill by the insertion of subsections (4) and (5) in the new section 19A of the Criminal Appeal Act. A review of the previous acquittal will only be granted by the Court of Criminal Appeal where fresh and compelling - I stress the word - ‘evidence’ is available, and any retrial is likely to be fair, having regard to all the circumstances. Fresh evidence, according to this Bill, means evidence which was not adduced at the trial and could not have been obtained with the exercise of reasonable diligence at the trial, and I stress the words ‘reasonable diligence’

These provisions are of the utmost importance in the quest to balance the rights of an acquitted person and the need to preserve the main objective of the criminal justice system, that is, to bring offenders to trial so as to uphold public confidence in the criminal justice system. Indeed, the requirement that fresh evidence could not have been obtained with reasonable diligence is very important.

The new Section 19A of the Criminal Appeal Act, as worded, will allay any fear of fabrication of evidence solely for the purpose of applying for a review of acquittals; that also, we have safeguarded.

We are not giving everybody who has been convicted a second bite at the cherry. We have circumscribed the parameters for review and retrial very carefully.

The appellant must satisfy these requirements, including, as I said, fresh and compelling evidence, a tainted judgment and so on.

Both the Commission, but more importantly, Mr Speaker, Sir, the Judges of the Supreme Court, I am sure, will analyse the fresh and compelling evidence very carefully.

It will certainly exclude evidence that could have been obtained. It must be genuinely fresh and compelling, and it must be evidence that is reliable; the compelling evidence must be substantial and highly probative of the case against the convicted or acquitted person.

Lastly, Mr Speaker, Sir, I think I have already answered it if you think of what I have been saying, but they have asked: why that hurry? Why could we not wait for a few more months? Some, the

way they were speaking, I thought they were going to say; why not have a referendum? Some have even inferred - I know you have said not to mention cases, I am just mentioning *en passant* – the ‘Harte’ case. There are only two cases which have been mentioned - we are not going into the decisions - the ‘Harte’ case and the ‘l’Amicale’ case.

Let me tell the hon. Members we follow it very carefully, because the ‘Harte’ case has international ramifications. It is important for us to find the guilty. But it will have to satisfy the requirements, not to my knowledge – so far as I know. There will have to be fresh and compelling evidence for review and retrial. They must satisfy all the criteria laid down in the Bill.

Mr Speaker, Sir, I have given examples earlier of the innocent being locked up in jail for many, many years. I have also given an example of a guilty person being tracked down after 25 years. Today, with the advances of science, evidence that could not have been available can be available now. DNA analysis today is not only available to track down the guilty, not just that. It is also - and I think I should remind hon. Members that DNA is not just used to find the guilty – a powerful tool to eliminate those who are wrongly suspected of criminal offences straightaway. It works both ways. Let us not forget, Mr Speaker, Sir, that when an innocent person has been wrongly convicted, it also means something else. It means that the guilty person is roaming about freely to recommit another serious offence, free to murder again. As Lord Justice Sedley of the Appeal Court of the UK said, and I quote –

“A legal system can promise to be fair, but it can never promise to be infallible.”

What is important, in the interests of society, is that the guilty should not be allowed to walk free even one day more than he should, and the innocent should not be allowed to languish in jail even if it is for one day more than he should. The interest of justice demands that neither should be the case.

Thank you, Mr Speaker, Sir.

The Minister of Agro-Industry and Food Security, Attorney General (Mr S. Faugoo): Mr Speaker, Sir, allow me to start with by thanking all Members from both sides of the House who have participated and intervened on the present Bill which is before the House, that is, the Criminal Appeal (Amendment) Bill.

We have had a lengthy debate, Mr Speaker, Sir, on the present Bill. I have taken note of all the points that have been raised by the Leader of the Opposition and also other Members from the Opposition side. In fact, it is not important...

(Interruptions)

I was going to say that - to rebut the points that have been raised. I am grateful to the Prime Minister who was taken the time to rebut all the points I must say, not most of them, but all the points. Three quarter of

the points that were raised from the other side was more on the form than on the substance, Mr Speaker, Sir.

Let me reiterate again that the amendments that the Government is bringing today are yet another measure in the reform process to enhance the criminal justice system of our country; a reform process which started back in 1995. They are talking of rushing through this particular Bill. I think we were talking of the reform process of the Judiciary and the administration of justice. We should go back to 1995 when, in the Labour Party's manifesto before the election, we had put that we are going to modernise our institutions, which included the Judiciary, the legal profession and the whole administration of justice. So it was not out of the blue that the hon. Prime Minister, for the first time ever, as he put it himself in the history of this country set up the Presidential Commission to enquire and report on the structure and operation of the Judiciary, the whole judicial system of our country, and also on the legal profession. This is the famous report which we call the Mackay report of 1987. Since then, Mr Speaker, Sir, we have had so many Bills, each of them targeting to reform the administration of justice, to make it better, to make it more accessible to the public.

I recall the first one which was brought to this House. It was by yourself, Mr Speaker, Sir, when you were Minister of Justice and Attorney General. That was back in 1999 after the Mackay report. That was the first Bill which was introduced with a view to enhance the administration of justice. What was provided for in that particular Bill - I won't go in the details of the Bail Act - it was to set up the Bail and Remand Court, something which never existed before. This was a measure that was taken because of development in mass communication, because we didn't need to bring prisoners from Beau-Bassin, all the way taking them in the bus; Magistrates in District Courts waiting for them until after noon just to sort of renew their bail or their remand – most of the prisoners, Mr Speaker, Sir. So, that was the first, and we continued except, I must say, that the reform process was put on hold between 2000 and 2005. This can be checked. I am talking of facts.

There was not a single Bill or legislation that was brought between 2000 and 2005 to further enhance the administration of justice in this country, be it civil or criminal, Mr Speaker, Sir. So, when my learned friend says that it would seem that the Opposition has brilliant ideas, but not when they are in Government, but only when they are in Opposition, Mr Speaker, Sir. When you have a look at the reform, it reflects 2000; the Mackay report was there. The recommendations of the Mackay report were there. Before we lost the elections in 2000, we brought so many amendments, so many changes, Mr Speaker, Sir. When we came back in 2005, in 2008 we brought at least...

(Interruptions)

I am only talking of the recommendations of the Mackay report. We brought the Law Practitioners (Amendment) Act for international law firms, Mr Speaker, Sir. We brought the International Arbitration Act - setting up, *inter alia*, a permanent Arbitration Court. We also brought the law to do with LAVIMS Project Implementation Act, provisions regarding land registers. In 2011, again to enhance the administration of justice, the Court Ushers (Amendment) Act, which made it possible for ushers in private practice to be used in the system. We brought the Law Practitioners (Amendment) Act, which set up the Judicial Studies Board, and provisions regarding Continuing Professional Development, Mr Speaker, Sir, which is working well today. We also brought the Institute of Judicial and Legal Studies for continuing judicial and legal education, Mr Speaker, Sir.

We brought again in 2012 the Bail amendment to once again further enhance the administration of justice, especially something to do with the liberty of the citizen; an amendment which allows for courts to be open on Saturdays and even Sundays, and Magistrates to be on call, Mr Speaker, Sir - going a long way to cater for prisoner's rights, and people who have been arrested. We have brought the Legal Aid Act, again bringing justice for those who cannot afford, Mr Speaker, Sir. So, it is not only as hon. Jugnauth put it: my statement was impressive. Our action has been impressive; not today, since 1995. It was not out of the blue. It was the vision of the Prime Minister for a modern country, with a modern judiciary, Mr Speaker, Sir. Now, I have listened carefully to the Leader of the Opposition, and also to the other Members who took part in the debate from the other side of the House.

At the end of the day, Mr Speaker, Sir, I must say what I and most of us from this side of the House have retained from the interventions of the Members from the other side of the House is that we rushed through this Bill. This has been answered; this has been demolished by the hon. Prime Minister when he stated the list of Bills which have been rushed through.

So, this does not hold any water, Mr Speaker, Sir. What is important, apart from some queries here and there on the constitutionality of the amendments and also whether we are departing from the established principles of double jeopardy, whether the amendments we are bringing today are in infringement of those basic principles of law?

The crux of their disagreement, I must say, is that Government should have replicated the CCRC model, the Criminal Cases Review Commission model, which exists in the UK under the Criminal Appeal Act of 1995. This was, in fact, the official proposal by the Opposition. I recall, when the Leader of the Opposition was intervening, he said that this could have been a landmark legislation, Mr Speaker, Sir. I am using his own words. It could have been, if we had acceded to their request. But the request was only to add the CCRC model. The request was not to do away with the Bill that was before the House already; it was not at all to do away with the provisions of the Bill. Over and above the provisions

of the Bill, the proposition was to add the element of 'Commission', the CCRC model which exists in the UK, Mr Speaker, Sir. So, what does it mean? That the Bill, as it is framed, the Bill, as it was presented to the House, is a good Bill. It is a landmark legislation already in itself. It could have been better, in their view, not necessarily ours, if we had added one extra provision, meaning the CCRC model of the UK. What is more important? Let me put a question.

They have all on the other side queried, and asked time and again why we are rushing with the Bill. We should have moved cautiously; this is what they say. The Leader of the Opposition stated how long they took in the UK to come with the CCRC. Rightly so! He said in 1991 the Royal Commission was set up. Rightly so! 1995, the Criminal Appeal Bill was passed in the UK; 1997, the Criminal Cases Review Commission started its operation, six years nearly after. So, why are we rushing? This was the question put by the hon. Leader of the Opposition. Six years it took in England. There was the Commission, the law and then the functionality, the starting of the CCRC.

But, on the other hand, what was the proposal? To replicate the CCRC model with the stroke of a pen in the present legislation, Mr Speaker, Sir! Is that not rushing? What were they saying at the end of the day? There is a Bill before the House to amend the Mauritian Criminal Appeal Act; it is an amendment Bill. They were saying to amend the Amendment Bill with the stroke of a pen, to bring in what exists in the UK. So, which is which, Mr Speaker, Sir? It is contradictory! When the Member is saying that we are rushing through, at the same time the proposal was not rushing, it was more than rushing! With the stroke of a pen, we include without any debate, without any consultation, without any national debate! You come through the backdoor, you amend a Bill which is before the House, and you introduce a system which is not working in the UK itself, which has yet to prove! There are so many questions being put on the working of the CCRC, Mr Speaker, Sir.

Mr Speaker, Sir, do we really need the CCRC as it exists in the UK? It is very important to remember the background to the creation of the CCRC in the UK. As we all know by now, that CCRC was created following recommendations made by the Royal Commission on Criminal Justice, following Runciman Commission, which was established in 1991 after a number of high-profile cases - which were mentioned both by Opposition Members and also by the Prime Minister earlier on - including the Birmingham Six and Guildford Four, came to light and shook public confidence in the criminal justice system. They had come in that country to a point that they had to set up the Royal Commission to study.

How, we, in Mauritius, come to that stage, Mr Speaker, Sir? We are not convinced that the same conditions exist in Mauritius. Some people may be dissatisfied or aggrieved by individual judgments. But we don't have the kind of outcry that the UK experienced at that time, Mr Speaker, Sir. Over there, it was triggered, as I said, by the public outcry in the root of the criminal justice system. We cannot here

adopt on a wholesale basis what was done over there for a cause, what was done over there after recommendations of a Commission that was set up by the Government over there. We cannot, here, Mr Speaker, Sir! What are we trying to do today? The provisions in the present Bill, Mr Speaker, Sir, deal with the question of retrial, trial *de novo*, and not an appeal which is restricted to the Court record, the proceedings of the Court.

In England, as rightly pointed by so many Members of the House, under section 78 of the Criminal Justice Act of 2003, the prosecutor can apply for retrial on new and compelling evidence. This is the law in the UK. So, the prosecutor, in fact, with the consent of the DPP, can apply for retrial on new and compelling evidence. This is exactly what we are doing here, Mr Speaker, Sir. We are allowing the DPP to appeal against an acquittal, person acquitted of a qualifying offence, on indictment or on appeal against conviction, verdict, or findings in proceedings on indictment. As I said, in the UK, prosecutor with the consent of the DPP, who is satisfied that there is new and compelling evidence, it is in the public interest and the principle of fair trial is respected, applies to the Court of Appeal for order quashing acquittal and for retrial. This is exactly what the Bill which is before the House purports to do, Mr Speaker, Sir, that is, we are giving the right to the DPP to go to the Court of Appeal to ask for a review with a view to retrial. We are also, at the same time, extending this to the convicted person.

We are going further, Mr Speaker, Sir. We are giving the right to the convicted person to either go to the Court of Appeal if he feels that he already has fresh and compelling evidence. We are not barring the convicted person to go directly to the Court of Criminal Appeal and ask for review with a view for a retrial. We are also opening the door, and this was following the discussions which we had with the Opposition, Mr Speaker, Sir. It is true that, in practice, there are so many convicted persons who, may be, cannot afford to gather fresh or compelling evidence. This is why we have given him the right and the possibility of also going to the Human Rights Commission, where he can apply. If he is satisfied that there is fresh and compelling evidence, he can ask the Human Rights Commission to refer the case to the Court of Criminal Appeal, Mr Speaker, Sir.

There is one thing which is very important for us to understand. In all these scenarios, whether it is the DPP or the convicted person who goes directly to the Court or to the Human Rights Commission, he is asking for a retrial. Whereas in England, under the Criminal Appeal Act of England, which we were asked by the Opposition to adopt and to put in the present Bill, one must look at section 9 of that particular Act, that is, the Criminal Appeal Act of 1995. There is a basic difference between the provisions which we are proposing today, the application for a new trial through review and the provisions which exist under the Criminal Appeal Act of UK, which says under section 9, Mr Speaker, Sir, I quote –

“Where a person has been convicted of an offence on indictment in England and Wales, the Commission -

(a) may at any time refer the conviction to the Court of Appeal”.

And under subsection (2) of the same section, it says -

“A reference under subsection (1) of a person’s conviction shall be treated for all purposes as an appeal by the person under section (1) of the 1968 Act against the conviction”.

So, under this particular law, even if it is referred by the CCRC to the Court of Appeal in the UK, it is restricted to the Court proceedings, to the Court record. It is not a retrial proper. What we are doing is that we are going further than what is provided for under the Criminal Appeal Act in the UK, Mr Speaker, Sir, because when a retrial will be given by the Court of Appeal to a convicted person, he will be able to adduce new evidence. He will be able to cross-examine witnesses, whilst in this case he cannot. So, we are going further to enhance the interest of the convicted person if there is fresh and compelling evidence, Mr Speaker, Sir.

I would also refer here to section 21 the Criminal Appeal Act of 1955, Mr Speaker, Sir. It is important that I quote section 21 which says –

“(...) nothing in this Act shall affect the prerogative of mercy.”

Prerogative of Mercy is one body of law, but -

“(...) the President on the consideration of any petition for the exercise by him of mercy having reference to the conviction of a person before the Supreme Court or to the sentence passed on a person so convicted, may if he thinks fit at any time refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted.”

This resembles section 9, Mr Speaker, Sir. We have it in our law and this has not been excluded. We are not repealing this provision by the provisions of the present Bill. This is in the law. The convicted person has the possibility to go before the President. Maybe, this has not been exercised by previous Presidents. This is another issue, another debate. But, the law is there. The law is similar to that which is provided under the Criminal Appeal Act 1995 of UK, Mr Speaker, Sir.

A lot has been said on the criteria, the test that has to be satisfied. We have said, because we are dealing with serious cases before the Supreme Court, drug cases, murder cases and manslaughter cases, Mr Speaker, Sir. Can we open a case when one has exhausted all the avenues? A case has gone through the first time trial on the merits, they have exhausted the right of appeal to the Court of Appeal; they have

gone to the Privy Council. Can you, on a balance of probabilities, if there is the evidence, allow a case to be reopened and retried? This is not possible, Mr Speaker, Sir. It has to be strong evidence. It has to be fresh evidence, and it has to be compelling evidence, Mr Speaker, Sir.

In this case, where a convicted person goes to the President, there is no test, Mr Speaker, Sir. It can be anything, any kind of miscarriage of justice. In fact, it is more open than section 13 of the Criminal Appeal Act of 1995 in the UK. In the UK, under section 13, Mr Speaker, Sir, the Commission can only refer the case to the Court of Appeal if there is a real possibility that –

“(...) the conviction, verdict, finding or sentence would not be upheld were the reference to be made,”

And again,

“(b) the Commission so consider -

- (i) in the case of a conviction, verdict or finding, because of an argument, or evidence not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it (...).”

And, again, under subsection (2) -

“Nothing in this subsection (...) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances (...).”

All these grounds can apply to the power that has been given to the President of the Republic, under section 21 of the Criminal Appeal Act, Mr Speaker, Sir. It can go over and above what is there. This has been defined under section 30; over there it is open. That law, as I said, is not being repealed. So, it is still open.

Mr Speaker, Sir, what we are doing today is a giant step forward in the interest of criminal justice, be it from the convicted point of view or be it from the victim point of view. As rightly pointed out by the hon. Prime Minister, there are always two sides to a criminal case. There is the accused party who has been convicted. There is the accused party who has not been convicted, the case has been dismissed or a verdict of not guilty has been entered. But, there is in that particular case the right of the victims, Mr Speaker, Sir. If ever, as rightly quoted by the hon. Prime Minister, there was a case where the accused was 17 or whatever, and then when he was 41 there were fresh evidence found. So, the question which we should have asked ourselves is: if there is fresh and compelling evidence which shows that an accused party who has been wrongly acquitted, does he walk away scot-free, Mr Speaker, Sir?

Is it not the duty? Is it not in public interest? Is it not in the interest of justice? Is it not the way forward in upholding the criminal justice system? Is it not compatible to the right of the citizens and the right of the victims of this country, Mr Speaker, Sir, to allow the DPP to ask for review when there is ‘fresh and compelling’ evidence? But the process does not end with the DPP; he still has to go to the Court of Appeal for review before three Judges, including the Chief Justice who is the President of the Court of Appeal, Mr Speaker, Sir. So, this is a very high test and, here, I must say there were points raised in this House, whether, hypothetically in a case where Police has retained certain evidence which could have been adduced and used in the proceedings of a case, can they afterwards have a second bite to the cherry? Can they come forward and apply for review with a view to have a retrial so that they can use those evidences again? And the answer is ‘no’. Because when we have defined ‘fresh evidence’; we have defined ‘compelling evidence’. This is not on, Mr Speaker, Sir; this is not the intention of the Government. We have brought the law, and clearly this is not our intention.

On the other hand, if the Police have refused to disclose certain evidence that they have in their custody, be it in the form of an exhibit or any other evidence, Mr Speaker, Sir, and they have somehow managed not to disclose it to the accused and the accused did not know about it, so, he could not use it. Can he, at a later stage, from his point of view, go to the Court or go to the Human Rights Commission, and say that there is ‘fresh evidence’? The answer is ‘yes’, Mr Speaker, Sir. This is our intention. This is exactly what we want; this is exactly what is intended in the present Bill, Mr Speaker, Sir, when we say, by either side, either the DPP or the convicted person have ‘fresh and compelling’ evidence. So, as I said, at the end of the day, there is a major difference between CCRC and the Criminal Appeal Act of 1995 in the UK, that is, when a case is referred by the CCRC, it is like an appeal. We are talking of opening of a case, that is retrial altogether of a case, Mr Speaker, Sir. This is the first point I wanted to make.

The second point which has been raised, Mr Speaker, Sir, is on the constitutionality of the provisions under the present Bill and, again, even if this has been said earlier, I must repeat here, that to have a proper understanding of the provisions of the Bill, one must take cognizance of section 10 (5) of our Constitution. Let me quote section 10 (5) of the Constitution, which says –

“No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, (...).”

Had it stopped there, we could not have come in this House with the present amendment of the Criminal Appeal Act, Mr Speaker, Sir! Had it stopped there! But it is implicit when one reads section 10 (5), the second part of the provision where it goes -

“(...) except upon the order of a superior court in the course of appeal (...)”.

And this is, in practice, how it works under the Criminal Appeal Act today. When a case is being heard on appeal, the Judge has the power, the Court of Appeal has the power to order a retrial, and this is based on this particular provision, but there is no substantive provision in our law to cater for review of proceedings, Mr Speaker, Sir. So, it says -

“(...) except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal”.

This is exactly what we are doing. So, we are bringing in law, legislation with a view to give the right to the DPP and also, at the same time, to the convicted person to put in question convictions and acquittal, if there is ‘fresh and compelling’ evidence.

Therefore, the amendments being proposed are within the ambit of section 10 (5) of the Constitution, and there is no need to amend the Constitution. Otherwise, if this was not possible, we could not, through a simple Bill, Mr Speaker, Sir, bring such changes; this would not have been possible at all.

The amendment to the Criminal Appeal Act is also consistent with section 2 of the Constitution, Mr Speaker, Sir. As I said, section 10 (5), we also need to take note of section 2 of the Constitution which says –

“This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void”.

So, section 10 (5) provides for exceptions. One exception is retrial in the course of an appeal; second possibility is a retrial in the course of review proceedings, and this is what we are making provision for, Mr Speaker, Sir.

As far as the right of the DPP to appeal is concerned, a lot has been said; whether this infringes the sanctity of a verdict of acquittal by the jury; the right of the DPP to appeal when a judgment is given for a lesser offence than the charge which was before the court. For sentence, it was there, and we are maintaining, but we are extending the DPP to appeal in two circumstances –

- (i) when the court finds an accused guilty of a lesser offence, and
- (ii) when a charge is dismissed or there is an acquittal by the Jury.

So, my friends on this side of the House have said that the DPP already has the power to appeal against sentence and conviction both on facts and law from the judgment of a District Court and Intermediate Court. Why should we stop there? Is it in the interest of justice? Is it in the interest of victims if there is ‘fresh and compelling’ evidence? I am not talking of review here; I am talking if there

is any miscarriage of justice, Mr Speaker, Sir. Why should he not be allowed to appeal and, again, we have been very cautious, I said it in my speech last week on Tuesday, Mr Speaker, Sir, that we are not giving an absolute power to the DPP; we are qualifying the power; we are saying that the DPP will be able to appeal only when there is a substantive misdirection given by the Judge to the Jury. That is on the law. Among the facts, he can only appeal if the judgment is tainted, if it is manifestly unreasonable, Mr Speaker, Sir. So, we are not opening the door large so that the DPP can appeal in any case.

Again, Mr Speaker, Sir, we are in a democratic country; we are in a country which has a Constitution. The post of the DPP is a constitutional post; it is an institution by itself. We are not talking of one person here; we are talking of an institution.

Will anybody take the risk to appeal against cases frivolously and lose the cases on appeal, so that at the end of the day they are seen to be as persecutors? Who will do that, Mr Speaker, Sir? Who will take the risk? We amended the law on committal proceedings - I think that was back in 2012 - but the question we should ask ourselves, we have given the power to the DPP without committal proceedings to prosecute cases. But how many cases have been prosecuted without preliminary hearing, Mr Speaker, Sir? We have to have trust in our institutions, we have to have trust in the functioning of our institutions, and also in the independence of our institutions, Mr Speaker, Sir.

Allow me briefly, Mr Speaker, Sir, to answer to few of the points that have been raised here and there by some of the hon. Members. The first point which was taken by hon. Obeegadoo, Mr Speaker, Sir, he said that the possibility of appeal against jury's verdict heralds the end of the jury system, and a danger to justice for accused parties totally overlooks the fact that, as long ago, as in 1970, Mr Speaker, Sir, a large number of jury trial cases were removed from Judge and Jury from the Supreme Court and transferred to the intermediate Court to be tried by Magistrates. At that time, there were two Magistrates sitting at the Intermediate Court. Then, the law was amended where one Magistrate could sit even at the Intermediate Court. This has not led to justice to accused persons being undermined, Mr Speaker, Sir. Not at all! As I said, we are not undermining the trial by jury system. We are reinforcing the administration of justice. We are reinforcing the criminal justice system, Mr Speaker, Sir.

There were few points which were raised by hon. Bodha. Maybe there is one, which I feel I need to reply. He asked a question whether under section 4 of the Human Rights Commission, where there are limits to enquire on matters which occurred two years preceding their complaint. This won't apply because there is a new clause 4(a) which we are adding. It can enquire into any case occurred any time before or after the passing of the present Bill, Mr Speaker, Sir.

I think I have done with most of the points that were raised. There were few points raised by hon. Jugnauth, Mr Speaker, Sir, as to whether if a person chooses to go to the President under section 21. Section 21 and the provisions of the Bill are not mutually inclusive, Mr Speaker, Sir. They are mutually exclusive. So, if a convicted person chooses to appeal to the President for mercy or asks the President to refer, where he has the power to refer the case to the Court of Appeal, he can always, under the present legislation, ask for review provided there is fresh and compelling evidence, Mr Speaker, Sir.

There was another point which was raised again as to whether if a convicted person has exhausted his appeal, he has even gone to the Privy Council, if there is a judgment of the Privy Council, whether the door will still be open for him to go for review. This is so, Mr Speaker, Sir, he can always go for review.

To conclude, Mr Speaker, Sir, I must say that this is a big step forward. This is not the end. We will be coming again with other legislations to enhance the administration of justice of this country, Mr Speaker, Sir. We believe in our institutions.

With these words, Mr Speaker, Sir, I again commend the Bill to the House.

Question put and agreed to.

Bill read a second time and committed.

COMMITTEE STAGE

(Mr Speaker in the Chair)

THE CRIMINAL APPEAL (AMENDMENT) BILL

(NO. XIX OF 2013)

Clauses 1 to 4 ordered to stand part of the Bill.

Clause 5 (Section 5 of principal Act amended)

Motion made and question proposed: “that the clause stand part of the Bill”.

Mr Faugoo: Mr Chairperson, I move for the following amendments in clause 5 –

- “(i) in the proposed subsection (2) -
 - (A) by inserting, after the words “Supreme Court”, the words “or a verdict of the jury”;
 - (B) in paragraph (a), by adding the words “or a person has been acquitted”;
- (ii) by adding the following new subsection -

(3) No appeal shall lie against an acquittal following a verdict of not guilty except on the ground that –

- (a) the trial Judge gave a substantial misdirection in the course of his summing-up to the jury;
- (b) the verdict is unreasonable or cannot be supported having regard to the evidence; or
- (c) a serious irregularity occurred in the course of or in relation to the trial, or the acquittal is otherwise tainted.”

Amendments agreed to.

Clause 5, as amended, ordered to stand part of the Bill.

Clauses 6 and 7 ordered to stand part of the Bill.

Clause 8 (New Section 19A inserted in principal Act)

Motion made and question proposed: “that the clause stand part of the Bill”.

Mr Faugoo: Mr Chairperson, I move for the following amendments in clause 8, in the proposed new section 19A -

- “(i) in subsection (1)(b), by deleting the words “subsection (4)” and replacing them by the words “subsection (5)”;
- (ii) by inserting, after subsection (3), the following new subsection, subsections (4) and (5) being renumbered as (5) and (6), respectively

—

(4) (a) Notwithstanding subsection (2), where a person, who has been convicted following a trial before the Supreme Court, makes an application to the Human Rights Division under section 4A of the Protection of Human Rights Act, the Human Rights Division may, subject to paragraph (b), refer the conviction to the Court for a review of the proceedings relating to the conviction.

(b) The Human Rights Division shall not refer a conviction to the Court unless it is satisfied, having regard to any fresh and compelling evidence, that there is a real possibility that the conviction will not be upheld if the reference is made.

(c) Any reference by the Human Rights Division to the Court shall be made and determined in accordance with Rules of Court.

(iii) in the newly renumbered subsection (5) –

(A) by deleting subparagraph (i) and replacing it by the following subparagraph -

(i) shall, where an application has been made under subsection (1) or (2), grant the application;

(B) by inserting, after subparagraph (i), the following new subparagraph, the existing subparagraphs (ii) and (iii) being renumbered as subparagraphs (iii) and (iv), respectively -

(ii) shall quash the conviction or acquittal, as the case may be;

(iv) in the newly renumbered subsection (6), by adding the following new definition, the full stop at the end of the definition of “fresh evidence” being deleted and replaced by a semicolon -

“Human Rights Division” has the same meaning as in the Protection of Human Rights Act.”

Amendments agreed to.

Clause 8, as amended, ordered to stand part of the Bill.

New Clause 9

Mr Faugoo: Mr Chairperson, I move that new clause 9 be added as follows -

“9. Consequential amendment

The Protection of Human Rights Act is amended –

(a) by inserting, after section 4, the following new section –

4A. Application by convicted person for reference to Court under Criminal Appeal Act

(1) Notwithstanding this Act, a convicted person, or his representative, may apply to the Human Rights Division, in such form as may be

prescribed, for an enquiry to be conducted as to whether there exists sufficient fresh and compelling evidence that may satisfy the Human Rights Division that a reference should be made under section 19A(4) of the Criminal Appeal Act.

(2) On receipt of an application under subsection (1), the Human Rights Division shall –

- (a) conduct such preliminary investigation as it considers necessary;
- (b) determine, within a period of 30 days from receipt of the application, whether it will conduct an enquiry into the matter; and
- (c) inform the convicted person, or his representative, accordingly.

(3) The Human Rights Division shall, without prejudice to its other powers under this Act, conduct the enquiry in such manner as it considers appropriate and shall, as far as practicable, complete its enquiry within 6 months from receipt of the complaint.

(4) On completion of the enquiry, the Human Rights Division may –

- (a) grant the application and refer the conviction to the Court of Criminal Appeal in accordance with section 19A(4) of the Criminal Appeal Act; or
- (b) reject the application,

and shall forthwith inform the convicted person or his representative of its decision.

(b) in section 6 –

- (i) in the heading, by deleting the words “**and duties**”;
- (ii) in subsection (1)(b), by inserting, after the words “of any”, the words “Court record or a certified copy thereof.”

The Chairperson: The question is that new clause 9 be read a second time.

Question put and agreed to.

New clause 9 ordered to stand part of the Bill.

New Clause 10

Mr Faugoo: Mr Chairperson, I move that new clause 10 be added as follows –

“10. Application of Act

This Act shall apply whether a person was or is convicted, or acquitted, before or after the commencement of this Act.”

The Chairperson: The question is that new clause 10 be read a second time.

Question put and agreed to.

New clause 10 ordered to stand part of the Bill.

The title and enacting clause were agreed to.

The Bill, as amended, was agreed to.

On the Assembly resuming with Mr Speaker in the Chair, Mr Speaker reported accordingly.

Third Reading

On motion made and seconded, the Criminal Appeal (Amendment) Bill (No. XIX of 2013) was read a third time and passed.

ADJOURNMENT

The Prime Minister: Mr Speaker, Sir, I beg to move that this Assembly do now adjourn to Tuesday 22 October 2013 at 11.30 a.m.

The Deputy Prime Minister rose and seconded.

Mr Speaker: The House stands adjourned.

MATTERS RAISED

(11.09 p.m.)

CAMP LEVIEUX - AIMÉ CÉSAIRE PRIMARY SCHOOL - HANDRAILS

Mrs L. Ribot (Third Member for Stanley & Rose Hill): Mr Speaker, Sir, the issue which I would like to raise concerns the hon. Minister of Public Infrastructure. I raised that same issue last March, but, unfortunately, nothing has been done yet. Mr Speaker, Sir, I am referring to the primary school Aimé Césaire of Camp Levieux, and to the setting up of handrails in front of the gate and along the walls in front and on the sides of the school.

Mr Speaker, Sir, as I pointed out previously, the school gate gives directly onto the main road, La Concorde Street, which is a very busy one as it is the road leading to the NHDC flats, to Mont Roches and the main supermarket of the region.

Mr Speaker, Sir, I am reiterating my request to the hon. Minister that these handrails be placed before a student of that primary school meets with an accident, and the time is the right one since the school is on holidays right now.

I will kindly ask the hon. Minister to treat that matter as urgent.

The Vice-Prime Minister, Minister of Public Infrastructure, National Development Unit, Land Transport and Shipping (Mr A. Bachoo): Mr Speaker, Sir, I have already transmitted this request to the NDU, and I hope they are going to do the needful, because it also takes time to have those handrails prepared. They have to pass orders and all.

ROSE HILL – MARKET - CONSTRUCTION

Mr R. Issack (Fourth Member for Stanley & Rose Hill): M. le président, j'ai une requête qui est adressée au vice-Premier ministre et ministre des Infrastructures publiques, mon ami, l'honorable Anil Bachoo.

Le marché de Rose-Hill a une place importante pour les Mauriciens en général, et les Rose-Hilliens en particulier. Ce marché malheureusement est dans un état de décrépitude; est dans un état lamentable. Quelques mois de cela, j'ai fait une visite au marché, et j'ai été ahuri par le constat, et quelques semaines après, mon ami l'honorable Deven Nagalingum m'y avait invité à la requête des bouchers, et nous avons constaté l'état de ce marché qui mérite non seulement une rénovation, mais peut-être même une reconstruction.

Donc, au nom des Rose-Hilliens, au nom des députés de la circonscription, je fais une requête au ministre pour qu'il fasse de son mieux pour que ce marché soit reconstruit tout en gardant son aspect patrimonial.

Merci.

The Vice-Prime Minister, Minister of Public Infrastructure, National Development Unit, Land Transport and Shipping (Mr A. Bachoo): Mr Speaker, Sir, I am glad to announce that the scope of work is being prepared.

MILITARY ROAD – AUCTION MARKET

Mr A. Ameer Meea (First Member for Port Louis Maritime & Port Louis East): Mr Speaker Sir, tonight, I am going to raise an issue concerning the Prime Minister.

It relates to the roundabout of ABC Motors, which is situated on the Military Road, whereby in the morning, several days a week, there is a *vente à l'encan*, and the *vente à l'encan*, by law, should start at 5 a.m. in the morning. But what happens is that people come, and the *vente à l'encan* starts at 1.00 a.m. and 2.00 a.m. in the morning. This is causing a lot of problems to the inhabitants of the surrounding, and also there is traffic jam. Early morning, they park everywhere, and even on the roundabout.

So I will urge the Prime Minister to ask the Commissioner of Police to look into the matter, and see to it that the *vente à l'encan* starts as from the time it should have started.

Thank you.

CITÉ L'OISEAU - FOOTBALL GROUND

Mrs F. Labelle (Third Member for Vacoas & Floreal): Mr Speaker, Sir, I would like to make an appeal to the hon. Minister of Public Infrastructure regarding the football ground situated at *Cité l'Oiseau*.

I must say that recently a nice fencing has been put on that football ground, but the levelling work has not been effected, and as the Minister is aware, the inhabitants have been waiting for this football ground since years, some eight years by now. Money has been spent, but up to now, they cannot take advantage of this football ground.

My appeal is: if the hon. Minister could look at this matter urgently, so that the money that has been spent could be cost effective by providing such football ground to the inhabitants.

Thank you.

The Vice-Prime Minister, Minister of Public Infrastructure, National Development Unit, Land Transport and Shipping (Mr A. Bachoo): Well, following the request made by hon. Mrs Bappoo and hon. Ms Anquetil, I still remember that we had given work orders, and quite a substantial amount of money is being spent on that football ground. We have already completed the fencing, and we are left with the lighting. It is only after that that we are going to look at the levelling work.

CANOT – COMMUNITY CENTRE

Mr F. Quirin (Third Member for Beau Bassin & Petite Rivière): M. le président, ma requête ce soir s'adresse à la ministre de l'Egalité des genres, et concerne le centre communautaire de Canot. Ce centre, M. le président, est dans un état déplorable, de même les équipements s'y trouvant. Je vais rapidement énumérer les différents problèmes: les trente ordinateurs ne fonctionnent plus, le tapis de la table de billard est complètement abîmé, il y a un *board* de carrom mais pas de pions, les sanitaires dans les toilettes sont cassés, la cuisine est dans un état déplorable ; manque d'hygiène, la plaque à gaz ne

fonctionne plus, l'éclairage de la cour doit être revu, terrain de volleyball pas de filet, et l'asphaltage du terrain doit être refait. Sur les quatre *fog lights*, il y a deux seulement qui fonctionnent ; même chose pour le terrain de pétanque, la surface de jeux a besoin d'être refaite, de même que l'éclairage; débris de construction entassés dans le jardin d'enfants doivent être enlevés rapidement. Le téléviseur qui se trouve dans le centre ne retransmet qu'une chaîne car l'antenne est cassée. Les bâches qui sont mises à la disposition des habitants du quartier en cas de besoin sont complètement abimées. Le nettoyage du centre ne peut être fait comme il faut, car le *cleaner* n'a aucun détergent à sa disposition. Et il y a aussi, M. le président, pour terminer, une demande accrue des jeunes du quartier pour des équipements de fitness, comme c'est le cas dans les autres centres communautaires, et je compte sur la ministre pour agir promptement.

Merci.

The Minister of Gender Equality, Child Development and Family Welfare (Mrs M. Martin): M. le président dès demain, je vais demander une enquête sur ce centre, et on verra ce qu'on peut faire dans les plus brefs délais.

BEAU BASSIN - WASTEWATER SYSTEM, BASKET BALL & FOOTBALL PLAYGROUNDS

Mr K. Li Kwong Wing (Second Member for Beau Bassin & Petite Rivière): Mr Speaker, Sir, the matter that I am raising is addressed to the hon. Deputy Prime Minister and Minister for Energy and Public Utilities.

Of course, it refers to my Constituency in Beau Bassin, and it has to do with the wastewater system, because most of the wastewater pipes are of small dimension and are under tremendous stress due to an increase in population.

May I ask the hon. Deputy Prime Minister if he could particularly look at three areas in Beau Bassin: rue Père Laval between the temple to Cité Avrillon; secondly, at Cité de Rosnay near the Monique Rayeroux Social Centre and the basketball playground, and thirdly, in Vuillemin between John Kennedy College and the football ground Hervé Duval.

May I request the Deputy Prime Minister to look into the whole wastewater piping system? Because they are causing overflows, which go through the manholes in all the streets.

Thank you Sir.

The Deputy Prime Minister, Minister of Energy and Public Utilities (Dr. R. Beebeejaun): I thank the hon. Member for drawing my attention. I'll look into it, and make sure that things are done.

TEC – TERTIARY INSTITUTIONS - OPERATION

Mrs L. D. Dookun-Luchoomun (Second Member for Quartier Militaire & Moka): M. le président mon intervention concerne le ministère de l'Education tertiaire. Je voudrais interpeler le ministre, et attirer son attention sur la nécessité de revoir le fonctionnement de la *Tertiary Education Commission*.

La *Tertiary Education Commission*, il semblerait, octroie des permis d'opération à des institutions peu fiables sans faire le suivi nécessaire pour assurer que la qualité et le niveau des cours dispensés soient maintenus à un niveau acceptable, et ceci, M. le président, afin de protéger les étudiants contre certaines pratiques malhonnêtes de certaines institutions.

Par conséquent, les jeunes étudiants se font arnaquer, et sont forcés à subir d'énormes difficultés, et là, M. le président, je ne fais pas mention du tort fait à l'image du pays qui s'est fixé comme objectif de devenir un *knowledge hub*, une plaque tournante dans la matière de formation et d'éducation.

M. le président, je fais allusion à une institution tertiaire d'Ébène qui a admis des étudiants étrangers pour des cours qui ne sont ni approuvés, ni accrédités par les autorités mauriciennes. Ces étudiants ont dû déboursier des sommes énormes pour venir suivre des cours de six mois dispensés par l'Oceana International Business School. Ces étudiants ont dû venir à Maurice, et se sont trouvés au bout de quelques semaines devant les faits accomplis. Les cours qu'ils suivaient n'étaient pas reconnus et accrédités par les autorités, et à ce moment-là, l'institution n'a trouvé rien de mieux à leur demander que de changer les cours pour lesquels ils se sont fait inscrire.

M. le président, quand les élèves ont objecté à cela, ils ont dû subir toutes sortes de pressions et de menaces. Mis devant les faits accomplis, ils ont dû courir à la *Tertiary Education Commission*, à la MQA, et finalement il y a eu une réunion au cours de laquelle la décision a été prise que l'institution aurait à rembourser à ces élèves l'argent déposé pour ces cours pour lesquels ils avaient été inscrits. La décision fut prise, M. le président, mais jusqu'aujourd'hui, pas un sou n'a été remboursé à ces élèves, et plusieurs d'entre eux se retrouvent aujourd'hui sans le sou. Certains courent toujours pour voir ce qu'ils pourront faire pour pouvoir continuer à vivre dans ce pays.

M. le président, j'aurais voulu aussi attirer l'attention du ministre sur le prospectus qui a été envoyé à ces élèves. Ce prospectus que les élèves étrangers ont eu, fait mention de '*paid internship*' qu'ils auraient pu avoir à la fin de ces cours, qu'ils allaient aussi avoir des '*internship fees*' de R 5,000 – '*Mauritian rupees*' – par mois. Il a même été dit qu'ils seront placés dans les '*hotel resorts*', dans les '*cruises*' et '*star hotels*', comme mentionné ici dans le prospectus, et qu'ils auraient des '*fees*' qui allaient

s'étendre de 720 dollars à 2,500 dollars par mois, dépendant de l'institution qui les prend. M. le président, c'est choquant !

Je voudrais faire ressortir aussi que non seulement les informations données dans le prospectus sont '*erroneous, misleading*', mais carrément illégales. J'aurais voulu attirer l'attention du ministre sur ce prospectus qui fait mention de «*assured paid internship, free local transportation, assured placement with international cruise lines or star hotels or luxury resorts, work permits*». Et plus grave, M. le président, "*five years of legal stay will earn permanent resident status*". M. le président, voilà ce que ces institutions sont en train de vendre à des élèves étrangers ; certains qui ne sont pas des gens qui ont beaucoup d'argent, mais qui font l'effort de faire le déplacement pour se rendre à Maurice, et pour se retrouver sur la rue, sans le sou.

M. le président, cela a un effet néfaste à l'image que Maurice veut projeter comme un *knowledge hub*. Là, je voudrais demander au ministre de s'assurer que la *Tertiary Education Commission* fasse le suivi voulu, les inspections voulues, et aussi d'assurer que les institutions qui reçoivent des permis d'opération soient *properly monitored*, que l'intérêt des élèves soit pris en considération, que l'image du pays soit conservée, que ces institutions qui fautent soient *taken to task*, et que des sanctions nécessaires soient prises contre ces gens malhonnêtes, qui salissent, non seulement l'image du pays, mais qui gâchent l'avenir du pays, parce que nous, on s'est fixé certains objectifs.

M. le président, je voudrais déposer sur la table de l'Assemblée nationale ce prospectus qui, comme je vous l'ai dit, est non seulement '*erroneous, misleading*', mais aussi carrément illégal.

Merci, M. le président.

The Minister of Tertiary Education, Science, Research and Technology (Dr. R. Jeetah): I would like to thank the hon. Member.

Mr Speaker, Sir, I am aware of one such institution which has, I understand, made some false publicity, not in Mauritius, but I think outside Mauritius. Mr Speaker, Sir, I have - not because of this institution, but also because of some others here locally - requested my Permanent Secretary to look into legal provisions to control what goes about into publicising institutions.

I must also say to the hon. Member that she did ask this question, but every time she removed the question. I would have had the chance to answer earlier. I am well aware, and also perhaps we should not mix what Tertiary Education Commission is doing with MQA courses. I have had discussions with my colleague, the Minister of Education, and we are looking into it. I do agree, Mr Speaker, Sir, that there are some institutions which have not behaved properly, and we are looking into the matter.

Thank you.

At 11.28 p.m., the Assembly was, on its rising, adjourned to Tuesday 22 October 2013 at 11.30 a.m.