THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2017/0234

IN THE MATTER of sections 3, 9 and 11 of the Constitution of Saint Christopher and Nevis

And

IN THE MATTER of an application by the Claimant, RAS SANKOFA MACCABBEE for Declarations, Damages and other reliefs alleging a breach of his rights under sections 3, 9 and 11 of the Constitution and redress pursuant to section 18 of the Constitution of Saint Christopher and Nevis

BETWEEN:

RAS SANKOFA MACCABBEE

Claimant

and

1. THE COMMISSIONER OF POLICE
2. THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Defendants

Appearances:

The Claimant in person
Mrs. Tashna Powell Williams and Ms. Nisharma Rattan Mack for the Defendants
Mr. Anthony Gonsalves Q.C. appearing as amicus curiae

2019: March 19, April 5;
(submissions filed on 23 and 25 April)
May 3

JUDGMENT

[1] VENTOSE, J.: The constitutional structure of the Federation of Saint Christopher and Nevis is one based on, among other things, the entitlement of all its people to the protection of fundamental rights and freedoms and the inherent dignity of each individual. These concepts are found in the preamble to the Constitution of Saint Christopher and Nevis. For example, Chapter II of the Constitution contains the provisions relating to the fundamental rights and freedoms while Chapter IV of the Constitution contains provisions relating to Parliament which shall consist of Her Majesty and the National Assembly. Section 37 of the Constitution states that Parliament may, subject to the provisions of the Constitution, make laws for the peace, order and good government of Saint Christopher and Nevis. Chapter V contains provisions relating to the Executive.

[2] Section 2 of the Constitution states that it is the supreme law of Saint Christopher and Nevis and, subject to the provisions of the Constitution, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Section 96(1) of the Constitution provides that, subject to certain sections, any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he or she has a relevant interest, apply to the High Court for a declaration and for relief under this section. Section 96 of the Constitution is found in Chapter IX of the Constitution entitled, “Judicial Provisions”.

[3] Section 18(1) of the Constitution provides that if any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is

lawfully available, that person (or that other person) may apply to the High Court for redress. Section 18(2) states that the High Court shall have original jurisdiction: (a) to hear and determine any application made by any person pursuant to subsection (1); and (b) to determine any question arising in the case of any person that is referred to it pursuant to subsection (3) and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive): Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

[4] It cannot be doubted that any law passed by Parliament under section 37 of the Constitution, irrespective of the nature and content of that law, must not contravene any of the provisions of the Constitution including but not limited to the provisions relating to the fundamental rights and freedoms found in Chapter II of the Constitution. Any person with a relevant interest can apply to the High Court for a declaration and for relief under section 96 if any provision of the Constitution has been or is being contravened. Pursuant to section 18 of the Constitution, the High Court has original jurisdiction to determine any application for constitutional redress brought before it and the High Court may make such declarations and orders as it considers appropriate for enforcing any provision of the fundamental rights and freedoms.

[5] I wish therefore to dispel the notion that there is any law made by Parliament that cannot be struck down for contravention of one or more of the provisions of the Constitution. There is no law passed by Parliament, irrespective of the subject matter, that cannot be subject to constitutional scrutiny by the High Court for compliance with the provisions of the Constitution. It is the duty of the High Court to uphold the Constitution against contraventions by either the Executive or Parliament and where contraventions are found to exist, to grant declarations and appropriate relief to any person with a relevant interest whose fundamental rights and freedoms

have been or are being contravened. In Cohens v State of Virginia 19 U.S. 264, 5 L. Ed. 257 (1821), the great Chief Justice of the United States John Marshall stated (at p. 56) that:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

[6] In Cable and Wireless Dominica Limited v Marpin Telecoms and Broadcasting Company [1999] ECSCJ No. 33, Redhead J.A. quoted the following from Basu in his Commentary on the Constitution of India (5th Edition, 1965) (at 226):

> Judges are bound by their oath to support the provisions of the constitution and to give effect to its commands irrespective of their views of the wisdom of such provision. Hence, where the constitutionality of a statute is properly raised before the court and it is clear that it transgresses the authority vested in the legislature by the constitution, the judges cannot shrink from their duty to declare the statute unconstitutional. The court should not be deterred from this duty by such considerations such as:-
>
> (i) That the Executive might take political action in disregard of the court's judgment;
>
> (ii) That serious consequences in the economic or social sphere will result from the declaration of unconstitutionality;
>
> (iii) That the violation of the constitution is small in its degree or extent. The duty of the court in this behalf is higher where fundamental rights are involved.
>
> > It is the constitutional duty of the courts to be vigilant and to resist even petty encroachment upon the fundamental rights, privileges and immunities of the people.
>
> (iv) That, in the opinion of the court, the impugned statue or other act is highly beneficial;
>
> (iv) That the statute has been in operation for a long time.

[7] On appeal, the Privy Council in Marpin (2000) 57 WIR 141 implicitly accepted the underlying rationale of Redhead J.A. when it stated that the right to freedom of communication would be a fragile thing if it could be overridden by general political or economic policy (at p. 151). The Board continued that the need for judicial

restraint cannot be allowed to discourage courts from a *firm* performance of their proper constitutional role (ibid). That role, in my view, is to, among other things, ensure that the fundamental rights and freedoms of all persons are not contravened by the Executive or Parliament. Therefore, the factors mentioned by Basu are irrelevant considerations to the task upon which I am about to embark, namely, to determine the boundaries of Parliamentary power when it is alleged that any law contravenes the provisions of the Constitution of Saint Christopher and Nevis, particularly when that alleged contravention concerns the fundamental rights and freedoms in the Constitution founded upon the inherent dignity of each individual. It is against this background that the issues in this case are to be determined.

[8] Rastafari is a relatively young religion, which has its roots in Jamaica in the 1930s. This development followed the coronation of Haile Selassie I as King of Ethiopia in 1930. Rastafarians believe Haile Selassie is God and that he will return to Africa members of the black community who are living in exile as the result of colonization and the slave trade. Rastafari theology developed from the ideas of Marcus Garvey, a political activist who wanted to improve the status of fellow black people.

[9] The Claimant is a Rastafarian and has been practicing his religion for over 23 years. The Claimant avers that on 24 October 2012 he was arrested by police officers and later charged with offences of possession of cannabis with intent to supply and cultivation of cannabis contrary to sections 6(2), 6(3) and 7(1) respectively of the Drugs (Prevention and Abatement of the Misuse and Abuse of Drugs) Act CAP. 9.08 of the Laws of Saint Christopher and Nevis (the "Drugs Act"). The Claimant was found guilty by the magistrate of the offences of possession and cultivation of cannabis but acquitted of the offence of possession with intent to supply. He was sentenced to one (1) month in prison for cultivating cannabis and fined $5,000.00 to be paid in one (1) month for the offence of possession of cannabis. The Claimant appealed his conviction and sentence, and in that appeal raised the issue of the constitutionality of sections 6(2) and 7(1) of the Drugs Act. The appeal was stayed by the Court of Appeal to allow the Claimant to bring this application by way of originating motion.

[10] On 31 July 2017, the Claimant filed an application by way of originating motion seeking the following reliefs:

(i) A Declaration that Rastafari is a religion (spiritual way of life) and entitled to protection under section 11 of the Constitution;

(ii) A Declaration that the applicant is a person who has been hindered in the enjoyment of his freedom to manifest and propagate his religion in worship, teaching, practice and observance;

(iii) A Declaration that the provisions of section 11 of the Constitution of St. Kitts and Nevis protecting the right of freedom of conscience have been, are being or likely to be contravened in relation to the applicant by the inclusion of cannabis in the schedule of controlled drugs under the Drugs (Prevention and Abatement of Misuse and Abuse of Drugs) Act chapter 9.08 of the revised edition of 2009 of the laws of the Federation;

(iv) A Declaration that the inclusion of cannabis in the schedule of controlled drugs in the Drugs (Prevention and Abatement of Misuse and Abuse of Drugs) Act cap 9.08 of the revised edition of 2009 infringes on the applicant (sic) right to protection for his personal privacy, accorded to him by section 3 of the Constitution of St. Kitts and Nevis

(v) A Declaration that (sic) brought against the Claimant in the District B Magistrate court for possession and Cultivation of cannabis contrary to sections 6(2) and 7(1) of the Drugs (Prevention and Abatement of Misuse and Abuse of Drugs) Act chapter 9.08 are unconstitutional (sic) violating the provisions of section 9 and 11 of the constitution.

(vi) An Order that the convictions dated the 17th May 2013 for the possession and cultivation of Cannabis be quashed.

(vii) Damages

(viii) Costs.

[11] The issues that arise for consideration are as follows: (1) whether Rastafari is a religion for the purposes of sections 3 and 11 of the Constitution of Saint Christopher and Nevis; (2) whether the prohibition on the possession and cultivation of cannabis (marijuana) under sections 6(2) and 7(1) of the Drugs Act, by reason of the inclusion of this substance in Schedule II to the Drugs Act infringes the Claimant's right to freedom of conscience as set out in sections 3 and 11 of the Constitution; and (3) whether the prohibition on the possession and cultivation of cannabis (marijuana)

under sections 6(2) and 7(1) of the Drugs Act, by reason of the inclusion of this substance in Schedule II to the Drugs Act infringes the Claimant's right to privacy set out in sections 3 and 9 of the Constitution.

[12] Since section 6(3) of the Drugs Act does not involve or relate to the fundamental rights and freedoms with which we are concerned here, it does not form part of the analysis in this matter. Section 6(3) of the Drugs Act is concerned with the possession of cannabis with the intention to supply it to another, which is a trafficking offence. I therefore agree with Counsel for the Defendants that this section has nothing to do with the private or religious use by adults of cannabis and that the Claimant correctly did not argue that he has a right to supply cannabis to others.

The Relevant Provisions of the Drugs Act

[13] Sections 6, 7 and 8(1) of the Drugs Act are as follows:

> 6. Restriction of possession of controlled drug
>
> (1) Subject to any regulations made under section 8 for the time being in force, it shall not be lawful for a person to have a controlled drug in his or her possession.
>
> (2) Subject to subsection (5) and to section 29, it is an offence for a person to have a controlled drug in his or her possession in contravention of subsection (1).
>
> (3) Subject to section 29, it is an offence for a person to have a controlled drug in his or her possession, whether lawfully or not, with intent to supply it to another in contravention of section 5(1).
>
> 7. Restriction of cultivation of cannabis plant.
>
> (1) Subject to any regulations under section 8 for the time being in force, it shall not be lawful for a person to cultivate any plant of the genus Cannabis.
>
> (2) Subject to section 29, it is an offence to cultivate any such plant in contravention of subsection (1).
>
> 8. Authorisation of activities otherwise unlawful under foregoing provisions.
>
> (1) The Minister may, by regulations,

(a) exclude or except from section 4(1) (a) or (b), 5(1) (a) or (b) or 6(1) such controlled drugs as may be specified in the regulations; and

(b) make such other provision as he or she thinks fit for the purpose of making it lawful for persons to do things which under the following provisions of this Act, that is to say sections 5(1), 6(1) and 7(1), it would otherwise be unlawful for them to do.

The Relevant Provisions of the Constitution

[14] Sections 3, 9 and 11 of the Constitution of Saint Christopher and Nevis are as follows:

3. Fundamental rights and freedoms.

Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, birth, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely,

(a) life, liberty, security of the person, equality before the law and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for his or her personal privacy, the privacy of his or her home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any person does not impair the rights and freedoms of others or the public interest.

9. Protection from arbitrary search or entry.

(1) Except with his or her own consent, a person shall not be subject to the search of his or her person or his or her property or the entry by others on his or her premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision

(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health,

town and country planning, the development and utilisation of mineral resources or the development or utilisation of any property for a purpose beneficial to the community;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

(c) that authorises an officer or agent of the Government, the Nevis Island Administration, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, Administration, authority or body corporate, as the case may be; or

(d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such an order,

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

11. Protection of freedom of conscience.

(1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of conscience, including freedom of thought and of religion, freedom to change his or her religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his or her religion or belief in worship, teaching, practice and observance.

(2) Except with his or her own consent (or, if he or she is a person under the age of eighteen years, the consent of a person who is his or her parent or guardian) a person attending any place of education, detained in any prison or corrective institution or serving in a defence force shall not be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion that is not his or her own.

(3) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education that it wholly maintains and such a community shall not be prevented from providing religious instruction for persons of that community in the course of any education that it

wholly maintains or in the course of any education that it otherwise provides.

(4) A person shall not be compelled to take any oath that is contrary to his or her religion or belief or to take any oath in a manner that is contrary to his or her religion or belief.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably required

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion; or

(c) for the purpose of regulating educational institutions in the interests of the persons who receive or may receive instruction in them;

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(6) References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

The Evidence of the Claimant

[15] The Claimant in his affidavit filed on 31 July 2017 in support of his application by way of originating motion avers that he is a member of the Tewoladi (Begotten) Sons of David, Church of His Imperial Majesty Haile Selassie I. He also avers that: (1) cannabis is a sacred herb to the Rastafari religion; (2) the use of cannabis is integral to his religious experience; (3) cannabis is smoked or burnt in a chalice or pipe and the Claimant would smoke cannabis in the form of a spliff as a religious rite when worshipping at gatherings which occur every Saturday; and (4) he uses cannabis every day when he gives praise. This practice, the Claimant contends, puts him in a spiritual mood and brings him closer to the "Almighty". The Claimant further contends that the cannabis herb is also used as part of the burning of incense during

sacramental orders and functions of the congregation. The Claimant avers that Rastafari is a recognized religion in many Caribbean countries including Saint Christopher and Nevis and that, as a Rastafari, he believes in the Holy Bible and other holy scriptures including the Apocrypha. The Claimant also avers that cannabis is a sacred herb to Rastafarians as it is used in spiritual rites when worshipping and at gatherings. The Claimant states that he uses cannabis each day when he gives "praises" to the "creator" and that cannabis is a natural God given plant and is used to nourish the spiritual values of Rastafarians.

[16] The Claimant filed an affidavit on 13 July 2018 in which he responds to the affidavit evidence of the Chief Medical Officer (the "CMO") and the Commissioner of Police (the "COP") in which he takes issue with the contents of these affidavits. The Claimant avers that cannabis with high tetrahydrocannabinol (THC) and low cannabidiol (CBD) is good for certain illnesses. The Claimant compares cannabis with other substances such as tobacco and alcohol and states that some over-the-counter medicines have side effects and, in some cases, these can even kill individuals. The Claimant however asserts that THC and CBD are two natural compounds found in cannabis. The Claimant also avers that in relation to the Defendants' concern over the use of cannabis by adolescents, that an age limit on cannabis use can be implemented. The Claimant states that the CMO's evidence is contradictory since she states in her affidavit evidence that the reported medical uses of cannabis are controversial and inconclusive but that during her testimonies and presentations as Chairperson of the SKB Marijuana Commission in Town Hall meetings she highlighted a number of illnesses that cannabis can help alleviate, including, epilepsy, asthma and glaucoma. The Claimant also relied on an excerpt from an article entitled "Cannabis: A Lost History" (7 July 2018) by Dr. Joseph Mercola, which contains a detailed list of illnesses that cannabis allegedly cures.

[17] The Claimant questions whether there is any real threat to public safety, public order or even public health if cannabis is allowed for religious purposes, especially in the privacy of homes and during religious ceremonies and gatherings when it is not abused and when there is no interference with the public. The Claimant states that

the suggested deleterious psychological effects on cannabis users due to the THC component mentioned in the COP's affidavit were not proven. The Claimant further notes that the WHO 2016 Report, under the heading "mental disorders", it is stated that:

> In general, while there are associations between regular cannabis use or cannabis-use disorders and most mental disorders, causality has not been established. Reverse causation and shared risk factors cannot be ruled out as explanations of these relationships.

[18] The Claimant asserts that the entire section of the WHO 2016 Report on mental disorders shows that studies are inconclusive and lack systematic control for known risk factors. The Claimant also asserts that the COP did not provide evidence of a study in Saint Christopher and Nevis to justify the statement that cannabis is linked to violence and crime. The Claimant avers that, in relation to the claims of violence related to cannabis, it is not the cannabis plant that creates the violence but possibly the black market created because of the illegality of the cannabis plant. The Claimant also relied on the publication of "Dr. Sanjay Gupta to Jeff Sessions: Medical Marijuana could save many addicts to Opioids" (24 April 2018) by CNN.com, as containing evidence of the medical benefits of marijuana. The Claimant concludes that Rastafarians have a right to practise their faith, and that sections 3 and 11 of the Constitution give them the right to freedom of conscience and the right to hold a particular belief.

[19] The Claimant subsequently filed a further affidavit on 12 November 2018 in which he discusses and attaches the decision of Benjamin J. in Francis v Commissioner of Police and the Attorney General of Antigua and Barbuda (ANUHCV 1996/0191 dated 28 September 2001), noting that Benjamin J. found that (by the criminalization of marijuana) the applicant in that case has been, is being and/or is likely to be hindered in the enjoyment of his freedom to manifest and propagate his religion or belief in worship, teaching and practice and observance. The Claimant notes that the court went on to hold (at [57]) that:

> … The goal is secular although, as I have concluded earlier, it operates to hinder the applicant and followers of Rastafari in the enjoyment of the sacred herb as part of their religious worship, practice and observance.

> However, given the state of medical knowledge the state is obligated in the interest of public safety and public health to shield the entire society, inclusive of Rastafari from potential unknown and uncertain dangers in respect of which answers are still being awaited. There is no issue as to public order as there is no evidence of Rastafari being otherwise than peaceful and non-disruptive.

[20] The Claimant states that Benjamin J.'s reservation and reluctance to declare unconstitutional the prohibition on cannabis use by Rastafarians in their religion was specifically based on "the state of medical knowledge", *at that time*, adding that much had changed since that case was decided 22 years ago, and there have been many new developments since that time.

[21] The Claimant also exhibited the Report of the CARICOM Regional Commission on Marijuana 2018 (the "CARICOM Marijuana Commission") entitled "Waiting to Exhale – Safeguarding our Future through Responsible Socio-Legal Policy on Marijuana 2018" (the "CARICOM Marijuana Report"), noting the recommendation contained therein that cannabis/marijuana should be declassified as a controlled substance. The Claimant also cited from page 3, paragraph 4, of the CARICOM Marijuana Report the following:

> The Commission accepts the evidence that the original classification of cannabis in law as a dangerous drug with no value was made without the benefit of scientific research and data. This classification, first in international treaties, was spearheaded by the U.S. and was automatically followed domestically. Documents declassified and released to the public in 2002 illustrate that the US Schafer Commission in a 1972 report to the U.S. Congress, itself challenged this classification, finding that marijuana presented little harm and should be decriminalized. Given the key finding that now establishes that cannabis/marijuana has several beneficial effects, cannabis/marijuana can no longer be classified in law as a "dangerous drug" with "no medicinal or other value." This finding is significant since the illegal status of cannabis was premised on its classification as a dangerous drug.

[22] The Claimant also filed on 12 November 2018 an exhibit entitled "Where in the world is medical marijuana legal?" by Lesley Nickus (1 November 2017) and relied on an article written by Mary Nel, Senior Lecturer in Public Law Stellenbosch University (a copy of which was exhibited) entitled "South Africa's top court legalizes the private use of marijuana. Why it's a good thing" (19 September 2018). The Claimant also

relied on the recommendation in the CARICOM Marijuana Report that "[t]he Commission is of the view that possession and use in private households and for personal use only should be decriminalised." The Claimant also avers that 40 States in the United States of America allow the private use of cannabis.

[23] In his affidavit, the Claimant avers that the Secondary School Drugs Survey was not relevant to his claim. The Claimant also avers that the Secondary School Drugs Survey focused on the perception and prevalence of drug use by high school students and it did not disprove any of the issues he sought to address in his affidavit, namely, whether cannabis use causes the user to commit crimes and whether using marijuana makes the user "unhealthy with deleterious behavior and that the answer was no". The Claimant filed on 31 January 2019 an affidavit in response to the Second Defendant's affidavit and the SKB Marijuana Report in which he avers that other considerations could be put in place by the National Assembly to regulate the use of the cannabis plant in the case of a change in the law and that lesser intrusive methods or prohibitions can be put in place by the State rather than the infringement of the Claimant's religious and privacy rights.

The Evidence of the Defendants

[24] The CMO in her affidavit filed on 16 January 2018 avers that she is the Chairperson of the Saint Christopher and Nevis Marijuana Commission (the "SKB Marijuana Commission") which was established by Cabinet to: (1) explore and investigate the legal, medical, social, economic, religious and human rights implications of the use, misuse and abuse of cannabis (marijuana) and its derivatives through national consultations with all stakeholders and develop a final report that will inform policy and legislative decisions; (2) interface with the CARICOM Marijuana Commission; and (3) engage the public and stakeholders in the Federation of Saint Christopher and Nevis on the issues of marijuana use. The CMO also states that Saint Christopher and Nevis is a signatory to various International Drug Conventions, namely, the Single Convention on Narcotic Drugs 1961 (as amended by Protocol in 1972) ratified by Saint Christopher and Nevis on 9 May 1994; the International Convention on Psychotropic Substances 1971 (accession by Saint Christopher and

Nevis on 9 May 1994); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (accession by Saint Christopher and Nevis on 19 April 1995) (the "International Drug Conventions").

[25] The CMO states that a report of the World Health Organization in 2016 entitled, "The Health and Social Effects of Non-Medical Marijuana Use" (the "WHO 2016 Report") contains various short-term and long-term effects of cannabis use. A summary of the short-term effects are as follows:

> The most obvious short-term health effect of cannabis is intoxication marked by disturbances in the level of consciousness, cognition, perception, affect or behaviour, and other psychophysiological functions and responses.
>
> - A minority of first-time cannabis users become very anxious, have panic attacks, experience hallucinations and vomit. These symptoms may be sufficiently distressing to prompt affected users to seek medical care.
> - Acute use impairs driving and contributes to an increased risk of traffic injuries.
> - There is some evidence that cannabis use can trigger coronary events. Recent case reports and case series suggest that cannabis smoking may increase CVD risk in younger cannabis smokers who are otherwise at relatively low risk.

[26] A summary of the long-term effects are as follows:

> Regular cannabis users can develop dependence on the drug. The risk may be around 1 in 10 among those who ever use cannabis, 1 in 6 among adolescent users, and 1 in 3 among daily users.
>
> - Withdrawal syndrome is well documented in cannabis dependence.
> - Growing evidence reveals that regular, heavy cannabis use during adolescence is associated with more severe and persistent negative outcomes than use during adulthood.
> - In a number of prospective studies there is a consistent dose-response relationship between cannabis use in adolescence and the risk of developing psychotic symptoms or schizophrenia.
> - The association between cannabis use and psychosis or schizophrenia has been recognized for over two decades …

- Long-term cannabis smoking produces symptoms of chronic and acute bronchitis, as well as microscopic injury to bronchial lining cells, but it does not appear to produce COPD.
- Long-term heavy cannabis smoking can potentially trigger myocardial infarctions and strokes in young cannabis users.
- Smoking a mix of cannabis and tobacco may increase the risk of cancer and other respiratory diseases but it has been difficult to decide whether cannabis smokers have a higher risk, over and above that of tobacco smokers.
- There is suggestive evidence that testicular cancer is linked to cannabis smoking and this potential link should be investigated further.

[27] The CMO acknowledged the existence of other reports on the medical uses of marijuana noting that many of these reports are controversial and inconclusive but claims that these reports show that there are risks of dependency and deleterious health effects as contained in verifiable reports and tests. However, the CMO does not provide any evidence of the reports and tests to which she refers. The CMO avers that the Ministry of Health has the responsibility to safeguard the health and well-being of all citizens of Saint Christopher and Nevis including Rastafarians. The CMO also avers that any decision to change the law on cannabis requires extensive research and analysis to verify the likely outcomes of such a change. The CMO states that certain measures would have to be put in place to safeguard vulnerable populations, including children, and prevent abuse and trafficking and the unlawful use of cannabis. The CMO avers that any decriminalization would have to be accompanied by attendant health and social support systems.

[28] The CMO states that the SKB Marijuana Commission has been tasked with the responsibility to lead the debate on the issues related to cannabis or marijuana use and the SKB Marijuana Commission is currently conducting comprehensive research on the latest evidence regarding the use, abuse, side effects, medical use and developments in relation to cannabis. The CMO avers that: (1) the retention of cannabis as a controlled drug under the Drugs Act is essential in the interests of public safety and public health and is reasonably required in a democratic society because of the deleterious health and social effects of the use and abuse of

cannabis; and (2) the continued prohibition serves a legitimate interest in attempting to prevent the use of dependence-producing drugs and trafficking in such drugs and the attendant health and social problems.

[29] The COP, Mr. Ian M. Queeley, in his affidavit filed on 18 January 2018 denies the paragraphs in the Claimant's affidavit relating to the function and use of cannabis in the Rastafari religion as these are not within his knowledge. He avers that cannabis is included as a controlled drug in Schedule II of the Drugs Act because it is considered to be harmful to the user over prolonged exposure due to its tetrahydrocannabinol (THC) component, and may have deleterious psychological effects on the user, particularly children. The COP also avers that he is aware that there is a direct correlation between the trafficking and cultivation of cannabis and violent crimes and that this is commonly found in altercations between persons who illegally grow and traffic cannabis and other persons who steal the product. The COP states that cannabis is one of the drugs involved in the intra-regional drug trade and there is a nexus between the substance and funds for the drugs trade, whereby it is used in the trade in illegal firearms. The COP provides no evidence to support any of these statements.

[30] In response to the Claimant's assertion in relation to the abundance of reports speaking definitively to the beneficial medical uses of cannabis, the COP avers that he is aware of such reports but that these reports are both controversial and inconclusive and that on the other hand there are other reports that state that the prolonged use of cannabis is "medically dangerous". The COP also avers that the retention of cannabis as a controlled drug under the Drugs Act is essential in the interests of public safety and public health and is reasonably required in a democratic society because of the deleterious health effects caused by the use and abuse of cannabis. The COP states that the prohibition serves a legitimate interest in attempting to prevent the abuse of dependence-producing drugs and trafficking in such drugs and all the attendant violence and social problems.

[31] The Defendants also filed, on 19 October 2018, an affidavit of Ms. Gaile Gray-Phillip to which was exhibited a report entitled "Secondary School Drugs Prevalence

Survey, St Kitts and Nevis, 2013" (the "Secondary School Drugs Survey"). In the executive summary, it is stated that the purpose of the study was to estimate the prevalence and incidence of drug use among secondary school students. The behaviors explored included: incidence and frequency of use; lifetime prevalence and age of first use; risk perception and curiosity. The study also looked at parental involvement and drug prevalence. In particular, the study examined the use of tobacco/cigarettes, alcohol, inhalants, marijuana, cocaine, crack, ecstasy and prescription drugs. Prevention programmes, treatment programmes and religiosity were also examined. The results of the survey indicated that 56% of students stated that there were drugs in the school while 68% of students stated that other students attempt to or are involved in the drug trade outside the school premises. In addition, 40% of the students indicated that they have witnessed other students selling or dealing drugs around the school compound.

[32] The Second Defendant, the Attorney General of Saint Christopher and Nevis, filed an affidavit on 21 January 2019 to which was exhibited the Report of the SKB Marijuana Commission dated 10 January 2019 (the "SKB Marijuana Report"). The Second Defendant noted the statement contained in the second paragraph of page 45 in Chapter 6 of the SKB Marijuana Report in which the views of the Rastafarian community are expressed as follows: "… We support the free use of herb for recreational, social and spiritual activities". The Second Defendant avers that to give free access to the use, possession and cultivation of cannabis, as the Claimant submits and as outlined in the views of the Rastafarian community found in the SKB Marijuana Report, would be to countervail the purposes of the Drugs Act, which are to prevent and abate the abuse, misuse and traffic in harmful substances, as well as to deal with the treatment of those who present with substance abuse problems. The Second Defendant also avers that cannabis remains a substance with potentially harmful effects if abused or misused, and that in order to restrict access to the substance, the Drugs Act prohibits the possession, cultivation and supply of cannabis unless authorized under the Drugs Act.

[33] The Second Defendant states that free access to cannabis even to a single community, namely, the Rastafarian community, poses several problems for law enforcement in Saint Christopher and Nevis insofar as the Rastafarian community has not been incorporated under any legislation for houses of worship or incorporated entities. The Second Defendant also states that there is no record of the members or membership of the faith houses and that, as a result, law enforcement would have difficulty discerning and identifying to whom the religious exemption would apply. The Second Defendant avers that unrestricted use, possession and cultivation of cannabis poses increased risks as it would become more difficult to restrict access to children, adolescents and other vulnerable populations. The Second Defendant concludes by asking the court to bear in mind the myriad of protective mechanisms and social and economic policies that would have to be reviewed, and the attendant social programmes and facilities that would need to be implemented and established, in order to manage the negative effects of allowing access to even small amounts of cannabis in Saint Christopher and Nevis.

[34] The Second Defendant, in an affidavit filed on 18 March 2019, avers that on 18 February 2019 Cabinet accepted the unanimous recommendations of the SKB Marijuana Report and Cabinet had determined that the use, possession and sale of cannabis in any form, including edibles, to persons under the age of 18 years should be strictly prohibited. The Second Defendant also avers that the implementation of the recommendations would take time in order to determine the appropriate legislative framework and undertake the institutional capacity building, which must be done prior to and after the roll out of such legislation.

The CARICOM Marijuana Report

[35] The terms of reference of the CARICOM Marijuana Commission are as follows: (a) conduct a rigorous enquiry into the social, economic, health and legal issues surrounding marijuana use in the Caribbean and to determine whether there should be a change in the current drug classification of marijuana thereby making the drug more accessible for all types of usage (religious, recreational, medical and

research); and (b) recommend, if there is to be a re-classification, the legal and administrative conditions that should apply. In the section of the CARICOM Marijuana Report entitled, "The Way Forward", the following recommendations are made:

> The Commission believes that the end goal for CARICOM should be the dismantling of (sic) prohibition in its totality, to be replaced by a strictly regulated framework akin to that for alcohol and tobacco, which are harmful substances that are not criminalised. However, it acknowledges that law reform can take many forms and should conform to national realities. This is particularly because the Commission is of the view that law reform should not adopt a laissez-faire, liberalised approach, but proceed within a responsible, controlled regime that will depend on focussed (sic) and adequate institutional resources to achieve the desirable objectives.
>
> The Commission is unanimous in its view that the current classification for cannabis/ marijuana as a "dangerous drug" with "no value," or narcotic, should be changed to a classification of cannabis as a "controlled substance."
>
> The Commission is unanimous in its view that children and young persons must be protected from possible adverse effects of cannabis. Consequently, prohibition for children and young persons within an appropriate age limit should be maintained except for medical reasons; however, young people who use marijuana should be directed to treatment and diversion programs rather than being prosecuted or criminalized.
>
> The Commission is unanimous that drug-driving laws and mechanisms should be put in place to prevent persons from driving under the influence. These are futuristic and mechanisms would need to be developed to enable this objective.
>
> The law must also ensure unhindered access to cannabis/ marijuana for scientific and medical research by approved institutions and researchers.
>
> Given the clear scientific support for the medical benefits of cannabis/ marijuana, its use for medical purposes should be legalised. This should occur within special regulatory conditions for the use of marijuana for commercial medicinal purposes, (despite the fact that other nutraceutical products are not regulated), the provision of public health facilities for users in need of it and well supervised supply, marketing, branding, packaging arrangements etc.
>
> The Commission recommends that cannabis/ marijuana smoking and other uses should be banned in all public spaces. Whether in a decriminalised or legalised regime. CARICOM could consider the establishment of designated or contained public spaces for this purpose, as occurs in The

> Netherlands, Portugal and Spain. However, this was not considered a priority for the Commission. The exception to the ban on public use should be for Rastafarians who should be able to practice their faith.
>
> The Commission is of the view that possession and use in private households and for personal use only should be decriminalised. In doing so, it concurs with the many law enforcement personnel who believe that effectively enforcing prohibitionist laws in private households is near impossible. It is an opinion reinforced by recent judicial precedents on the rights to health as demonstrated by the upholding of the freedom to grow and use cannabis for personal medical use and on the right to privacy. Given these precedents, limited home-growing for a small number of plants should be permitted. A number of legislated models permitting home-growing already exist, including Uruguay, Colorado, and Washington and in the Caribbean, Jamaica, and Antigua and Barbuda.

[36] The report is comprehensive and makes it clear that there are many facets of this issue that need to be considered before any determination is made by the respective member States of CARICOM on the manner in which all, if any, of the recommendations are implemented. The CARICOM Marijuana Report provides useful information on: (1) use and attitudes towards cannabis; (2) history and illegality of religious views; (3) legal environment of cannabis in the Caribbean; (4) scientific and medical context; (5) law enforcement perspectives on prohibition; (6) the social and human costs of prohibition; (7) human rights arguments against prohibition; (8) special considerations for children and youth; (9) economic basis for law reform; (10) international law issues; and (11) law reform models. The Report makes it clear that its recommendations and findings were made after carefully evaluating the evidence, including the most up-to-date body of medical and scientific research on the multi-faceted and complex subject of cannabis/marijuana.

The SKB Marijuana Report

[37] The objectives of the SKB Marijuana Commission were outlined earlier. In the SKB Marijuana Report, the SKB Marijuana Commission made clear that the recommendations were the result of an exhaustive analysis of the local cannabis situation, along with the general health effects, psychological/mental health effects, social, religious, financial, economic and human rights implications for cannabis use (at p. 10). The SKB Marijuana Commission recommended that the blanket

criminalization of cannabis is unjustified, and that the medical and scientific use of marijuana should be permitted subject to a licensing scheme. The SKB Marijuana Commission was unanimous in respect of the use of marijuana for religious purposes but not in respect of the conditions attaching to any such use, with three (3) members recommending unrestricted use for religious purposes, three (3) members recommending permission for religious use with a restriction on the use of cannabis by persons under 21 years, and three (3) persons supporting the use of cannabis for religious purposes under some form of licensing scheme. None of the members of the SKB Marijuana Commission recommended retaining the total prohibition for religious purposes. Similarly, there was no unanimity among members of the SKB Marijuana Commission in relation to the use of cannabis for recreational purposes.

[38] The SKB Marijuana Report 2019 covered the following areas, namely: (1) background/introduction; (2) cannabis - the local situation; (3) cannabis and its health effects; (4) mental health implications of use and abuse of cannabis; (5) social implications of cannabis use and law enforcement; (6) cannabis use and its religious implications; (7) financial implications of trading in the cannabis industry; (8) cannabis and the law; (9) human rights implications and cannabis use; (10) results of surveys; (11) recommendations of the St. Kitts and Nevis National Marijuana Commission; (12) policy imperatives recommended by consultant Dr. Andre Gordon; and (13) references.

The Submissions of the Claimant

[39] The Claimant submits that: (1) the Drugs Act violates his constitutional right to freedom of religion and personal privacy since the inclusion of cannabis as a dangerous drug without an exemption for religious use places him at risk of contravening the law in order to "manifest and propagate his religion or belief in worship practice and observance"; (2) the criminalization of possession and/or cultivation of cannabis by the Drugs Act hindered and continues to hinder his freedom to manifest his religion; (3) the criminalization of possession and/or cultivation of cannabis for religious use is not reasonably required in the interests of

public safety or public health; (4) the criminalization of possession and/or cultivation of cannabis with no exemption for religious use is not reasonably justifiable in a democratic society; (5) there are an abundance of reports, clinical studies and data available that speak "definitively" to the beneficial medicinal uses of cannabis; and (6) he has suffered loss and damage.

The Submissions of the Defendants

[40] The Defendants submit that sections 6(2) and 7(1) of the Drugs Act are not unconstitutional and the inclusion of cannabis as a controlled drug in Schedule II of the Drugs Act is not unconstitutional and does not violate the Claimant's rights as enshrined under sections 3, 9 and 11 of the Constitution. The Defendants also submit that if sections 6(2) and 7(1) of the Drugs Act and the inclusion of cannabis as a controlled drug in Schedule II of the Drugs Act prima facie infringe upon any rights of the Claimant as provided for under sections 3, 9 and 11 that such infringement is justified pursuant to section 3 of the Constitution and the limitations found in sections 9(2)(a) and 11(5)(a) of the Constitution. The Defendants contend that the inclusion of cannabis in Schedule II and its subsequent criminalization under sections 6(2) and 7(1) of the Drugs Act are reasonably justifiable in a democratic society in that they serve the legitimate legislative purpose of promoting public health, public order and public safety by controlling a substance with verifiable harmful health effects; and also by attempting to prevent and curb the illicit trade and supply of such a substance. The Defendants also add that the right to privacy is subject to the public interest.

[41] The Defendants also submit that the inclusion of cannabis in Schedule II and its subsequent criminalization under sections 6(2) and 7(1) of the Drugs Act were done pursuant to the State's international obligations under the International Drug Conventions. The Defendants contend that sections 6(2) and 7(1) of the Drugs Act are neither religious nor sectarian in nature and are not designed to target the Rastafari religion and Rastafarian community; rather, these provisions are secular and are designed to have general application in the pursuit of public health, public order and public safety, the objectives of which can best be achieved by the blanket

prohibition on possession, cultivation and dealing in marijuana except as authorized under section 8 of the Drugs Act. The Defendants further contend that notwithstanding the emergence of research indicating that cannabis/marijuana has medical or medicinal benefits, such benefits do not remove the health hazards or the State's responsibility to protect and preserve the health and safety of all persons in Saint Christopher and Nevis including the Rastafarians.

[42] The Defendants submit that the blanket legalization or decriminalization of cannabis for religious use as sought by the Claimant would defeat the objectives for which the Drugs Act was passed. The Defendants also submit that any policy change to admit a permitted use for the Rastafari religion under the Drugs Act: (1) is within the purview of Parliament given the challenges and the innumerable variables that must be accounted for; (2) requires careful planning and extensive research to verify the likely outcomes of any such change; and (3) needs careful regulation and control to safeguard vulnerable populations and prevent abuse, unlawful use and trafficking.

[43] The Defendants contend that the search of the Claimant's home on 24 October 2012 was not a breach of his right to protection from arbitrary search and entry in so far as it was done pursuant to an unchallenged warrant pursuant to sections of the Drugs Act that have not been challenged by the Claimant. The Defendants further contend that the Claimant cannot get an order quashing his conviction as sought in Paragraph vi of the prayer found in his application by way of originating motion. The Defendants submit that the limit of the fiat of this court in this instance is to determine the constitutionality of the challenged sections of the Drugs Act. The Defendants further submit that the determination of this court must be remitted to the Court of Appeal for final disposition of the matter concerning the Claimant's conviction.

The Rastafari Religion

[44] It is not surprising that the Defendants have agreed that Rastafari is a religion. The Defendants are correct in this concession. In Francis, Benjamin J., after an exhaustive review of the applicable case law, concluded that:

> [29]. I hold no reservations whatsoever that Rastafari is a religion within the meaning and context of section 11 of the Constitution and I hereby declare that Rastafari is a religion entitled to protection thereunder.

[45] I, too, accept, for the same reasons as Benjamin J., that Rastafari is a religion for the purposes of sections 3 and 11 of the Constitution of Saint Christopher and Nevis.

Cannabis, Rastafari and Freedom of Conscience

[46] In Francis, the applicant, a Rastafarian, was arrested and charged with the offence of possession of cannabis contrary to section 6(2) of the Misuse of Drugs Act 1973 of Antigua and Barbuda. The applicant subsequently filed an application by way of originating motion in the High Court against the Commissioner of Police and the Attorney General of Antigua and Barbuda seeking redress under section 18 of the Constitution of Antigua and Barbuda in the form of declarations. Of critical relevance here is that one of the declarations the applicant sought was that he is a person who had been hindered in the enjoyment of his freedom of conscience including freedom of religion and freedom to manifest and propagate his religion in worship, teaching, practice and observance. Benjamin J., dealt with this issue as follows:

> [34] The Applicant's contention is that he is a person who has been hindered in the enjoyment of his freedom of religion or belief guaranteed by section 11(1) and (4) of the Constitution. The crux of his complaint is that the very existence of the Misuse of Drugs Act, S. 6(1) and (2) of which make it an offence to be in possession of the Class B controlled drug cannabis, operates to hinder his freedom of religion as a follower of Rastafari. The offence renders it unlawful for him to use his sacrament as he is faced with the choice of either running afoul of the law or being deprived of his spiritual food.
>
> [35] Support for this assertion was offered from the case of Dudgeon v UK [1983] EHRR 149. The Applicant, a homosexual, directed complaints against the existence of Northern Ireland of offences relating to the commission of an act of buggery, an attempt to commit buggery, the commission of an act of gross indecency by one man with another and an attempt to commit an act of gross indecency. The law operated to criminalize homosexual conduct in private between consenting adults over the age of 21. In answering the question whether these criminal offences constituted an interference with a person's right for his private life in contravention of Article 8 of the European Convention of Human Rights, the Court, by a majority held that there had been a breach inasmuch as

individual countries were entitled to fix an appropriate age for consent in respect of such conduct. In its judgment the court said:

> "…the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his social life) within the meaning of Art. 8(1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life; either he respects the law and refrains from engaging (even in private with consenting male partners) in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies or he commits such acts and thereby becomes liable to criminal prosecution."

It was contended on the Applicant's behalf that like the case of Dudgeon, the interference with the Applicant's fundamental right to freedom of conscience has been hindered and continues to be hindered.

[36] The Respondents sought to contend that the Applicant must establish by consent evidence that he was in possession of cannabis for religious use and that he failed to do so (Ramson v Barker) (1979) 28 WIR 181). This contention fails on a number of points. Firstly, the evidence of the Applicant is to the effect that when he was arrested he was on his way to Las Vegas at Tinning Village where he intended to meet a gathering of other members of the Rasta family for meditation and reasoning in a section of the booth set aside for that purpose. It was neither suggested to him (sic) was any other evidence addressed to the effect that this was not the case. Secondly, there is an obvious answer based on the Dudgeon case that even after the Applicant's arrest and up to the present the Misuse of Drugs Act continues to hinder his enjoyment of freedom of religion and belief.

[37] During cross-examination, the Applicant's attention was drawn to section 9 of the Misuse of Drugs Act of which he was not aware. That section confers upon the Minister the discretion to make regulations for exemptions, grant licenses and empower medical practitioners to prescribe in respect of controlled substances. The Applicant was also ignorant of the Minister's power to give a license for research. Consequently, he admitted never applying for any licenses or exemptions. These answers were coupled with the submission by Counsel for the Respondents to the effect that on the authority of Ramson v Barker the Applicant must show that his arrest by the Police was deliberately intended to hinder or prevent him from exercising his fundamental right to freedom of religion or belief.

[38] I am not attracted to the Respondent's approach to the problem as it operates to place a restrictive interpretation on the provisions of Chapter II of the Constitution. It could not have been intended that in order to invoke the protection of section 11(1) an applicant must in every case show a deliberate attempt to hinder his or her enjoyment of his freedom of religion or belief. In my view, it matters not that the act complained of was not aimed

> directly at the person's enjoyment of his freedom of religion or belief. I therefore accept the Applicant has been, is being and/or is likely to be hindered in the enjoyment of his freedom to manifest and propagate his religion or belief in worship, teaching, practice and observance.

[47] The Defendants correctly did not deny or challenge the evidence of the Claimant that cannabis is an integral and sacred part of the Rastafari religion. This is a critical and important aspect of this case, which means that the Claimant's unchallenged or uncontroverted evidence that the use of cannabis is an integral and sacred part of the Rastafari religion must be accepted as correct by the court. In Prince v President of the Law Society of the Cape of Good Hope [2002] ZACC 1; 2002 (2) SA 794 (Prince I), the Constitutional Court of South Africa accepted that the right to freedom of religion includes: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination. In addition, the right to freedom of religion is the absence of coercion or restraint and may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs (at [34]). In Prince I, the Constitutional Court of South Africa stated that there is no genuine dispute that the use of cannabis is central to the Rastafari religion (at [18]). In Francis, Benjamin J. accepted the evidence of the applicant that cannabis is a sacred herb to the Rastafari religion (at [33]). I, therefore, accept that use of cannabis is an integral and sacred part of the Rastafari religion.

[48] It is for the Claimant to show that sections 6(2) and 7(1) of the Drugs Act contravene his right to freedom of conscience guaranteed to him under sections 3 and 11 of the Constitution. Once it is accepted as a fact that cannabis is an integral and sacred part of the Rastafari religion, the question is whether the court can declare the provisions of the Drugs Act that make it unlawful to possess and cultivate cannabis to be unconstitutional because they contravene sections 3 and 11 of the Constitution. It is significant to note that criminalization of cannabis started in Jamaica with the Ganja Law of 1913, approximately two decades before the establishment of the Rastafarian movement in the 1930s. In Saint Christopher and Nevis, the trade, cultivation and possession of cannabis was made illegal by the

Dangerous Drugs (General Legislative Competency) Ordinance, No. 4 of 1937. What is clear is that when cannabis was made illegal in Jamaica in 1913 the Rastafari religion had not yet commenced. In fact, it was only on 1 November 1930 that Ras Tafari Makonnen was crowned Emperor Haile Selassie I of Egypt.

[49] At first, I entertained grave doubts as to whether there exists any principle or authority by which an unlawful act (possessing and cultivating cannabis) can be converted to a constitutional right by continued use or practice over many years in a movement that is now considered a religion. This would require a determination of the point in time when Rastafari became an established religion for it can only be at that point would any argument based on sections 3 and 11 of the Constitution have any merit. After careful and anxious consideration, I find myself in complete agreement with the submissions of the parties and Mr. Gonsalves Q.C. that this is not a relevant consideration because, if accepted, it would have the effect of immunizing the provisions of the Drugs Act from constitutional scrutiny in a way in which the Constitution did not and does not contemplate. Moreover, this would be contrary to the views expressed by the Caribbean Court of Justice in Nervais and Severin v R (2018) 92 WIR 178 concerning the operation of the "savings law" clauses in Commonwealth Caribbean constitutions. These "savings law" clauses, the argument ran, immunized all pre-existing colonial laws from being challenged under the Bill of Rights found in the independence constitutions. In that decision, Sir Dennis Byron, President of the Caribbean Court of Justice, in an impressive judgment dealt a death blow to the archaic understandings of the effect of savings law clauses, stating as follows:

> [58] The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned. Professor McIntosh in Caribbean Constitutional Reform: Rethinking the West Indian Polity (2002), commenting on s 26 noted that to give literal effect to the provision as written was to deny any special eminence to the Constitution and in particular, its fundamental rights over all other law. He emphasized that the 'horror of this is brought home to the intelligent mind

> when one realizes that the literal consequence is to give prominence to ordinary legislation over the Constitution'.
>
> [59] It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.

[50] I therefore hold that the Claimant has provided sufficient evidence in his affidavit in support of his application by way of originating motion to show that the prohibition on the possession and cultivation of cannabis (marijuana) under sections 6(2) and 7(1) of the Drugs Act, by reason of the inclusion of this substance in Schedule II to the Drugs Act infringes the Claimant's right to freedom of conscience under sections 3 and 11 of the Constitution.

[51] The next question that arises is whether the Defendants can justify the infringement of the Claimant's right to freedom of conscience by virtue of the exception found in section 11(5)(a) of the Constitution which provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably required in the interests of defence, public safety, public order, public morality or public health and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. The test accepted by the Privy Council in de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 A.C. 69 to determine whether any such limitation is reasonable and justifiable is to ask whether: (a) the legislative objective is sufficiently important to justify limiting a fundamental right; (b) the measures designed to meet the legislative objective are rationally connected to it; and (c) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. In other words, the question is whether: (1) the policy underlying sections

6(2) and 7(1) of the Drugs Act pursues a legitimate objective; and (2) the limitation or restriction of the Claimant's right to freedom of conscience under sections 3 and 11 of the Constitution bears a reasonable or rational relationship to the objective of sections 6(2) and 7(1) of the Drugs Act.

[52] In **Worme and Grenada Today Ltd v Commissioner of Police of Grenada** (2004) 63 WIR 79, the Privy Council explained that:

> [41] It is, as already explained, common ground that the crime of intentional libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under s 10(1) of the Constitution. It is therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, the burden shifts to the appellants to show, in terms of the last limb of s 10(2), that the provisions are not reasonably justifiable in a democratic society; see Cable and Wireless (Dominica) v Marpin Telecoms and Broadcasting Co Ltd (2000) 57 WIR 141 at 152, per Lord Cooke of Thorndon.

[53] Therefore, it is for the Defendants to **establish** that sections 6(2) and 7(1) of the Drugs Act are reasonably required in the interests of defence, public safety, public order, public morality and/or public health. Only if the Defendants establish any of these would the **burden shift** to the Claimant to show that sections 6(2) and 7(1) of the Drugs Act are not reasonably justifiable in a democratic society. The Defendants are incorrect in their belief that they merely need to "assert" that "the relevant provisions of the Drug Act are reasonably required in the interests of public safety and public health" (at [18] of submissions). The Defendants must **establish** that section 11(5)(a) applies, not simply assert it as if mere assertion establishes the section 11(5)(a) requirement.

[54] The Defendants in submissions filed (at [17]) seem to accept that sections 6(2) and 7(1) of the Drugs Act infringe the Claimant's right to freedom of conscience guaranteed to him under sections 3 and 11 of the Constitution but maintain nonetheless that the infringement is justified for the following reasons. First, it is justified under section 11(5)(a) of the Constitution by: (a) controlling a substance with verifiable harmful health effects; and also by attempting to prevent and curb the illicit trade in and supply of such a substance; and (b) the blanket prohibition on

possession, cultivation and dealing in marijuana except as authorized under section 8 of the Drugs Act. Second, the inclusion of cannabis in Schedule II and its subsequent criminalization under sections 6(2) and 7(1) of the Drugs Act were done pursuant to the State's international obligations under the International Drug Conventions. Third, sections 6(2) and 7(1) of the Drugs Act are: (a) neither religious nor sectarian in nature; (b) not designed to target the Rastafari religion and Rastafarian community; and (c) are secular and designed to have general application.

[55] The Defendants' assertion that they are bound by certain International Drug Conventions cannot be used as a justification for any contravention of the fundamental rights and freedoms provisions, or any provision, found in the Constitution. The Constitution in section 2 states clearly that the Constitution is the supreme law of Saint Christopher and Nevis and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. How then can these international treaties, which have no effect in domestic law, unless incorporated therein, be used to justify any infringement of the fundamental rights and freedoms provisions in the Constitution? In Minister of Justice and Constitutional Development v Prince [2018] ZACC 30 (Prince II), the Constitutional Court of South Africa stated as follows:

> [82]. Counsel for the State referred to various international agreements to which South Africa is a signatory and submitted that South Africa is obliged to give effect to these international agreements. The answer to the submission is that South Africa's international obligations are subject to South Africa's constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution. Of course, it is correct that, in interpreting legislation, an interpretation that allows South Africa to comply with its international obligations would be preferred to one that does not, provided this does not strain the language of the statutory provision. …

[56] These words apply equally here, and I hold that the court is not precluded from enforcing any provision in Chapter II, the Protection of Fundamental Rights and Freedoms, by virtue of any international treaty obligation.

[57] The Defendants also submit that cannabis is a controlled substance due to the adverse health effects that it may potentially cause, citing the WHO 2016 Report, the CARICOM Marijuana Report and the SKB Marijuana Report. The Defendants point to the: (1) several severe potential health risks among the youth and adults vulnerable to the effects of marijuana; (2) impairment of psychomotor skills; the prevalence of use among adolescents; and (3) the accompanying adverse health and social effects. The Defendants also make reference to the "complication" of crime and violence in society from the "involvement" of marijuana in the illicit drug trade.

[58] The Defendants submit that, first, the Drugs Act targets these areas by applying a blanket prohibition on the possession and cultivation of cannabis unless authorised by regulation under section 8(1) of the Drugs Act. Second, the blanket prohibition is arguably the best way "at this time" for Saint Christopher and Nevis to deal with these problems. Third, unless authorised by regulation under section 8(1) of the Drugs Act, no person should possess, cultivate or supply cannabis. Fourth, this is targeted at reducing the availability of cannabis to the general public and thus prevents its circulation and access to adolescents and vulnerable adults alike; and eliminates the illegal trafficking in the substance. The Defendants contend that a religious exemption would not enable the State to achieve these objectives, as an exemption for use in the Rastafari religion would not allow for the necessary regulated framework in terms of access, dosage, frequency of use, curtailment of supply of cannabis etc.

[59] The Defendants also contend that religious use will be dictated by freedom of conscience, which is subjective and that: (1) additional questions arise, for instance, the manner in which the presence of the cannabis plant affects access to children and adolescents; (2) there are also other concerns that unregulated use of cannabis may be abused; and (3) personal use of cannabis can easily stray into supply to

others or trafficking. In my view, these are matters that can be dealt with in legislation and the Defendants must surely now concede this in light of the provisions of the Cannabis Bill 2019 which provide the possible legal framework to deal with the issues that the Defendants vigorously argued, in submissions and in oral argument, mandated the continued blanket prohibition on the use, possession and cultivation of cannabis by any person in Saint Christopher and Nevis.

[60] As mentioned above, in order to show that sections 6(2) and 7(1) of the Drugs Act are reasonably required in the interests of public safety, public order and public health, the Defendants have sought to rely on: (a) obligations arising out of the International Drug Conventions, (b) the deleterious effects of marijuana on users, and (c) the alleged linkages between marijuana and crime. The medical evidence from both the CARICOM Marijuana Report and the SKB Marijuana Report show that children, adolescents and adult persons with pre-existing conditions are most vulnerable to the harmful effects of cannabis use. Having read these reports, there is clear evidence that there are indeed such adverse health effects, particularly on young persons. The reasons advanced by the Defendants, for example, the harmful effects that cannabis use may have on children, may justify a prohibition on cannabis use in relation to children and young persons.

[61] However, the existence of some harmful effects of cannabis use on a limited number of persons in society does not justify a total ban or a blanket prohibition on the use, possession and cultivation of cannabis in relation to all adults. These reasons do not justify the complete prohibition on the use, possession and cultivation of cannabis by adults contrary to the right to freedom of conscience guaranteed to the Claimant under sections 3 and 11 of the Constitution. It is accepted that the State has a legitimate interest in preventing harm to others, but the evidence adduced by the Defendants does not show that a total prohibition is necessary to achieve the aims which the Defendants claim that the Drugs Act attempts to achieve. Consequently, the Defendants have not established that section 11(5)(a) applies to justify a limitation on the fundamental rights and freedoms enjoyed by the Claimant.

[62] The Defendants also ground the limitation on the use, possession and cultivation of cannabis by adults on the basis that there are links to violence and crime. However, these relate to the trafficking of significant amounts of cannabis, which is not the subject of this decision. This decision focuses on the use of cannabis by adults for the purposes of the Rastafari religion. The Defendants in the affidavit evidence of the COP have not provided any evidence to show that the use of cannabis for a religious purpose is inextricably linked to violence, crime and the war on illegal drugs. I note as well that this issue is one that is currently engaging the attention of the Executive and no doubt will soon engage the attention of the National Assembly of Saint Christopher and Nevis. However, this court must not shirk from its responsibility to decide, in accordance with constitutional principles, whether it is satisfied, based on the evidence presented to the court by the Defendants, that sections 6(2) and 7(1) of the Drugs Act are reasonably required in the interests of defence, public safety, public order, public morality or public health and the limitations on that right do not go further than is necessary to accomplish these objectives. The Defendants accept that these provisions create a blanket prohibition on the possession and cultivation of cannabis contrary to the Claimant's right to freedom of conscience guaranteed to him under sections 3 and 11 of the Constitution but seek refuge in the three main reasons as stated above as falling within the exception found in section 11(5)(a) of the Constitution.

[63] I reiterate that the fact that cannabis may cause harm to some persons, namely, children, young persons and vulnerable adults, does not justify a complete prohibition on its use, possession and cultivation by adults for the purposes of the Rastafari religion. In submissions and during oral argument the Defendants remained steadfast that only a complete prohibition on the use, possession and cultivation of cannabis was necessary to protect public health, public safety and to curb the illegal trade and supply of cannabis. I fail to appreciate why the difficulties that the Defendants allege might arise if an exemption for religious use is allowed can justify the continued infringement of the Claimant's right to freedom of conscience. Moreover, I disagree that a blanket legalization or decriminalization for religious use would defeat the objectives for which the Drugs Act was passed.

Administrative difficulties alone cannot be used to justify the contravention of the Claimant's right to freedom of conscience guaranteed to him by sections 3 and 11 of the Constitution. The Defendants by the online publication of the draft Cannabis Bill 2019 must now naturally concede that any administrative difficulties that they initially envisaged in respect of the religious use of cannabis can be overcome.

[64] In 2002, the South African Constitutional Court in Prince I had to consider the constitutional validity of the prohibition on the use or possession of cannabis when its use or possession is inspired by religion. The applicant alleged that the prohibition was unlawful because it went too far, bringing within its scope possession or use required by the Rastafari religion. The Constitutional Court accepted that the legitimate goal of the impugned provisions was to prevent the abuse of dependence producing drugs and trafficking in those drugs. The majority held that the legislation served an important governmental purpose in the war against drugs. Consequently, the legislation did not infringe the appellant's right to religion. The majority explained that:

> [108] In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the Constitution, but if it does that, courts must enforce the laws whether they agree with them or not.

[65] The majority disagreed with the minority that it was incumbent on the State to devise some form of exception to the general prohibition against the possession or use of cannabis in order to cater for the religious rights of Rastafarians (at [111]). The majority summarized the issue as follows:

> [114]. In the proportionality analysis required by section 36 of the Constitution, there can be no doubt that the right to freedom of religion and to practise religion are important rights in an open and democratic society based on human dignity, equality and freedom, and that the disputed legislation places a substantial limitation on the religious practices of Rastafari. It must also be accepted that the legislation serves an important governmental purpose in the war against drugs. In substance, the appellant contends that the legislation, though legitimate in its purpose and application to the general public, is overbroad because it has been formulated in a way that brings within its purview the use of cannabis by

> Rastafari that is legitimate and ought not to be prohibited. A challenge to the constitutionality of legislation on the grounds that it is overbroad is in essence a challenge based on the contention that the legitimate government purpose served by the legislation could be achieved by less restrictive means.

[66] The majority opinion explained that the State was not called upon to justify this method of controlling the use of harmful drugs and that the validity of the general prohibition against both possession and use was accepted (at [117]). It continued that the case the State was called upon to meet was that in addition to the medical and research exemptions contained in the legislation, provision should also have been made for the use of cannabis for religious purposes by members of the Rastafari religion (ibid). The majority opinion stated that:

> [129]. … Moreover, the use to which cannabis is put by Rastafari is not simply the sacramental or symbolic consumption of a small quantity at a religious ceremony. It is used communally and privately, during religious ceremonies when two or more Rastafari come together, and at other times and places. According to his own evidence, the appellant uses cannabis regularly at his home and elsewhere. All that distinguishes his use of cannabis from the general use that is prohibited, is the purpose for which he uses the drug, and the self-discipline that he asserts in not abusing it.
>
> [130] There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purposes and the use of cannabis for recreation. It would be even more difficult, if not impossible, to distinguish objectively between the possession of cannabis for the one or the other of the above purposes. Nor is there any objective way in which a law enforcement official could determine whether a person found in possession of cannabis, who says that it is possessed for religious purposes, is genuine or not. Indeed, in the absence of a carefully controlled chain of permitted supply, it is difficult to imagine how the island of legitimate acquisition and use by Rastafari for the purpose of practicing their religion could be distinguished from the surrounding ocean of illicit trafficking and use.

[67] The majority of the Constitutional Court accepted that the right to freedom of religion is a right enjoyed by all persons. The right embraces religions, big and small, new and old. If an exemption in general terms for the possession and use of harmful drugs by persons who do so for religious purposes were to be permitted, the State's ability to enforce its drug legislation would be substantially impaired (at [132]). It continued that there would be practical difficulties in enforcing a permit system,

including the financial and administrative problems associated with setting up and implementing any such system, and the difficulties in policing what would follow if permits were issued sanctioning the possession of cannabis for religious purposes (at [134]). The majority concluded that:

> [139] The use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state's ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution.
>
> [141] Moreover the disputed legislation, consistent with the international protocol, is not formulated so as to penalise only the harmful use of cannabis, as is the case with legislation dealing with liquor. It seeks to prohibit the very possession of cannabis, for this is obviously the most effective way of policing the trade in and use of the drug. This method of control was not disputed save for the religious exemption sought. The question is therefore not whether the non-invasive use of cannabis for religious purposes will cause harm to the users, but whether permission given to Rastafari to possess cannabis will undermine the general prohibition against such possession. We hold that it will.
>
> [142] We are also unable to agree that the granting of a limited exemption for the non-invasive religious use of cannabis under the control of priests is a competent remedy on the evidence that has been placed before us. It would not meet the appellant's religious needs and he is the only party seeking relief from this Court. The Rastafarian Houses are not parties to the litigation and the appellant neither asserts nor has established authority to act on behalf of any person other than himself. There is moreover no evidence to suggest that the granting of such an exemption would satisfy any of the Houses or enable Rastafari to practice their religion in accordance with their beliefs, or that the appellant or other Rastafari would refrain from smoking or consuming cannabis if such an exemption were to be granted. On the appellant's own evidence cannabis is required by him for the purpose of smoking, and as he told the Law Society and repeated in his affidavits, he intends to continue doing so. His claim was not for a limited exemption for the ceremonial use of cannabis on special occasions. An exception in those terms does not accord to him the religious right that he claims. Nor would a more general exemption for the non-invasive use of cannabis for religious purposes. All that this would do would be to facilitate the possession of cannabis by Rastafari, leaving them free for all practical purposes, to use it as they wish. Policing of the use in such circumstances would be well-nigh impossible. There are, moreover, important concerns relating to cost, the prioritisation of social demands and practical implementation that militate against the granting of such an exemption.33

> The granting of a limited exemption interferes materially with the ability of the state to enforce its legislation, yet, if the use of cannabis were limited to the purpose of the exemption, it would fail to meet the needs of the Rastafari religion.

[68] The dissenting (minority) opinion in Prince I was of the view that where the constitutional complaint is based on the failure of the statutory provisions to accommodate the religious use of cannabis by the Rastafari, the weighing-up and evaluation process must measure the three elements of the government interest, namely, first, the importance of the limitation; second, the relationship between the limitation and the underlying purpose of the limitation; and, third, the impact that an exemption for religious reasons would have on the overall purpose of the limitation (at [46]). The minority also noted that the government interest must be balanced against the appellant's claim to the right to freedom of religion which also encompasses three elements: (i) the nature and importance of that right in an open and democratic society based on human dignity, equality and freedom; (ii) the importance of the use of cannabis in the Rastafari religion; and (iii) the impact of the limitation on the right to practise the religion (Ibid).

[69] In relation to the broad nature of the criminal prohibition, the minority noted that:

> [51] The impugned provisions criminalise all use and possession of cannabis except when used for medicinal, analytical or research purposes. They criminalise the use of cannabis by the Rastafari regardless of where, how and why it is used. It matters not that they use it for sacramental purposes as a central part of the practice of their religion. The impugned provisions do not distinguish between the Rastafari who use cannabis for religious purposes and drug abusers. The effect of the prohibition is to state that in the eyes of the legal system all Rastafari are criminals. The stigma thus attached is manifest. Rastafari are at risk of arrest, prosecution and conviction for the offence of possession or use of cannabis. For the appellant, the consequences have gone beyond the stigma of criminal conviction. He is now prevented from practising the profession of his choice. There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.

[70] The minority recognized that there can be little doubt about the importance of the limitation in the war on drugs that serves an important pressing social purpose, namely, the prevention of harm caused by the abuse of dependence-producing drugs and the suppression of trafficking in those drugs (at [52]). It noted that the government has a clear interest in prohibiting the abuse of harmful drugs and that the international obligations of South Africa require it to fight that war subject to the Constitution (ibid). The minority recognized that any exemption to accommodate the religious use of cannabis will of course have to be strictly controlled and regulated by the government (at [64]). Such control and regulation may include: (1) restrictions on the individuals who may be authorised to possess cannabis; (2) the source from which it may be obtained; (3) the amount that can be kept in possession; and (4) the purpose for which it may be used.

[71] The minority also noted that, first, conditions necessary to safeguard against using it for some purpose other than that for which the exemption is granted, as well as trafficking in cannabis, may be imposed and these may include the requirement of registration with the relevant authorities; recording the amount purchased and the date of such purchase; and where and how it may be used. Second, any permit to possess and use cannabis for the purposes of the exemption may have to be issued subject to revocation if the conditions of its issue are violated, such as using cannabis otherwise than for the purpose of burning it as an incense or trafficking in cannabis or having more in ones' possession than the amount the permit allows (ibid).

[72] The minority was of the view that the concerns raised by the government in respect of the religious use exception are matters that can be dealt with in legislation that will regulate the exemption. It agreed that a permit system coupled with administrative guidelines and infrastructure for administration of such an exemption may adequately address the practical problems that may arise (at [66]). The minority stated that the suppression of illicit drugs does not require the ban of the sacramental use of cannabis when such use does not pose any risk of harm (at [69]). The minority, therefore, concluded that the prohibition contained in the

impugned provisions is constitutionally bad because it proscribes the religious use of cannabis even when such use does not threaten the government's interest (at [84]).

[73] In Francis, Benjamin J. held that:

> [57]. I ask the question, what then is the State's obligation in the face of such evidence of a divergent nature. The Misuse of Drugs Act prohibit the possession of controlled substances including cannabis. Access by the public to such substances in restricted and penalties are prescribed for breaches. The goal is secular although, as I have earlier concluded, it operates to hinder the Applicant and followers of Rastafari in the enjoyment of the sacred herb as part of their religious worship, practice and observance. However given the state of medical knowledge, the State is obligated in the interests of public safety and public health to shield the entire society, inclusive of Rastafari from potential, unknown and uncertain dangers in respect of which answers are still being awaited.

[74] No doubt that, 18 years later, much more is known about cannabis and the consequences of its use. This is borne out by the contents of the CARICOM Marijuana Report and the SKB Marijuana Report. The Defendants have not provided adequate, or even any, evidence to the court to justify pursuant to section 11(5)(a), the complete prohibition on the use, possession and cultivation of cannabis found in sections 6(2) and 7(1) of the Drugs Act contrary to the Claimant's right to freedom of conscience found in sections 3 and 11 of the Constitution. The Defendants have, therefore, failed *to establish* that one or more of the exceptions found in section 11(5)(a) of the Constitution applies to justify limiting the Claimant's right to freedom to exercise his religion. It is not sufficient for the Defendants merely to assert, as they did, that there are some harmful effects of cannabis use.

[75] The CARICOM Marijuana Report and the SKB Marijuana Report contain valuable information on the state of the medical knowledge relating to the uses and harmful effects of prolonged abuse of cannabis and the impact of the prohibition and possession of cannabis on criminal activity and the drugs trade. The SKB Marijuana Report provides a summary of the views of various stakeholders Saint Christopher and Nevis on the medical benefits of, and harm that may be caused by, cannabis, mirroring and borrowing heavily from the CARICOM Marijuana Report. The decision

of the Supreme Court of Canada in Malmo-Levine v Her Majesty The Queen [2003] 3 S.C.R. 571, 2003 SCC 74 cannot govern this issue since the scientific premises that underpinned the decision of the court have now been debunked as is evident in both the CARICOM Marijuana Report and the SKB Marijuana Report.

[76] It may be said by some that the courts are manifestly ill suited to determine the "multi-faceted and complex subject of cannabis/ marijuana". However, this is not the specific constitutional issue to be decided in this case. The Government of Saint Christopher and Nevis, quite correctly, felt that the subject was one that required the input and study of various sectors of society. As mentioned above, in 2017, the SKB Marijuana Commission was established with a mandate to explore this issue in a comprehensive manner. This mandate is clear evidence that the subject matter at issue is a complex one that requires careful study, analysis and a carefully crafted approach to law reform if the National Assembly decides to change the law in accordance with its mandate to represent the interests of the people of Saint Christopher and Nevis. The Government has responded so far by publishing online, as detailed below, the Cannabis Bill 2019 which contains a possible comprehensive regime relating to the use of cannabis for religious purposes.

[77] The SKB Marijuana Report has provided the Executive and the National Assembly of Saint Christopher and Nevis with a comprehensive examination of the issue from a domestic perspective. The Executive and Parliament may consider the recommendations found in the SKB Marijuana Report in determining the manner in which they wish to proceed in respect of the broader issues with which the court not concerned in this case. And, as explained above, the Executive has responded with the Cannabis Bill 2019 which will soon be debated in the National Assembly. I agree with Counsel for the Defendants that, first, the recommendation for legalization of cannabis for medical and economic benefits and the discussion of the challenges and adverse effects arising in implementing the anti-drug laws regionally that are contained in the CARICOM Marijuana Report are key policy considerations for Parliament to consider in its review of marijuana in Saint Christopher and Nevis; and, second, the weighing exercise is the province of Parliament to balance and

determine the relevant considerations for Saint Christopher and Nevis and implement whatever system Parliament in its wisdom decides best suits the needs of Saint Christopher and Nevis. This is exactly what the Executive has done in the Cannabis Bill 2019. However, the specific constitutional issue before this court is a very narrow one, namely, whether the prohibition on the use, possession and cultivation of cannabis contravenes the Claimant's right to freedom of conscience guaranteed to him under sections 3 and 11 of the Constitution. The wider issues in respect of the "medical and economic benefit" or otherwise of cannabis do not form part of the specific constitutional issue before this court and have properly been considered by the Executive in its Cannabis Bill 2019.

[78] The fundamental rights and freedoms of the citizens of Saint Christopher and Nevis are not and can *never* be subject to Parliamentary approval. The power granted to Parliament under section 37 of the Constitution to make laws must be read as the power to make laws that are consistent with the Constitution. It would make a mockery of the Bill of Rights if the fundamental rights and freedoms guaranteed to each person in Saint Christopher and Nevis were subject to State approval and sanction by the National Assembly. This notion is repugnant to the Constitution and the ideals of a constitutional democracy based on respect for human rights and freedoms such as Saint Christopher and Nevis. These fundamental rights and freedoms exist not only because the Constitution, as the supreme law of Saint Christopher and Nevis, stipulates what they are in clear terms and the limitations that may exist in relation to them, but they exist primarily because they are part of the inherent dignity of each individual. The courts, as guardians of the Constitution, must at all times ensure that these fundamental rights and freedoms are not contravened by the State. The court must remain *firm* in the proper performance of its constitutional role.

[79] The Claimant emphasizes the medical benefits of cannabis and the lack of effectiveness of the existing prohibition found in sections 6(2) and 7(1) of the Drugs Act. However, this is not the issue before this court or even a relevant consideration in respect of the constitutional issue to be decided by this court. I agree with Counsel

for the Defendants that these issues are immaterial to the issue of the constitutionality of sections 6(2) and 7(1) of the Drugs Act and are only relevant to policy decisions of Parliament in reviewing the legislation. I note that the Executive has made provision for medical cannabis in the Cannabis Bill 2019 comprising no less than 47 sections. Clarke J. in Forsythe v Director of Public Prosecutions and Attorney General of Jamaica (1997) 34 J.L.R. 512 puts it succinctly when he stated (at p. 513) as follows:

> This case is not about whether ganja is more or less harmful than tobacco or alcohol. Neither is this court concerned with the possible economic benefits which could be derived from the legalizing of ganja.
>
> In so far as this application is concerned, those matters are red herrings, drawn along the trail with the sole object of confusing the issues which arise for our determination.
>
> These arguments are more properly advanced before the bar of Parliament in an endeavour to convince the legislators on the question of legalising ganja.
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> The issue which arises to be resolved on this motion is the Constitutionality of the Dangerous Drugs Act. Does, the act contravene the rights guaranteed to the applicant under section 21(1) of the Jamaica Constitution. Is the applicant being hindered in the enjoyment of his freedom of conscience to wit, in the practice of his religion as a Rastafarian.
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> Those are the issues with which the court will concern itself. The court will not be drawn into any emotional debate.

[80] In concluding, I therefore agree with the submission of Mr. Gonsalves Q.C. that, first, the Defendants offer no real or substantial arguments, reasons or actual evidence to support the position that this intrusion on the Claimant's right to freedom of conscience under sections 3 and 11 of the Constitution is the least possible intrusion necessary to achieve their legitimate aims, and second, the blanket prohibition is certainly a way, perhaps a convenient way, or the easiest way, but not necessarily the least intrusive way of so doing. The Defendants have not in my view provided adequate, or any, evidence to explain why the general prohibition on the use, possession and cultivation of cannabis in the Drugs Act is necessary in the interests of public health, public order or public safety in light of the contravention of

the Claimant's right to freedom of conscience guaranteed to him by sections 3 and 11 of the Constitution.

[81] The Defendants maintain that the general prohibition is necessary because there are no less restrictive options in respect of the present general prohibition contained in the Drugs Act as a means to deal with what is stated to be a serious social and health problem. The Defendants point to the problems in administering any possible exemption for medical use. In relation to this, the minority in Prince I stated that:

> [63] Yet the government contended that any exemption would be difficult to administer. In contending that it would be difficult to police any exemption the Attorney-General pointed out certain difficulties including the problem of identifying bona fide Rastafari; the source from which cannabis is to be obtained; and how to safeguard against the abuse of the exemption. Both the High Court and the SCA also pointed out these difficulties. But what is required is to subject the religious use of cannabis to strict control including the purpose for which it can be acquired; the persons who may acquire it; the sources from which it may be acquired; and the amount that may be lawfully possessed. It is for the legislature to determine the regulation and control to which the religious use of cannabis should be subjected as well as the measures that should be put in place in order to safeguard against the abuse of the exemption. Such regulation and control, whilst directed at enforcing a legitimate government interest, should bear in mind and as far as possible respect the centrality of the different uses of cannabis to the Rastafari religion.

[82] Rather than find ways in which the religious use may be accommodated, the Defendants maintain throughout in their affidavit evidence, submissions and during oral argument that a total prohibition is necessary in the interests of public health and public safety. That approach without adequate supporting evidence is impermissible and is constitutionally suspect. The prohibitions contained in sections 6(2) and 7(1) of the Drugs Act, to quote from Prince II, do not employ the least restrictive means to deal with a social and health problem for which there are now a number of less restrictive options supported by a significant body of expertise.

[83] In my view, for reasons explained above, the Defendants have not provided adequate, or any, evidence to show that sections 6(2) and 7(1) of the Drugs Act are reasonably required in the interests of defence, public safety, public order, public morality or public health in accordance with section 11(5)(a) of the Constitution. As

a result of this finding, it is not necessary for the Claimant to show that sections 6(2) and 7(1) of the Drugs Act are not reasonably justifiable in a democratic society.

Cannabis, Rastafari and the Right to Privacy

[84] The Claimant also grounds his challenge to the constitutionality of sections 6(2) and 7(1) of the Drugs Act on the basis that these sections infringe his right to privacy found in sections 3 and 9 of the Constitution. It cannot be questioned that section 3 of the Constitution can be enforced under section 18 of the Constitution of Saint Christopher and Nevis. Section 3 is included in section 18 of the Constitution – the enforcement section. The debate concerning whether similar provisions to section 3 are separately enforceable even when they are not included in the enforcement section is not applicable to the Constitution of Saint Christopher and Nevis. That debate has now ended with the forward-thinking decision of the Caribbean Court of Justice in Nervais and Severin v R (2018) 92 WIR 178. When examining the scope of section 11 of the Constitution of Barbados, which is in similar terms to section 3 of the Constitution of Saint Christopher and Nevis, Sir Dennis Byron, President of the Caribbean Court of Justice, stated that:

> [25] The language of s 11 is not aspirational, nor is it a preliminary statement of reasons which make the passage of the Constitution, or sections of it, desirable. The section is in two parts. The first part commences with the word 'whereas', a word which it is contended implies that the section is merely preambular and ends at the end of sub-para (d). This part gives effect to the statement in the preamble which states that the people have had rights and privileges since 1652 and these have been enlarged since then. It declares the fundamental rights and freedoms of the individual to which every person in Barbados is entitled in clear and unambiguous terms. It is the only place in the Constitution that declares the rights to which every person is entitled.
>
> [31] The second part of s 11 provides that the following provisions, namely ss 12–23 shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the rights conferred in s 11 does not prejudice the rights and freedoms of others or the public interest. The plain language of this part must rebut the contention of the Crown and the reasoning of Lord Mance in [Newbold v Commissioner of Police [2014] UKPC 12 (2014) 84 WIR 8] and the decisions on which he founded his conclusions. There is no need for

> linguistic finessing to conclude that the word 'those' which precedes 'rights', and the phrase 'said rights' which are subjected to limitation, must refer to the rights declared in s 11(a) to (d). This means that the provisions in ss 12–23 afford protection for those rights subject to the limitations they authorize. Without the foundation of those s 11 rights, ss 12–23 do not fulfil the aspirations and intentions of the constitutional provisions for the fundamental rights and freedoms.
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> [37] In summary, s 11 declares the entitlement of the fundamental and inalienable rights of the citizens of Barbados. Sections 12–23 afford protection to those rights and freedoms conferred by s 11 subject to such limitations of that protection as are contained in those provisions.

[85] As mentioned above, the right to privacy found in section 3 of the Constitution is enforceable under section 18 of the Constitution of Saint Christopher and Nevis. In Chief of Police et al v Nias (2008) 73 WIR 201, Chief Justice Sir Hugh Rawlins stated that:

> [10] In reviewing legislation for unconstitutionality, the court always applies the presumption of constitutionality. This is the presumption that in making legislation the legislature has not exceeded its constitutional powers to legislate. Legislation is presumed to be constitutional unless there is clear proof to the contrary. The burden is upon the applicant to rebut the presumption.

[86] I agree with Rampersad J. in Jones v Attorney General of Trinidad and Tobago (2018) 44 BHRC 566 that the so-called presumption of constitutionality, exemplified by the decision of the Privy Council in Director of Public Prosecutions v Nasralla [1967] 2 A.C. 238, has no place in constitutional and human rights adjudication in the Commonwealth Caribbean. It harks back to an earlier time in the immediate post-colonial period, the dark ages even, when British judges, unfamiliar as they then were with written constitutions, adopted interpretations that did not give our citizens the full benefit of the wide scope of the Chapter on the fundamental rights and freedoms found in our Constitutions. I have, therefore, avoided any reference to the presumption of constitutionality in the previous section relating to the right to freedom of conscience guaranteed by sections 3 and 11 of the Constitution and I will do the same in respect of the right to privacy guaranteed by sections 3 and 9 of the Constitution.

[87] I wish to adopt the enlightened approach of the Privy Council in Matthew v The State (2004) 64 WIR 412 where Lord Hoffman, speaking for the majority, stated:

> [42] The correct approach to interpretation of a Constitution such as that of Trinidad and Tobago is well established by authority of high standing. In Edwards v Attorney-General of Canada [1930] AC 124 at 136, Lord Sankey LC, giving the opinion of the Board, classically described the Constitution established by the British North America Act 1867 as 'a living tree capable of growth and expansion within its natural limits'. The provisions of the Act were not to be cut down 'by a narrow and technical construction', but called for 'a large and liberal interpretation'. Lord Wilberforce spoke in similar vein in Minister of Home Affairs v Fisher (1979) 44 WIR 107 at 112 and 113, when he pointed to the need for a 'generous interpretation', 'suitable to give to individuals the full measure of the fundamental rights and freedoms referred to' in the Constitution and 'guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences'. The same approach was commended by Dickson J, giving the judgment of the Supreme Court of Canada in Hunter v Southam Inc [1984] 2 SCR 145 at 155:
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> > 'The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the un-remitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be re-pealed or amended. It must, therefore, be capable of growth and development over time to meet new so-cial, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Prof Paul Freund expressed this idea aptly when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one”.'
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> In Attorney-General v Whiteman (1991) 39 WIR 397 at 412, Lord Keith of Kinkel, giving the advice of the Board, said:
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> > 'The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights.'
>
> Reference may also be made to Attorney-General of The Gambia v Momodou Jobe [1984] AC 689 at 700, Vasquez v R; O'Neil v R (1994) 45

WIR 103 at 113, and Reyes v R [2002] UKPC 11, 60 WIR 42 at pp 54 and 55, paras [25] and [26].

[88] Giving the Constitution of Saint Christopher and Nevis a generous interpretation and avoiding the "austerity of tabulated legalism" (de Smith, The New Commonwealth and its Constitutions (1964), p 194; Minister of Home Affairs v Fisher [1980] AC 319, 328), what does the right to privacy entail? Williams J. in Williams et al v Attorney General of Saint Christopher and Nevis et al (Suit No: NEVHCV2013/0120 dated 21 March 2016) accepted in principle that the right to privacy existed under the Constitution of Saint Christopher and Nevis. In Puttaswamy v Union of India (Writ Petition (Civil) No 494 of 2012) dated 26 September 2018), the Supreme Court of India stated that:

> Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life … Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

[89] In Prince II, the Constitutional Court of South Africa had to consider whether sections 4(b) and 5(b) of Drugs and Drug Trafficking Act 140 of 1992 read with Part III of Schedule 2 of that Act and section 22A(9)(a)(1) of the Medicines and Related Substances Control Act 101 of 1965 were inconsistent with section 14 of the Constitution to the extent that they criminalized the use or possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private. In other words, whether these sections limit the right to privacy as held by the High Court and, if they did, whether that limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors listed in section 36(1) of the Constitution (at [40]) or whether the prohibition by the impugned provisions of the mere possession, use or cultivation of cannabis by an adult in private for his or

her personal consumption in private was inconsistent with the right to privacy provided for in section 14 of the Constitution and, therefore, invalid (at [51]).

[90] The Constitutional Court accepted the definition of privacy adopted in its previous decision of Bernstein v Bester [1996] ZACC 2, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 where it stated (at [76]) that:

> Wilson J pointed out that one of the purposes underlying the section 8 right is the 'protection of the individual's reasonable expectation of privacy'. Since an enquiry into privacy constitutes an important component in determining the scope of an unreasonable search or seizure, the Courts have had to develop a test to determine the scope and content of the right to privacy. The 'reasonable expectation of privacy' test comprises two questions. First, there must at least be a subjective expectation of privacy and, secondly, the expectation must be recognised as reasonable by society.

[91] The Constitutional Court accepted that the right to privacy entitles an adult person to use or cultivate or possess cannabis in private, and in the absence of children, for his or her personal consumption (at [58]). It held that the extent that the impugned provisions criminalise such cultivation, possession or use of cannabis, they limit the right to privacy guaranteed under section 14 of the Constitution (ibid).

[92] The next question for the Constitutional Court was whether that limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required by section 36 of the Constitution (at [59]). In other words, the State must satisfy the court that the limitation is reasonable and justifiable in an open and democratic society (ibid). Section 36 of the Constitution of South Africa requires that certain factors be taken into account in determining whether the limitation of a right entrenched in the Bill of Rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, namely: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. These factors are in similar terms to the criteria established by the Privy Council in de Freitas and mentioned above.

[93] The Constitutional Court in Prince II distinguished Prince I on the ground that the question in that case was whether the prohibition on the use or possession of cannabis when inspired by religion was constitutionally valid, not whether a prohibition on the cultivation or possession or use of cannabis by an adult in private for his or her own personal consumption unreasonably and unjustifiably limited the right to privacy (at [63]). It held that when all the factors are taken into account including the increasing number of open and democratic societies in which possession of cannabis for personal use has either been legalised or decriminalised and the inadequate evidence put up by the State, the conclusion was inevitable that the State had failed to show that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (at [94]).

[94] At the hearing of the application by way of originating motion, Counsel for the Defendants and Mr. Gonsalves Q.C. accepted that the analysis in respect of any decision on the right to freedom of conscience found in sections 3 and 11 of the Constitution must of necessity also apply to the analysis in respect of the right to privacy guaranteed under sections 3 and 9 of the Constitution. I, too, agree. Although the Constitutional Court in Prince II attempted to distinguish Prince I, it applied the reasoning of the minority in Prince I. The decision of the Constitutional Court in Prince II cannot sit comfortably with the previous decision of the Constitutional Court, via majority, in Prince I. To the extent to which Prince II applied the reasoning of the minority in Prince I, one may assume that Prince I was overruled sub silentio. I immediately accept that these two decisions do not bind this court. However, I find the reasoning of the minority in Prince I and the unanimous decision in Prince II both compelling and persuasive and I adopt them unreservedly.

[95] I do not agree with the submission of Counsel for the Defendants that Prince II was decided on constitutional provisions that differ from sections 3 and 9 of the Constitution of Saint Christopher and Nevis and *for that reason alone* the reasoning in Prince II does not apply to this case. While the wording of the limitation on the right to privacy found in section 36 of the Constitution of South Africa uses words

such as "was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", it cannot seriously be doubted that the values expressed by those words are apt to cover the wording of the limitations found sections 3 and 9(2) of the Constitution of Saint Christopher and Nevis. The wording of these sections is broad enough to cover the values and concepts referred to in section 36 of the Constitution of South Africa.

[96] I am sure that Counsel for the Defendants did not mean to suggest that Saint Christopher and Nevis is not an open and democratic society based on human dignity, equality and freedom. These concepts are infused in *all* the provisions of the Constitution and are specifically recognized in the preamble to the Constitution of Saint Christopher and Nevis as follows:

> WHEREAS the People of Saint Christopher and Nevis
>
> (a) declare that the nation is established on the belief in Almighty God and the inherent dignity of each individual;
>
> (b) assert that they are entitled to the protection of fundamental rights and freedoms;
>
> (c) believe in the concept of true democracy with free and fair elections;
>
> (d) desire the creation of a climate of economic wellbeing in the context of respect for law and order; and
>
> (e) are committed to achieve their national objectives with a unity of purpose:
>
> NOW, THEREFORE, the following provisions shall have effect as the Constitution of Saint Christopher and Nevis: … (Emphasis added)

[97] Applying the reasoning of Prince II to the facts of this case, it is inevitable that the prohibition on the possession and cultivation of cannabis (marijuana) under sections 6(2) and 7(1) of the Drugs Act, by reason of the inclusion of this substance in Schedule II to the Drugs Act infringes the Claimant's right to privacy under sections 3 and section 9 of the Constitution.

[98] Section 9(2)(a) of the Constitution states that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably

required in the interests of defence, public safety, public order, public morality, public health. In seeking to justify, pursuant to section 9(2)(a) of the Constitution, the contravention of the Claimant's right to privacy under sections 3 and 9 of the Constitution, the Defendants again submit that the State has acceded to various International Drug Conventions. I have already explained that these conventions must yield to the provisions of the Constitution as the supreme law of Saint Christopher and Nevis. Although cannabis poses a health risk to some vulnerable members of the population, such as children, pregnant women and young persons, that alone is no good reason for the blanket prohibition on the use, possession and cultivation of cannabis by adults for personal use in private. While appropriate legislation setting out the parameters of such a right will need to be put in place by the National Assembly to deal with this, the lack of a legislative framework cannot by itself lawfully justify the continued prohibition on the use, possession and cultivation of cannabis by adults in private for their personal use.

[99] The fundamental right to privacy guaranteed by sections 3 and 9 of the Constitution is not a light switch that can be turned on and off by the State at its pleasure. These fundamental rights and freedoms must shine bright for all persons in Saint Christopher and Nevis and they are not subject to any time limitations. As with the right to freedom of conscience, the Defendants have not provided adequate or any evidence to justify the limitation grounded in section 9(2)(a) of the Constitution to the right to privacy found in sections 3 and 9 of the Constitution. The paternalistic assumption that many have that the private use of cannabis is wrong and unhealthy cannot be used to justify the continued contravention of the Claimant's right to privacy. The moral views of one section of the community *do not* and *can never* justify any limitation on the Claimant's fundamental rights and freedoms or the fundamental rights of any other person in Saint Christopher and Nevis, particularly the right to privacy guaranteed under sections 3 and 9 of the Constitution of Saint Christopher and Nevis.

[100] There is no principled basis to hold that the use, possession and cultivation of cannabis contravene the right to freedom of conscience under sections 3 and 11 of

the Constitution but at the same time accept that they do not contravene the right to privacy guaranteed under sections 3 and 9 of the Constitution. Once the contravention is found to exist, the burden shifts to the State to establish (by evidence) that one or more of the exceptions to these fundamental rights and freedoms apply. The Defendants have failed to provide adequate or any evidence to establish any justification for the limitations on these fundamental rights and freedoms under sections 9(2)(a) and 11(5)(a) of the Constitution. That failure rested primarily on the fact sections 6(2) and 7(1) of the Drugs Act do not employ the least restrictive means to deal with a social and health problem for which there are now a number of less restrictive options supported by a significant body of expertise (Prince II).

[101] In other words, the means used by the State to deal with cannabis impair the Claimant's fundamental rights and freedoms more than is necessary to accomplish the objective of protecting public health, public order and public safety. Further, the Defendants have not shown that the hindrance goes no further than is necessary to accomplish these objectives. This much has now been recognized by the State in light of the existence of sections 3 to 12 of the Cannabis Bill 2019 that provide a possible regulatory framework within which persons of the Rastafari religion may use cannabis to practise their faith consistent with their constitutional right to freedom of conscience guaranteed to them under sections 3 and 11 of the Constitution of Saint Christopher and Nevis.

[102] The decision that the court makes today is not to be taken as undermining the State's legitimate interest in the war on illegal and dangerous drugs. The constitutional issues in this case are narrow ones, and focus *only* on the use, possession and cultivation of cannabis by adults for use in the Rastafari religion and also the use, possession and cultivation of cannabis by adults in private for personal consumption. They *do not* touch or concern the issue of trafficking in cannabis, illegal drugs or other illegal activities. Indeed, the State *failed* to show a necessary correlation between the limitations founds in the Drugs act on these two fundamental

rights and freedoms and the total prohibition on the use, possession and cultivation of cannabis.

[103] I also emphasize that both of these issues *do not* relate to children and young persons who must always be protected. It is now for the National Assembly to determine consistent with this judgment the limits of, and to regulate, the religious and private use by adults of cannabis and to determine (among other things) the amount of cannabis that the National Assembly considers does not constitute undue harm, which may be subject to, first, use by adults in the Rastafari religion and, second, personal use and consumption by adults in private. These falls squarely within the prerogative of Parliament under section 37 of the Constitution to may make laws for the peace, order and good government of Saint Christopher and Nevis.

[104] After the draft of this judgment was prepared, I was able to read the provisions of the Cannabis Bill 2019 published by the Saint Christopher and Nevis Information Service website (https://www.sknis.kn/cannabis-bill-2019/). Part II of the proposed Cannabis Bill is entitled "Cannabis for Religious Purposes". It contains 10 sections regulating the use of cannabis for religious purposes. Apart from the observations already made, I make no further comment on the existence of these provisions in light of the affidavit evidence, and the submissions made orally and in writing on behalf, of the Defendants, and as outlined above. I am also mindful that the National Assembly may need additional time to cure the defects in the Drugs Act in respect of the personal use and consumption of cannabis by adults in private. The Attorney General proposed that a period of 90 days should be sufficient to enable the necessary legislation to be amended and passed by the National Assembly.

[105] The effects of the declarations made below are two-fold. First, they allow the use, possession and cultivation of any amount of cannabis by an adult member in the Rastafari religion for use in the Rastafari religion. Secondly, they allow the use, possession and cultivation of cannabis by an adult in a private place of any amount of cannabis for his or her personal use in private. The National Assembly has the power to legislate in respect of these matters consistent with this judgment. In

addition, and I emphasize, there can be no doubt that the National Assembly also has the power to, and *must*, determine through legislation the *amount* of cannabis permitted in respect of the orders made at Paragraphs (4) to (7) below.

[106] I wish to thank the parties for their helpful submissions, and I am also grateful to Mr. Anthony Gonsalves Q.C. for accepting the court's invitation to appear as amicus curiae and for his invaluable assistance to the court.

Disposition

[107] For the reasons explained above, I make the following orders:

(1) A Declaration is granted that Rastafari is a religion and is entitled to protection under sections 3 and 11 of the Constitution.

(2) A Declaration is granted that the Claimant is a person who has been hindered in the enjoyment of his freedom of conscience guaranteed under sections 3 and 11 of the Constitution.

(3) A Declaration is granted that the Claimant is a person who has been hindered in the enjoyment of his right to privacy guaranteed under sections 3 and 9 of the Constitution.

(4) A Declaration is granted that section 6(2) of the Drugs Act read with Part II of the Second Schedule to the Drugs Act is inconsistent with and therefore infringes the Claimant's constitutional right to freedom of conscience and religion under sections 3 and 11 of the Constitution to the extent to which it makes no exemption for possession of any amount of cannabis for religious use by adults in the Rastafari religion.

(5) A Declaration is granted that section 7(1) of the Drugs Act read with Part II of the Second Schedule to the Drugs Act is inconsistent with and therefore infringes the Claimant's constitutional right to freedom of conscience and religion under sections 3 and 11 of the Constitution to the extent to which it makes no exemption for the cultivation of any amount of cannabis by an adult member of the Rastafari religion for religious use by adults in the Rastafari religion.

(6) A Declaration is granted that section 6(2) of the Drugs Act read with Part II of the Second Schedule to the Drugs Act is inconsistent with and therefore infringes the Claimant's constitutional right to privacy under sections 3 and 9 of the Constitution to the extent to which it makes no exemption for possession by an adult in a private place of any amount of cannabis for his or her personal use in private.

(7) A Declaration is granted that section 7(1) of the Drugs Act read with Part II of the Second Schedule to the Drugs Act is inconsistent with and therefore infringes the Claimant's constitutional right to privacy under sections 3 and 9 of the Constitution to the extent to which it makes no exemption for the cultivation by an adult in a private place of any amount of cannabis for his or her personal use in private.

(8) Paragraphs (4) to (7) are hereby suspended for a period of 90 days from today's date to allow the National Assembly to remedy the constitutional defects set out in this judgment.

(9) The convictions of the Claimant dated 17 May 2013 for possession and cultivation of cannabis only in relation to sections 6(2) and 7(1) of the Drugs Act are hereby quashed.

(10) A Declaration is granted that in the interim period set out in Paragraph (8), any prosecutions brought under sections 6(2) and 7(1) of the Drugs Act shall be stayed.

(11) Costs to the Claimant to be assessed if not agreed within 21 days of today's date.

Eddy D. Ventose

High Court Judge

By the Court

Registrar