SENATE

Monday, November 02, 2009

The Senate met at 1.30 p.m.

PRAYERS

[MR. VICE-PRESIDENT *in the Chair*]

LEAVE OF ABSENCE

Mr. Vice-President: Hon. Senators, I have granted leave of absence to Sen. The Hon. Danny Montano who is ill and Sen. Michael Annisette who is out of the country.

SENATOR'S APPOINTMENT

Mr. Vice-President: Hon. Senators, I have received the following correspondence from His Excellency the President, Prof. George Maxwell Richards, T.C., C.M.T., Ph.D.:

"THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

By His Excellency Professor GEORGE MAXWELL RICHARDS, T.C., C.M.T., Ph.D., President and Commander-in-Chief of the Republic of Trinidad and Tobago.

/s/ G. Richards
President.

TO: MR. JOEL PRIMUS

WHEREAS Senator Danny Montano is incapable of performing his duties as a Senator by reason of illness:

NOW, THEREFORE, I, GEORGE MAXWELL RICHARDS, President as aforesaid, acting in accordance with the advice of the Prime Minister in exercise of the power vested in me by section 44 of the Constitution of the Republic of Trinidad and Tobago, do hereby appoint you, JOEL PRIMUS, to be temporarily a member of the Senate, with immediate effect and continuing during the period of illness of the said Senator Danny Montano.

Given under my Hand and the Seal of the President of the Republic of Trinidad and Tobago at the Office of the President, St. Ann's, this 2nd day of November, 2009."

Mr. Vice-President: We have a second Senator, Dr. Rolph Balgobin, but he is not here. We will stand that one down until he comes.

OATH OF ALLEGIANCE

Sen. Joel Primus took and subscribed the Oath of Allegiance as required by law.

PAPERS LAID

1. Audited financial statements of the Cipriani College of Labour and Co-operative Studies for the year ended September 30, 2007. [*The Minister of Trade and Industry and Minister in the Ministry of Finance (Sen. The Hon. Mariano Browne)*]

2. Audited financial statements of the Cipriani College of Labour and Co-operative Studies for the year ended September 30, 2008. *(Sen. The Hon. M. Browne*

WRITTEN ANSWER TO QUESTION

The following question was asked by Sen. Wade Mark:

Trinitrain Consortuim Contract
(Details of)

177. With respect to the Rapid Rail Project, could the Minister of Works and Transport provide the Senate with:

(i) Details of the US $67 million Phase I contract with Trinitrain Consortium; and

(ii) A copy of the contract?

Vide end of sitting for written answer.

EVIDENCE (AMDT.) BILL
[SECOND DAY]

Order read for resuming adjourned debate on question [27th October, 2009]

That the Bill be now read a second time.

Question again proposed.

Mr. Vice-President: The list of those who spoke on Tuesday, October 27, 2009, are Sen. The Hon. John Jeremie SC, the Attorney General and mover of the Bill, Sen. Wade Mark and Sen. Dana Seetahal SC.

Sen. Lyndira Oudit: Mr. Vice-President, let me start by saying that whenever we are going against legislation or any clause in our Constitution—and this one is clearly stated by the Attorney General—it is imperative that the State impose an

even greater obligation to ensure that there are tighter restraints. Once there is variation in the Constitution it means—

Sen. Jeremie SC: Can I correct you? I know that you are just beginning but I said that we were not infringing the Constitution. In the course of my presentation, I made the point that in the committee stage, I intend to move an amendment to delete the reference to the constitutional infringement.

Sen. L. Oudit: Thank you very much, Attorney General, Sen. Jeremie SC. However, I feel that at this point I would stand with my interpretation simply because it is more critical that objections levelled against anything that has a question mark on constitutionality should be taken very, very carefully. We have to examine every objection that is raised to this particular piece of legislation.

This is especially important when you take into consideration that this is almost like a dagger in the hearts of the judicial powers by the simple abolishment or elimination of what is called the fraternity accepted common law. You are driving a stake in the heart of judicial interpretation and the power of the magistrates to interpret. You are denying the wisdom of all the judges in their interpretations prior to this.

This legislation needs to be dissected and analyzed by serious criminal as well as civil societies. This is why I am going to call again, for this Bill to go before a Joint Select Committee to ensure a wide as possible analysis of this particular piece of legislation. This particular legislation needs what is referred to as a legislative curb because again, I would stick with my interpretation that it seeks to question the constitutionality. There may be interpretations to the contrary, but until that is done and we are clear in our heads that this is not referring to—and by changing the wording of the Bill, I do not think that that does away with the question of the constitutionality. There are many quarters that will still question this state machinery.

Instead of bringing legislation that is almost handcuffing the defence lawyers, the State should be dealing with more effective ways of dealing with our problems. Our problems are not so much in the problems of the prosecution, but sometimes in the question of the defence. This piece of legislation seems to be working for the prosecution. Police and investigators often and increasingly work with prosecutors and the advice of prosecutors when conducting their investigations. Oftentimes, prosecutorial rules may cause law enforcement agencies to actually support the inferences of the prosecutors.

It seems as if at this point in time with this particular piece of legislation we have the institutional backbone and the political will to deal and assist the

prosecution. I hope that this political will and backbone will come and be ever present in the defence of the nation and apprehension of persons who are not only the street criminals of our society, but rather our economic thieves and bandits who would make these street criminals look like angels.

In recent times we have had an almost comical display of economic mismanagement. We have variations in public expenditure and recordings of a number of infractions and misdemeanours. It is my hope that the video recordings, the documents and the audio visual that this criminal piece of legislation is seeking to institute can also be used, when we have the question of the application of these recordings to deal with the big economic thieves of our society.

I will refer to a point that the hon. Sen. Dana Seetahal SC made in her contribution. She said when she referred to 15N of the Bill, she identified the seven gateways and offered her opinion that it was better than what was referred to as common law. My question at this point—in *Hansard* she said the judge always has the discretion in these cases. If it is that the judge always has the discretion in the cases, then why eliminate the ruling on common law? If that is the understanding, then by simply deleting the words, does it negate the common law authority? It does not seem to. I cannot imagine why you would eliminate or delete the clause on common law.

When I looked at the Bill my understanding was a simple question I had for the Attorney General. It was about the use of the word "accused" instead of the word "defendant". I looked at the Oxford dictionary and it is very clear. It states, "an accused is someone who is said to have done something wrong or illegal." I am sure it can be used in any legal document as well. “A defendant is a person responsible for infringing upon the rights of the plaintiff and is a person who is brought in the court of law.” Since we are dealing with legislation, then one would have assumed that in layman's term, "the accused", would not have been used and the jargon would have been consistent with other established legal documents and legislation.

I suggest in the first instance, that the word "accused" be replaced throughout the document with the word "defendant" making it a person who is actually before a court.

1.45 p.m.

Section 15A abolishes the rule of common law and I would like to refer to the Federal Rules of Evidence. The Federal Rules of Evidence governs all civil and

criminal proceedings in all the courts of law in the United States. This became effective in 1973 and I will read for you what it says. It says that:

> "…the Supreme Court and the Congress"—in enacting the Federal Rules of Evidence—"did not intend to wipe out years of Common Law development in the field of evidence. To the contrary, the Federal Rules of Evidence largely incorporate the judge-made common law evidentiary rules in existence at the time of their adoption…courts may answer unresolved questions by relying on common law precedent."

It goes on to indicate where there would be exclusions to this, for example, in trials of misdemeanour and other petty offences, in naturalization proceedings, et cetera. It seems that there is some reason that I cannot fathom, and I cannot imagine for the life of me what would be the reason, the agenda, behind the abolishing of the common law.

Rule 501 of the Federal Rules of Evidence is very clear. It says:

> "Except as otherwise required by the Constitution of the United States…the privileges of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

I understand that this is directly taken from English law, but we are bound by every clause in that particular piece of legislation. It may have been to our advantage and good favour if we did not take everything word for word and copycat this legislation and had made legislation more suited to our circumstance and state of development, rather than wholesale. Had we done that, we would have been able to accept what the United States in its wisdom and legislative authority accepts and willingly calls on the courts to acknowledge the supremacy of a fraternity accepted, time-tested common law rule. So, I seriously ask the Attorney General to look at this piece of legislation again and see if there is any way they can accept the common law.

Section 15I and 15J are introducing new forms of evidence and I would like to ask the question concerning storage, quality of the material and reliability of data as it relates to the storage of equipment. We have a history of rats eating cocaine, guns going missing, guns finding themselves in all other places that were supposedly stored in secure areas. We have a problem of improper storage. How will you ensure, where you have such delicate things such as DVDs, flash drives, iPods and all the rest of it; all sorts of new digital recording devices; how is the

Attorney General and the Minister of National Security going to ensure, when big blocks of cocaine disappear, that little pieces of flash drives, no bigger than half a marker are going to be properly secured and not get accidently thrown out with the garbage?

Does this piece of legislation mean that the police stations will be improved? Are we going to see a betterment of storage facilities? Are we going to see, throughout the entire country, a revamping of buildings and ensuring that rooms and facilities at police stations for storage of material are going to be improved?

In the *Guardian* of Monday, October 26, 2009, maybe the Attorney General may find this funny, but this is serious business. It says:

> The Balo Maharaj kidnapping.
>
> "The records which could have given him an alibi"—referring to Richard De Four—"have been destroyed by the T&T Regiment, according to the statement from the Ministry of National Security…
>
> These were among other documents being stored in a 40-foot container which was flooded by rainfall, resulting in the documents being severely damaged…
>
> These documents were subsequently authorized to be destroyed by incineration and were actually incinerated during the period August to September, 2005…"

This is an ongoing investigation, an ongoing case right here in Trinidad and we have containers being flooded.

Sen. Seetahal SC: I have been involved in the extradition in that case, so I know about it. It is not an ongoing investigation. It was finished and the persons extradited and charges already laid. Four years after, they asked for a document that they could have asked for at the outset.

Sen. L. Oudit: Thank you very much, Sen. Seetahal SC. If it took four years to ask for the information, that is fine. The problem is that we find ways of explaining matters away when things go missing. We say: You know what? In this case, it was four years after. That is fine, but it is not the first and only case. What happened with the rats and the cocaine? What happened to the Moruga cocaine that was washed up on the beaches? This is evidence and we are dealing with the introduction of new forms of delicate information.

We have a question, when it comes to recording devices, of background noises and the quality. I made reference to the quality of your data. According to

Jerry Capeci—and you will laugh at this name—he wrote a book called *The Complete Idiot's Guide to the Mafia*. Jerry Capeci in his book referred to a case against the Gambino Soldiers, Gene Gotti and John Carneglia in the late 1980s. On two occasions during their prosecution, there were mistrials and it was only in their third trial that they were sentenced. Do you know why?

It is simply the question of tampering with available recorded information. It says that when you have recorded information, depending on where it is recorded, there are background noises. It could be a television, the hum of an air-condition unit, a background siren from a police car; a number of things. What is done by many persons involved in the case is that they try to disaggregate the voice and the background, but the problem comes in when a person will claim that you have simply tampered with the recording and this is the exact thing that happened in this huge trial in the United States.

Technology allows for voice to be enhanced while background noises, et cetera, are reduced, but are we going to admit into evidence the exact form of the recording or are we going to try to make sure—how does the legislation deal with the way we amplify the sound to ensure that we get the person's voice, rather than what is there? We are trying to ensure an accurate recording.

Does this audio recording refer to telephones? In telephones now we have land lines as well as cellular phones. Cellular phones have, in many phones, recording devices such as video, voice recording or capture pictures. Are we going to include the telephone? It is not clear in the legislation and I feel this information has to be included.

In a matter in Australia in 1997, in the judgment in *Giles in Sunstate Airlines v First Chicago Australia Securities Limited (1997)*:

> "The conduct of proceedings in open court available to public scrutiny is of great importance…in many cases the Court is assisted in fact finding by observance of what is called the demeanor of the witness…upon which the taking of video evidence may impact…cross-examination may be very difficult when video evidence is taken."

That refers to the question of how you gauge. Oftentimes, people tell you they can see first-hand if a witness is lying. We have here several cases which pointed to the fact that there are severe constraints and limitations with the use of video recordings. We have to consider that. I applaud the efforts of the Government to try to rectify, because time and again we keep saying we have to do something

about the crime situation. We need to see action. I think that it is laudable that this particular piece of legislation has come at this time; however, we cannot—this is important; sometimes we want to have a situation where we would like to prosecute and we would like the offenders to pay for what they have done, but we must guard against the rights of all, including those accused whether or not they are guilty. I am not saying that we should not deal with the wrongdoers, but we have to be careful not to set the precedence of several other countries where we are now questioning whether anybody has rights. We have to be mindful of that.

The Attorney General, in his presentation, indicated that by using video and audio we are actually going to shorten the time that it would take to conduct a case. This has proven in other countries to be far from the truth. In fact, court cases have been, in a burdensome manner, lengthened and have had many cost overruns, simply because of factors that include the cross-examination with the use of evidence from video and audio recordings.

2.00 p.m.

In New South Wales, there is the case of *ASIC v Rich*, 2004. In that case, that was as recent as 2004, the final ruling was that there were particular factors leading to the conclusion that it would be better to hear the witness, *viva voce*, in London, even though the case was being held in Australia; to go to London would have been preferable than to use a video link. It stated that the factors leading to this conclusion included the central importance of the evidence; the fact that credit would be an issue; the anticipated length and complexity of cross-examination; the logistical difficulty of managing the large bundle of documents involved and the duly taxing arrangements, which would be required to overcome what we have as the time zone problems.

If this piece of legislation is to follow in the manner of the FIU, the Proceeds of Crime Bill, et cetera, and we are dealing with an international arena, then we must have in this piece of legislation, cross-examination with a factor of a time zone. What would happen if a witness, where you would like to admit video evidence, who is in another location outside of your area and possibly, which is not uncommon, is in a different time zone? How do you schedule? That comes to the question of scheduling of the court. This is certainly going to add to the scheduling and the arrangement. There is the question of cost: Who pays for this and how is this managed? I would hope that the Attorney General could be honest in his explanation, that really and truly it is not going to shorten the time spent on cases and the potential or propensity, rather it is to lengthen and add extra financial cost to cases that are being tried, using video audiovisual.

There is a particularly nagging problem and I hope possibly the Senior Counsel or the Attorney General might be able to answer for me; the question of client confidentiality. Section 15I(3)(d) states where a direction under subsection (2) may be made in relation to:

> "any views of the witness as to whether his evidence in chief should be given orally or by means of the video or audio recording."

Am I to assume that all video and audio referred to in this particular legislation is prerecorded? Is there then the possibility in the word of "any" of this that live evidence will be taken?

Sen. Seetahal SC: Could I answer?

Sen. L. Oudit: Let me finish. In section 15Q(1) and (2) it talks about evidence which is to be cited by co-defendants. Would we have a question of attorney/client confidentiality and how do we treat with that in a court where there is a live recording being done? Further, what about the administration of an oath or the affirmation to be gone via a video or audio link; how will it be done? Will it be done by the direction of a court, a person so authorized to do so, or will it be done right there and then in the giving or the accepting of this evidence via video? I do not know if the Senior Counsel could answer that one?

Sen. Jeremie SC: Which one?

Sen. L. Oudit: I am not sure if you heard the question.

Sen. Jeremie SC: We were chatting. I did not hear the question.

Sen. L. Oudit: I gathered as much. Maybe the learned Senior Counsel—

Sen. Seetahal SC: I do not know. I think there are two of us who equally share that designation.

In relation to the question about video recording, the legislation is meant to provide for recording, which would have been out of court being played as evidence in chief. That is at (f). I think you referred to it; 15I(1)(f), evidence in chief and then the live witness will then be cross-examined. What you said before, it will be played and that will be your evidence in chief, then you will be sworn and cross-examined on it. The court will have to determine all these matters whether to admit.

It also provides for an accused person who gave a statement out of court and there is a video recording of it for that to be put in, rather than a written statement that now happens.

Sen. L. Oudit: Thank you very much, Senior Counsel. I was also referring to clause 15Q(1) and (2), where it talks about co-defendants and evidence to be cited.

Sen. Seetahal SC: 15Q really has nothing to do with the video, it has to do with the question of the seven gateways when you are cross-examined on character and where you have two accused and one is running a cut-throat defence; he is saying he did it, I was there. Then those provisions will kick in.

Sen. L. Oudit: Thank you. Just to the end of that discussion. A part of the parent Act, which was not included in the amendment Bill, was section 19(1)A. That, in fact, did refer to the administration of the oath. My question again is: Would this section 19 of the parent Act hold when you have a new recording being done? That is something that was a bit of a nagging problem when I was looking at it; the administration of the oath.

I also saw where section 15I(8) talks about a statement by a witness being admitted under this section, whether or not the statement was made on oath. If we go back to section 14A(1) and (2) of the parent Act, it refers to the admissibility of photographs. The photographs that are to be admitted must be supported by a certificate signed by a photographer before a Justice of the Peace authenticating the photograph as being a true image of the aforesaid;

> "(2) the photographer shall be required to give evidence of the procedure adopted by him to produce the photograph."

While you have section 14A that just deals with photographs and the admissibility of photographs, why is there not a corresponding requirement when it came to giving evidence on video or audio? Again, was it something that was inadvertently left out, that you have that strict requirement? You are admitting evidence via audio or video and where you have photographs, there are so many requirements and yet under the video you have almost nothing; not even doing an oath.

Mr. Vice-President, I started by saying that I felt that the Attorney General and Minister of National Security should have dealt with problems in our society in a better manner, rather than coming to handcuff defence, simply by making improvements in the way in which the problems—we have problems of crime in this society. One of the side effects of the problem is the inability of the Witness Protection Programme. We have a serious, serious problem. We have the inclusion of the words "is fearful". What makes a man fearful of his own life? I am not looking for the man to go and kill him and none of my colleagues here are; it is other bandits, criminals and the people who have been so accused and in the

court for defending themselves. They are the ones he has to be fearful of. What do we do if he is to become a witness? You cannot state that all this legislation is going to bring out people and as soon as you offer your face on a video, they cut your throat. The Witness Protection Programme is crucial. This legislation is almost spinning top in mud, because you have legislation here that is not corresponding with the rate of development of your Witness Protection Programme.

The point about this is that informants are oftentimes from the same community, as those persons who are in the court. When we have the idea that I am a witness and I must give evidence, possibly against my own neighbour or somebody from two streets down the road—we have a concern here about, not only the witness protection and the safety of the witness, but the procedures used by the police in even obtaining the information. There is a serious, serious problem. [*Interruption*] Listen please. In fact, with respect to the procedures used to gather the information and to get cooperation from informants in a place like Jamaica, you cannot be an informant. Your life expectancy is reduced to days. We have the same situation here. Persons do not have a life expectancy of 78 and 82, that is for people who live in a dream world. Those "fellas" who live on the streets are either on the criminal end, the witness protection end or the informant. Their shelf life is days. They are looking like hard biscuit, you have to throw it out in no time, simply because you cannot protect them as witnesses. You cannot protect the witnesses or your informant.

According to the Inspector General of the US Justice Report, in 2005, the Inspector General did a comprehensive study on the tactics used by police in gathering data and in getting their hands on informants. Hon. Attorney General, it is interesting to note that neither the Miranda Ruling nor the Levi Guidelines were sufficient to prevent abuses of the police officers in the execution of data gathering. The FBI continues to fail to follow its guidelines for using informants. The Inspector General found that the most significant problems were the failures to comply with the confidential information guidelines, where it is identified that one or more violations were in 87 per cent of all files that were examined. We like to think that this is only for the US.

On October 11, 2009 in Trinidad:

"State getting legal licks"

This is serious business. According to Justice Joseph Tam on March 11, 2002:

> "In the circumstances, the court is of the view that the defendants, five prison officers, have clearly attempted to distort the facts to concoct evidence to

mislead the court. The court is, therefore, unable to accept their evidence, because it is riddled with several material inconsistencies. This was the most vicious attack that resulted in the plaintiff being rendered unconscious."

We have here a situation where we are bringing more and more legislation, but we are not training our policemen in the way in which they ought to be gathering their data, in the manner in which they ought to house or keep secure; not only the person so accused, but certainly their witnesses. So we really have to understand—[*Interruption*]

2.15 p.m.

Mr. Vice-President: Hon. Senators, *Hansard* is having a little problem in recording the Senator's contribution, because of not so much crosstalk, but also chatter from the Benches. Could you please keep the chatter down so that *Hansard* can record properly?

Sen. L. Oudit: Mr. Vice-President, thank you. It is really irritating. I would like to suggest to the Attorney General that in reviewing this, possibly a joint select committee would really do a good job at making this a more comprehensive piece of legislation. I think what is missing critically from this piece of legislation—I am no lawyer—is that if you have to identify that equipment be used in any area in any industry, company or organization, you just cannot bring in the equipment. You must have technical requirements; you must have a place to store it; and you must have people who know how to operate the equipment.

There are so many factors and facets to the whole idea of equipment, especially when it comes to sensitive areas such as evidence for a man's life. When one looks at death row and all the sentencing that has to be done—I would like to refer the Attorney General to what is called the Evidence (Audio Visual and Audio Linking) Act 1997 out of Australia. There is no single word as "audio", Mr. Attorney General. It is audio-visual and audio-linking. They are two separate things. It refers to AV. You know, long ago, we would say the "AV room" or that you had to go to the "AV". Audio was never separated from audio-visual. It was audio-visual, because you must have the audio in addition to the visual. Under this Act—it goes in very nicely. I feel a simple reading would have been much better. In section 42G, there is an entire section which deals with technical requirements for any particular court. It refers to the class of equipment to be used; the layout of cameras; the standard, or speed, of transmission; the quality of the communication; any requirements for the presiding judge or magistrate. It says that both the court point and the remote point must be equipped with

facilities that are of a similar nature. You cannot have a primitive recording device elsewhere in a remote area or even the reverse. In a courtroom you might have something that is very old and outdated. The facilities and the equipment must be hand in hand.

Mr. Vice-President, I would like to suggest as I wrap up, that this Bill go before a joint select committee. I would like to suggest to the Attorney General that he find a way to direct the Minister of National Security so that we do not have problems with evidence gathering, and that we find a way to install closed-circuit television in all police vehicles. When you do that, there is nobody who can turn and say, well it did not happen this way, it happened in another way.

We have to be very careful when we have the reading of rights and all these things that normally come back to haunt the police service, that we have an accurate recording. One of the ways that we can deal with that is to have closed-circuit televisions installed in all police vehicles, as well as in every courtroom, in every charge room in every police station or in any interrogation room, so that we do not have this question of abuse and excessive punishment given or meted out to witnesses, informants or even to the accused or people who eventually become defendants.

I would like to suggest, as in other developed countries in the world, that we retain the admissibility of common law, and we give cognizance to the fact that judges in their wisdom over time and over the accepted period with their fraternity have been afforded the authority to interpret their laws, and so common law ought to be reinstated. I would also like to include that a section under technical requirements for the courtrooms and for all the legislation be included here.

Mr. Vice-President, I would like to close by referring to *The Common Law* written in 1881. Justice Oliver Wendell Holmes says: The life of the law has not been logic, it has been experience. The law cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. It is to be gathered, not simply by taking the words and the dictionary, but by considering their origin and the line of their growth.

I would like to close by indicating while this piece of legislation is laudable, it is incomplete, and it really ought to be sent to a joint select committee.

I thank you. [*Desk thumping*]

DISTINGUISHED VISITOR
(HON. PATRICIA GORDON-PAMPLIN)

Mr. Vice-President: Hon. Senators, I would just like to acknowledge the presence of The hon. Patricia Gordon-Pamplin, Member of Parliament of the House of Assembly in Bermuda. [*Desk thumping*] She is serving her third term in the Bermuda House of Assembly. She has been there since 1999 to present. Previously, she was a Senator from 1998 to 1999. She is an Opposition Member and she is the shadow Minister of Works and Engineering. So, I would just like to welcome her. [*Desk thumping*] I do not think that our Opposition has any shadow ministers in the Senate that we know of.

EVIDENCE (AMDT.) BILL

Sen. Prof. Ramesh Deosaran: Mr. Vice-President, the Attorney General outlined the reasons this Bill has been brought forward. He did it in a rather parsimonious way. I, myself, would have preferred a bit more flesh on the presentation, especially since the evidence for the Bill is obvious in the public mind, that is; so many cases have collapsed because of the problem which the Bill seeks to address.

I also believe that more information should have been provided to the Senate with respect to the work done by the Law Reform Commission or what you might call the consolidated bundle of legislation because it is, as most of us would agree, a complex piece of legislation. Section 15 runs from A—Z, as if it is an alphabetic soup. The whole alphabet is in the legislation. It is necessary and, I think, he has done his duty. Sen. Mark as well has pointed out some of the possible pitfalls. He has raised the constitutional issue which was responded to by my colleague, Sen. Dana Seetahal SC. I think her comments have been quite helpful in elucidating some of the precedence and the circumstances under which this Bill was necessary to be brought forward.

All in all, when you bring such a Bill in the criminal justice system, it always poses a dilemma for the Government that brings the Bill, because you are dealing with an adversarial system in which the rights have to be duly and properly balanced. What has taken us in a horrible way in this country is the severe assault; both in the criminal justice system by the role played by witnesses and, more generally, the attack on the society by a bunch of vicious criminals who make it necessary for such pieces of legislation to be brought forward.

In bringing it forward, on principle, the balance must be sought and sustained, because it is not being made just for the present time. When you consider a trial, what is a trial? A trial is an attempt to reconstruct something that happened some

time ago. The mere fact that phenomenon tells you a lot has to depend on memory, perception and the attention, especially those of witnesses; witnesses have used these items to their unfair advantage in many instances. You have them coming and telling you that they forget. I am going to illustrate in a short while the specific cases in which a witness, after giving a statement, merely stands in court and says "I forgot". One went to be his own psychiatrist. He said he has amnesia. Another one got something from divinity, as it were, and he said his conscience is now bothering him. The rest were threatened and they were fearful for their family and so on. So, we are really in a tenuous position as to how to remedy this present and serious danger and, at the same time, to maintain section 13 of the Constitution, that is, we must still live in a society that has respect for fairness and justice.

Some of the words used in the Bill have to do with reliability, witness testimony, a fair trial and fear. But the first question I would like to ask is: Over the years, why have such a heavy emphasis and such a heavy reliance been put only and exclusively on the testimony of witnesses? And with great respect, I would suggest some evidence from hard research where such reliance not only puts the trial at risk, but the very concept of justice in jeopardy when you rely so heavily on such a vulnerable phenomenon as a witness, especially eyewitness testimony. This particular Bill, the Evidence (Amdt.) Bill, 2009, whatever is the justification—and there is justification—it seems as if as part of the way, we are creating a prosecution paradise in a sense. It does make it easier for the prosecution to have the advantage. As I said, there might be good reason for it in the prevailing circumstances.

2.30 p.m.

I would like to pose five questions, which if they can be properly answered will lend to enrich the Bill and further its justification. This I will call the efficacy test. Would the Bill be sufficiently efficacious?

My first question is, why so many cases depend only and exclusively on confessions and witness statements? What about other forensic evidence? What about other pieces of physical evidence, which are quite objective and less disputable in court?

Secondly, really, how reliable is witness testimony? I will produce some examples to show that the reliability over the years—all over the world—is under serious question.

Before I forget, I also want to welcome the Member from Bermuda. Welcome. I forgot to do so at the beginning.

The third issue is, if there are fundamental defects in witness testimony, as I will indicate in a short while, is this legislation sharpening the axe so as to increase the efficiency of its imperfections? That is witness imperfections. That is what is happening. The extent to which eyewitness testimony is vulnerable and imperfect and you are sharpening the legislation, not merely to validate certain areas of eyewitness testimony, but to make it more proficient during the trial, more relied on, especially by the prosecution. So, you are sharpening the axe to increase the efficiency of such imperfections.

The fourth one is, will this legislation increase police and prosecution reliance on witness testimony and confessions so as to have them neglecting other forms of more convincing evidence? That is a stark possibility which the authorities now have to prevent.

The last one is, given its draconian content, as necessary as it might be, will this legislation make people more fearful of giving evidence in the first place? If you know you have to go through all of these processes of being tested and verified at every inch of the way, and duly so, it means in the very first instance persons might find it difficult. Their fear will not generate after the first statement. Their fear will be initiated even before they say anything to the police in the name of their civil obligation. They will be deaf, dumb and blind. It will produce the monkey effect, that is, there is a Hindu picture which shows you three monkeys, one blocking his eyes; one blocking his ears and one blocking his mouth.

That is a very serious consequence of this legislation. Unwittingly so, it was not designed to produce this result, but that is what you might call an unintended consequence of the legislation. How do you deal with that? Let me give you a real example to help illustrate this particular concern: In the North Champs Fleurs, St. Joseph, Maracas Valley area, there is a gang of thieves who have attacked households in the last month. The figures are there in the neighbourhood. About 15 households have been broken into; laptops stolen, television screen stolen and a number of other things stolen, but more than that, they held a resident on Hilltop Drive, beat him up at 7 o'clock in the morning when he was now getting ready to go into his car to go to work to do his duty as a civil, law abiding person, going to do an honest day's work; cuff him, beat him, tied him up with blood all over his face and robbed the home. Two days after a similar assault by the same gang. And I will tell you why I am saying the same gang, because it has some implications for eyewitness testimony. They held another resident a few houses away in the same vicinity. The boldfacedness of these vicious criminals is phenomenal. That is why the public, whatever the doubts might be, would support legislation like this one.

They held another resident at 9 o'clock in the morning and beat him up too, kicked him, as if stealing the goods, the laptop and so on, was not enough. They beat you up ferociously, tie you up and escape with what you call the loot. Another house was robbed, in this whole scenario, in the same area and each time the report was made to the police, you would expect, given the proximity and the frequency there will be some particular strategic operation unleashed against these criminals, but they are still parading. Almost every other day you get a house robbed in that district. The time when this vile phenomena started, the records will show, in fact, I will tell you, I wrote the Commissioner of Police on it to tell him if he needed any help, let us know, but so and so has happened and I think you should invoke your intelligence services because there is a pattern, there is a location and there is a frequency. So you do not have an intelligence to find when such things are very clear? But the relevance to a witness's testimony is this: There was a maid who was in a home about 10 o'clock in the morning when the robbers went into her home; they passed her home, she saw them; they passed back again after with the loot, she saw them and when the resident whose house was broken into approached her to give some statement to the police she closed the doors and she said no, she has nothing to say, she is afraid.

How do you deal with these things if you want to fight the criminals? At the same time as I was saying, these things exploded in that Champs Fleurs area, it was the same time a very grave misfortune happened in the St. Joseph Police Station. That is when they found all of these guns and illegal drugs and so on, in the roof of St. Joseph Police Station. That is the same police station you were depending upon to safeguard, protect and serve the residents in the area. The Commissioner of Police has my letter.

I thought seriously about making this public. I did not make it public; it was about two months ago that my house was robbed. I was one of those whose house was robbed, and all of the information on my laptop, all my secure information was stolen about two months ago; apart from the television and all of the things my small salary was used to buy. I am speaking about a general problem. Here you are depending on a police station to rescue you, only to find out they have guns and drugs in the rooftops.

So when Sen. Mark and Sen. Oudit express concerns, it is not because they want to obstruct or thwart the legislation of the Government. It is not to thwart. You are sharing concerns of the citizens, but we have to focus on the particular Bill as a matter of relevance. In fact, to aggravate what these gangs of robbers are doing in that area, a few days ago they even robbed the residence of Scotland

Yard officers who were brought down here to help with our police investigations, training and so on. Their house was broken into and there is nothing about identifying them publicly, unofficially, getting them caught; even those who were battered and bruised saw them and the maid has seen them.

It raises a serious question as to how far can you go in the midst of fear, even before the statement is given, that is crippling this national community so much. That is why I say that you would create unwittingly the monkey effect. People will see crimes; they will see robberies; even murders and they will hear no evil, see no evil, and therefore speak no evil. The legislation is quite refined and it is elegant. Sen. Seetahal SC, did, in her contribution clarify and did maintain the integrity of the legislation, but this is no silver bullet. This legislation is certainly no silver bullet and do not expect it to be so. It is like having a lot of attention, expenditure, preparation for a wedding; everything in place, but there is no groom to attend. That is what I mean by the efficacy test.

So when you consider, as I will demonstrate in a short while, the vulnerability of eyewitness testimony, not that they genuinely go and make falsehoods, there is an area in human behaviour, especially in social perception, attention and memory recall, where mistakes are genuinely made. If something happened three weeks ago, four weeks ago, an accident or in a crowd of people, it is difficult for you to identify each element, even though they might be evidential. So that is one reason that I will provide to show you, you cannot rely so exclusively as we have been doing, on eyewitness testimony.

At best, it is tenuous, at worst it is flawed. Now we have to be modest in seeking the speaking of the truth, which is what we are trying to seek. We are trying to use the law to seek the truth as far as we can go, if not the absolute truth. In the same way I, myself, have to be quite modest by the research I will show, it is helpful but it is certainly not the complete answer. What we have to do is to beef up our legislation such as this one on a more secure foundation of research by the Law Reform Commission or by the Attorney General's office, and he knows I have been asking him about this for a long time; Government legislation in such sensitive matters where balance is required, you need proper research.

I have a stack of cases here to show; if at least these have been gone through you would have seen how many were fearful, how many lied, how many said they forgot and how many just did not appear. Because the kind of witnesses that we are speaking about that caused these cases to collapse are not just citizens, they are police officers too.

Sen. Seetahal SC: Most of the times, criminals.

Sen. Prof. R. Deosaran: It is here! The reports are clear. So if a police officer, with all of the training, certification and constitutional protection he has does not appear, will this legislation help cure such a breach?

Mr. Vice-President, when I think about the seriousness of the problem such as the scenario in Champs Fleurs, St. Joseph, I just described and I look at this Bill, I think we are providing an aspirin where you need intensive care or maybe surgery. That is why I thought on the next occasion the Attorney General should include, not only on this reason for cases failing, but the other attendant reason, because cases collapse, not just through witness testimony; there are a lot of other reasons why: lost documents, any number of things which I will not enumerate given the constraints of time and place. But even the judges have been issuing warning many years ago, and that is why as a first step, I hope, the Government and the Attorney General's intervention here, they are welcome interventions, and whatever reservation you might have possibly, you should try to help the process.

2.45 p.m.

When he was Director of Public Prosecutions, now judge, Justice Geoffrey Henderson, the headline in the *Express* newspaper, dated December 06, 2006 on page 3 said, "DPP wants phone tapping as evidence", as one means of dealing with the collapse of the cases in the particular instance, of witness testimony, falsehood, subversion, absenteeism, and so on. Let me quote it with your permission, Mr. Vice-President. A case collapsed, but the then DPP said:

> "Everybody has to get serious…referring to the increasing number of prosecutions that were falling apart in the courts."

The story went on:

> "The DPP suggested that amendments could be made to local laws to allow for evidence gathered by investigative techniques..."

Investigative techniques! And I say with respect, great respect, because it is not a disparaging statement. It is a statement of fact and for encouragement. But police have to engage themselves in more investigations, rather than just listening to a statement and bringing it easily to the court as a police confession, or as an original statement. You cannot do that, and I will tell you why as I said in a short while:

> "These techniques, he said, included the planting of 'bugs' on prosecution witnesses, so that conservations with suspects could be recorded during the investigation, and the 'tapping' of phone conversations by the police."

He continues:

> "Maybe the time has come when"—we have—"to start looking at tools and approaches in other jurisdictions which have been successful at investigating and prosecuting organized forms of criminal activity."

And it went on. I will not belabour the Senate with further quotations, except to say, that the search for other kinds of evidence, apart from such exclusive reliance on the statements and confessions of witnesses, that change has to take place and it has to take place with alacrity.

So, the DPP was worried about cases collapsing, but he was also worried about the reason and the emphasis being placed so much on witness testimony.

The *Express* newspaper again, Wednesday, November 30, 2005—So this story about collapsed cases did not start just yesterday. It had a long history; long history:

> "A police mistake has caused a High Court judge to throw out two alleged oral confession statements of a murder accused after they were deemed to be inadmissible."

So the murder accused freed over police error. That was the headline. Just a brief reference.

This one is a woman jailed for lying to the court. That was in the *Guardian* of November 10. This one, four men walk free as murder witness claims amnesia. This is the one I spoke about, who became his own psychiatrist. He diagnosed himself; free of charge, of course. Witness admits to lying. I have always found this amazing. Amazing might be too gentle a word. It is shocking for a witness to say something and then come in open court in public, and tell the judge, maybe the jury and the country, "that I was lying". In many cases nothing was done in terms of perjury, except one or two times, and Justice Carmona who sentenced a women to jail. That is what you should do too, at the end of it. Do not just let the case collapse and everybody wipe their hands, dust their pants and go home. There should be a consequence for such incidents. The story reads:

> "The opening of the new law term started off on a sour note for the State yesterday, when its case against three men charged with the murder collapsed."

This is not robbery, or shoplifting, or a traffic offence. This is murder where you have victims grieving and crying out for justice. This is the horror that we face, and a case collapsing because the witness just got up and say, "I am lying."

> "As a result"—I call the three names—"Mangaroo…Anderson and… Hall were freed by Justice Malcom Holdip, after being informed by"—Oh, I see my colleague was on that case—"Special State prosecutor, Dana Seetahal that the State was discontinuing the case against the accused."

So you are right to support the legislation, because you need the kind of assistance that the legislation provides, except with the kind of reservations I have merely mentioned.

The last one, Mr. Vice-President—I do not want to belabour the point—January 23, 2009, page 3 in the *Guardian*. This "fella" says, "My conscience is now bothering me, so I have to change my story." His conscience is bothering him. Even though people got killed and so on, he is making the inference that he was not talking the truth the first time, and he walks out the court. They have this way when people get freed now, they are grinning in front the court with the media taking out pictures, and celebrating the occasion, even though the case collapsed for very dubious reasons. But that is another story. I know it is contempt of Parliament, but I would not like to push the envelope too far. It goes and goes. The accused freed as rape victim refuses to testify. This is a more delicate issue, except to say that the judge, Justice Herbert Volney says, "The justice system stinks." The justice system stinks. You see the language and the frustration, otherwise judges would not use this kind of language, but they have become so frustrated; they are seeing before their eyes on a daily basis cases collapsing because of the problem we are trying to deal with. So I stop there and I proceed.

I want now to make a brief reference, Mr. Vice-President, to a book which tells us a lot about the vulnerability, the fallacies, the weaknesses. Not all deliberate, but as far as the phenomenon of recollection, attention and human perception is concerned, we are all weak in our senses. Our sense of sight is subjected to illusions; our sense of hearing is also subjected to misperceptions for different reasons. The book is called *Psychology Law and Legal Processes* by David Farenton and others. On page 167, it carries, a full chapter on eyewitness testimony, the problems encountered in court and how such problems could be prevented, at least partially by proper research, so the attorneys would know what question to ask, and the judge would know when the limits are reached to either by bring in, or reject certain kinds of evidence.

There is another one, *Psychology and the Legal System* by Wrightsman, 1998. There is another chapter filled with evidence about witness vulnerability. I am bringing this forward not to be unduly pedantic, but to suggest to all concerned, that there is a serious weakness in eyewitness testimony, and secondly, the extent to which the police rely so exclusively on these statements and confessions, to that extent would cases collapse. To that extent would cases collapse because it is easy to punch holes in eyewitness testimony when you talk about distance. Distance depends on the angles to which you stand. Appearance also depends on the time of day and the lighting involved, and we know, those are one of the early questions defence counsel ask when eyewitnesses are facing the court: Do you wear glasses? Did you have on your glasses on that day? And yes, or a no, would make a big difference. So there are vulnerabilities. I am not wishing that the legislation fails. I am merely sounding some notes of caution, and to see whether we can take steps to prevent it. But, the conclusion in that chapter in this book, *Psychology and the Legal System* is the frightful one. After surveying the evidence to which I alluded, the conclusion is and I quote:

> Faulty eyewitness testimony is the major cause of wrongful convictions—when they did the statistical analysis.

So it is a fearful situation. Not just witnesses fearful of their safety, the situation itself in using eyewitness testimony is a fearful one for the reasons I am presenting. Faulty eyewitness testimony is the major cause of wrongful convictions. So even though you have steel frame legislation, well packaged, elegantly configured with the one or two drafting errors that my colleague, Sen. Seetahal SC pointed out, it is like the luxurious preparation for a wedding to which there will be no groom.

But another piece of compelling evidence to support what I am saying, Mr. Vice-President, is in a book written by Brandon and Davies entitled—listen to the title—*Wrongful Imprisonment*, and taking a few years of trials, and looking at the subsequent pieces of evidence presented—objective evidence, DNA and so on—they found 70 cases in which there were wrongful convictions. I find that is frightful. I find that is very fearful, but listen to this. One of the cases to which they referred was a trial in Washington. Two police officers coming to identify the accused or the defendant, when the judge asked him, "Could you point out the accused?" They pointed to the defence counsel. That is the first officer. So he went out. They brought in the second police officer. But before that happened, the defence counsel passed his note pad and so on to the accused sitting next to him, and the judge asked the second officer, "Could you point out the accused to us?"

So he watched and saw the note pad where it was, and he pointed out the defence counsel again because he felt the lawyer was the one with the note pad. Appearances can be very deceptive. There is no art to tell the mind's construction of the face and so on.

So whilst we feel what you see is what you get, it is not quite true. The mind sees much more than what the eyes see, and that is a phenomenon in psychology. Some of us should take psychology courses. I remember my fourth year at the University of Toronto, we had a course called Perception and we linked it to the jury system, and it is from that experience, I feel obligated to sound a note of caution because the evidence is there. Many of the assumptions we make in law, in the practice of law, are rather tenuous, but necessary in the circumstances.

You cannot run an experiment for every issue that comes up, so the judge gives an opinion. That is what the judges do. The Appeal Court gives another opinion by case law, by precedence. Sometimes they rely on cases that are century old because the precedence is there. The Privy Council gives an opinion, and in some cases, it reverses its opinion. So we are into dangerous waters when you lack physical evidence and you rely so exclusively on eyewitness testimony. Because in these books to which I refer, there is a common conclusion: once somebody gives a tentative identification, the police feel they have the case wrapped up, and that is where the injustice could likely begin.

3.00 p.m.

We must not allow the law to stand in the way of justice, not if we could help it. The conclusion in the book by Brandon and Davies was this, at page 162.

> "One reason why such mistakes proliferate is that, when eyewitnesses make a tentative identification, police often stop investigating other leads. The goal of finding the truth is submerged, often unintentionally, in the rush to find the cause of a crime."—especially under heavy public pressure.

In fact, today there is a civic organization gathering a lot of cases which have collapsed, a lot of cases which have received convictions through eye witness testimony, only to show, with subsequent investigation, with DNA particularly, that eye witness testimony is not only unreliable, but it has sent a lot of innocent people to jail and, who knows, to be executed. One of the reasons being for those who oppose the death penalty is this same issue.

I sincerely hope I am not testing your patience, Mr. Vice-President; this is the last book to which I will refer, I think it is necessary to elucidate, because we are told that the Independent Senators are here to enlighten. [*Laughter*] With this

modest remark I wish to help enlighten the debate. This is called *The Psychology of the Courtroom*; it is a very classic book that we use in criminology. On page 158 is a very persuasive conclusion, based on all the research done in terms of eye witness testimony, judicial fallacy and the mix of the reliability of a witness. The authors, Stephen Penrod and Elizabeth Loftus, very prominent in this area of research, are the experts, and John Winkler. This is the conclusion:

> "If we have done nothing else in this chapter,"—on eye witness testimony—"we hope we have effectively underscored first of all that eyewitness unreliability is a real phenomenon of significant magnitude. Secondly, we hope we have demonstrated that existing psychological research can explain—in a systematic way—the bases of eyewitness unreliability..."

Surely this is the challenge of the future. There you have it on page 158.

It must be emphasized that the authorities: the Cabinet, the Attorney General and the Minister of National Security, in order for them to be helped in fighting this menace of crime and the imperative of having evidence to convict, they have to encourage the police officers to drive towards more scientific pieces of evidence.

In fact, I heard the Minister of National Security, a few days ago, making that same point; so I have a feeling that he himself is in some agreement to the point I am making, that is, the need for more physical forms of evidence scientifically driven, that does not depend on the vagaries, whims and fancies of these vagabond witnesses. There are different things; you have stings; you have checking out business places if the robbery product is there, a lot of other things. This is the age of science. It is not cave man justice that we want here; we want a modernized system of technology driven evidence.

There is a piece of evidence which would help capture the essence of what I am saying. Not only witnesses, but jurors are also prejudiced. They have biases and stereotypes, and that too, which is a related but separate issue, juror prejudice, does play an important part in the verdict. So what happens?

Some researchers got together and in the southern United States they wanted to see the extent to which such prejudice could affect jury verdicts. So they got some potential jurors and showed them a picture of persons standing in a bus holding a strap, some sitting. These were white potential jurors. A black man had an object in his hand and they asked these potential jurors, "What do you think he has in his hand?" The vast majority said a knife. The fact was that he had a pencil in his hand, but the prejudice overcame the facts. That is what I mean to tell you;

that the mind sees more than the eyes. It is these pieces of evidence which suggest care in encroaching on people's basic rights, especially when you are making a shift to the extreme on the prosecution side.

Look where we have reached; none has escaped; none is escapable. They are even charging magistrates and judges with being unconsciously biased, which means objectivity is not as strong, even in those who dispense justice. So you could imagine in those who give witness to justice.

The mind seeks closure. If you drew a few dots and asked people what they were, they would see a face or a tree. There is a test in psychiatry called the "Rorschach Test". If you show people this test, which is ambiguous stimuli that looks like a tree, it looks like different things to different people. Your interpretation depends on your values and on your suppressed instincts. They use it to run personality tests. Some persons see the same stimulus in the psychiatrist's office and some say it is a tree, others say it is your private parts. That is the extent to which the difference goes. [*Laughter*] I would not call the name of the specific private part, but you would know what I mean. It goes so far as to show the difference in perception, even with the same object.

So when a witness is called before the court, it is not always that he is deliberately lying, it may be so, but you may not know. There are times when he would be genuinely mistaken. So there are genuine liars and there are innocent liars, for the reasons I just gave. [*Laughter*]

So let us not open the gateway to judicial fallacy and injustice. Apart from having externally driven subversions against justice, in the examples I have given in the context of eyewitness testimony, there are also internally driven flaws and psychological traps. [*Interruption*]

Mr. Vice-President: Hon. Senators, the speaking time of the hon. Senator has expired.

Motion made, That the hon. Senator's speaking time be extended by 15 minutes. [*Sen. D. Seetahal SC*]

Question put and agreed to.

Sen. Prof. R. Deosaran: Thank you, Sen. Seetahal SC and colleagues. I am coming to the end, in any case.

Without saying too much, I agree with some of the sentiments about storage, security and safety of the evidence, as indicated by Sen. Oudit. I will not elaborate, because this is Trinidad and Tobago. You may very well find that when

you want the technician to come and present the video or take the video, he is on sick leave; he has taken industrial action or something of that kind. People forget the urgency of the situation and sometimes use it to their private advantage. We know that too well; but in terms of expertise, storage and security, that is a challenge; but I will leave that for now.

In fact, I remember Mr. Vernon de Lima coming to my office, when I was at the University of the West Indies, and listing to me—I am sure he would not mind, because he is aware of it—or suggesting to me the number of people who were wrongfully convicted, and suggested that we should do a study about that. I cannot just go and do a study; you need funds, and when I ask for the funds, some people feel that I want the funds for myself. You have to hire research assistants, you have to photocopy, you have to have transportation. I have put that issue in the hands of the Attorney General.

The audio is out; I reject the use of audio recording totally. I will not elaborate; others have elaborated on that. All you have to do is to remember the Watergate issue, where the President of the United States, Mr. Richard Nixon, manipulated the tape; he took out parts and put in other parts. That was a very serious issue in terms of evidence; so it is possible. It was possible then and with technology now it is even more definite; so the audio is out.

On the question of fearful, fear is:

> "An unpleasant emotion caused by exposure to or the expectation of danger or pain."

"The expectation of", I think that is what we are dealing with here, the expectation. That is the Oxford Dictionary, Ninth Edition. I must tell you that jurors are very afraid to go to court now, that is why you have a very diminished pool of jurors. They are frightened of going to court too; that is another area. Fear predominates; fear permeates. That is why we have the bulk of jurors being just working class, which does not give you the right to a fair trial of your peers, because a lot of the professionals duck out for different reasons.

You have, perhaps unintentionally, in terms of proportion, a diminished jury pool, out of many jurors being fearful of exposing themselves. The question would and should arise in another debate: Why is there so much fear for safety in this country? What has contributed to the escalating fear for personal safety in this country and who are responsible for it? But another time; the society is soaked with fear.

Witnesses have told me that they not only fear for their safety, they also fear the way lawyers "bull rag" them in court. Lawyers insult them; harass them over and over, and when you think one lawyer on the defence side is finished with you, you have two more coming to ask you about the same things. I am always disappointed—I am speaking generally, Sir—that judges remain so passive in the face of such apparent onslaught against witnesses who come to serve the cause of justice.

I remember one last year with the female attorney talking to the police witnesses and talking about "his testicles", and so on, apart from calling them unrepentant liars. You do not make assertions; you prove that the evidence is unreliable and then you could, perhaps, infer falsehood; but do not call them prematurely and frighten them. So this fearfulness also pertains to the fear of just going to court and the fear of lawyers.

I was in London a couple weeks ago; there is something now called "lawyer battering syndrome". I heard it about two years ago, but it is a new syndrome being practised in the court and the judges are now taking a second look at it. The Westminster tradition or the British judicial system assumes the judge would be impartial and neutral, but things like what we are dealing with in this legislation have gone too far. Judges must be more active in protecting witnesses from this kind of undue hassling, harassment and “bull ragging” in court by lawyers, otherwise somebody would file a case called "lawyer battering syndrome". [*Interruption*]

Sen. Rahman: The lawyer battering or the witness battering the lawyer?

Sen. Prof. R. Deosaran: The lawyer battering the witnesses. I wish it could be the other way too, but that is all right.

You have a situation here, as I come to the end, in terms of the clauses. I am not stretching this argument too far, of course, because I could call the names of lawyers I have known very well over the years, who are not only diligent in their work, but discreet in their cross-examinations and their reputations, and are very well known. But I am speaking about those exceptions, and this is a profession, I say with due respect, where notoriety seems to bring you more clients and greater prosperity. That is the peculiarity of this profession, but those are the exceptions that I think I need to note in this particular instance.

3.15 p.m.

There are clauses I have here; I will not list all of them but I am particularly a little bothered about a few of them which I will now make reference to. Section 15M, I think it is (1)(c) on page 13—as I said, this is a real alphabet soup here; all

the letters in the alphabet and you do not know if an "I" is like an "L", clause 7, section 15M(1)(c)—I will tell you what bothers me and I am quite sure the Attorney General could allay my own concerns. I am saying that in such cases, if the judge has the discretion and, as well, you have certain criteria set down for the judges' intervention in 15M(1) it states:

"In criminal proceedings evidence of the bad character of a person, other than the accused, is admissible where—

(a) it is important explanatory evidence;

(b) it has substantive probative value..."

And subclauses (i) and (ii) state:

"(i) is in issue in the proceedings; and

(ii) is of substantial importance..."

But you have a subclause (c)—

Sen. Ali: "or"

Sen. Prof. R. Deosaran: "or". It states:

"or.

(c) all parties to the proceedings agree to the evidence being admissible."

So that is "or". My view is that you should take out that completely and just leave it to the judge, because in many other cases you have left it to the judge without having such a caveat. You have had it with the judge alone intervening in 15R, 15T, 15M and 15I. So how come—because I am saying, once you begin to have the two parties to agree in an adversarial system, there is always an advantage for one side or the other and if they do not agree, well, you have a stoppage right there. It has happened in the paper committals; it has happened in the Mediation Act where, once you bring in the lawyers to agree on a matter that is adversarial in nature, you have a problem.

The same thing in clause 7, section 15N(1)(a) on page 15. Again I am saying, let the judge decide, because you will create an unnecessary wrangling in the court and stopping the process, which is what you really do not want happening. Clause 7, section 15N(1)(a) has no "or; " This one tells you:

"(a) all parties to the proceedings agree to the evidence being admissible;"

as one of the criteria. You have other criteria to use and let the judge, in due process, use his judgment and his discretion, because once you are asking the two

parties to agree on matters that are of a sensitive and adversarial nature, you have a win/lose situation and each side will try to gain advantage by having a protracted dispute.

There are several other such instances, I think: section 15O, the judge decides and 15N right on to 15O, I find really complicated; I find it very miserably complicated and I also wonder why can things not be written in a simpler way for the general public and Members of Parliament.

So all in all, I am asking the authorities to take a look, if not at this particular legislation, given the matter of time, but giving a more expanded attention to why cases collapse, because you would have to come with another piece of legislation to deal with the other reasons. I think the time has come for a more holistic, effective approach because though legislation seems to be a prosecution paradise, it might at the end be really paradise lost.

Thank you very much, Mr. Vice-President.

Mr. Vice-President: Hon. Senators, we stood down a matter earlier and I think we would do it now.

SENATOR'S APPOINTMENT

Mr. Vice-President: Hon. Senators, I have received the following correspondence from His Excellency the President, Prof. George Maxwell Richards, T.C., C.M.T., Ph.D.:

"THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

By His Excellency Professor GEORGE MAXWELL RICHARDS, T.C., C.M.T., Ph.D., President and Commander-in-Chief of the Republic of Trinidad and Tobago.

/s/ G. Richards
President.

TO: DR. ROLPH BALGOBIN

WHEREAS Senator Michael Annisette is incapable of performing his duties as a Senator by reason of his absence from Trinidad and Tobago:

NOW, THEREFORE, I, GEORGE MAXWELL RICHARDS, President as aforesaid, in exercise of the power vested in me by section 40(2)(c) and section 44 of the Constitution of the Republic of Trinidad and Tobago, do

hereby appoint you, ROLPH BALGOBIN, to be temporarily a member of the Senate, with effect from 2nd November, 2009 and continuing during the absence from Trinidad and Tobago of the said Senator Michael Annisette.

Given under my Hand and the Seal of the President of the Republic of Trinidad and Tobago at the Office of the President, St. Ann's, this 27th day of October, 2009."

OATH OF ALLEGIANCE

Senator Dr. Rolph Balgobin took and subscribed the Oath of Allegiance as required by law.

EVIDENCE (AMDT.) BILL

The Minister of National Security (Sen. The Hon. Martin Joseph): Thank you very much, Mr. Vice-President. I am pleased to participate in this debate on the Evidence (Amdt.) Bill, 2009. It is always a pleasure to come after the distinguished Sen. Prof. Ramesh Deosaran because in his contribution, especially on matters of this kind, he forces, or causes the Government to take stock of legislation that he is of the view, and correctly so, for which a balance needs to be struck between what the circumstances require us to treat with at the current time and at the same time ensure that the rights of the citizens, et cetera, are protected.

As Sen. Prof. Deosaran indicated in his contribution—and I am sure the aspect of law, et cetera, the hon. Attorney General will deal with. He indicated that—and I think I need to underscore that this is no silver bullet, but he asked a lot of very pertinent questions. For example: why does the law enforcement rely so heavily on witnesses, especially in these times when we need to be more scientific, et cetera, and I will attempt to address some of the concerns raised by the hon. Senator.

He also raised concerns as to the people who are responsible for making sure that the issue of evidence; how we collect the evidence; how the evidence is presented. Sen. Oudit also raised concerns. Also some very pertinent concerns were raised about the competency of law enforcement at this particular time as a major player in ensuring that the legislation that is before us, that it really provides the capacity, the evidence, et cetera, so that at the end of the day the issues that confront us can be addressed.

I am always careful whenever making any arguments, whenever presenting Government's position on this side, that you do not unnecessarily interfere, because this is a society where, no matter how much caution you take as it relates

to looking at what I would refer to as the value chain in the criminal justice system—that you do not offend other players in the criminal justice system.

Because it is quite clear that we are all—well, let me just back up. Sen. Prof. Deosaran asked a very important point: who is to blame for where we are today? Why is it that witnesses are fearful, et cetera? Sen. Oudit also raised the question about the Witness Protection Programme and I will get to that also in my contribution.

He asked who is to blame; why have we gotten to this path? It seems to me that the major players, the Legislature, the Judiciary and also the law enforcement, we all have some responsibility for where we are today and if these players do not recognize that, then to quote Sen. Oudit, we are really spinning "top in mud".

I say this because the position that I am going to take in this debate comes from a law enforcement perspective. Let me start off by saying that the police and other law enforcement agencies welcome this piece of legislation. There are no ifs, ands or buts about it; they welcome this piece of legislation. But in welcoming this piece of legislation they also recognize that there is a level for which they also must now reach so that the confidence in the implementation of this legislation does not get compromised or concerned; very, very important.

Because let us face it also, you made the point: why is the level of investigation that is required from law enforcement not up to scratch, to just summarize what you are saying. It is because—and I have made the point over and over and when I make it sometimes people seem to not like it—law enforcement agencies have found themselves in a situation where they have not kept pace with the environment, through no fault of theirs. Through no fault of theirs, they have been unable to keep step with the environment. The changes that are taking place and the extent to which, in some instances, the ability to anticipate those changes and, failing that, to react quickly to the changes that have taken place, that is the fundamental issue.

It was as a result of that, through no fault, and a recognition that it will take law enforcement some time to change the way in which they have historically done their business—because sometimes people figure it is just by waving a wand they recognize that, okay, I could do things differently. Unfortunately, organizations, like a police organization—and I am not being critical; I have to be very careful when I make my comments, because as I made the point before, the last thing you want to do is to give the impression that you are publicly criticizing the police.

Again, I think I have told this honourable House some time before, when I first became Minister of National Security, the first advice that I was given from

the business community was to scrap the police; do away with the police organization; come up with something new. Of course, that was not a very realistic recommendation, but I am making the point that transforming, changing the way in which they have been so accustomed to doing business, is not just by saying that they must do it differently and wave a magic wand. It will not happen. There were certain fundamental things that needed to be done and this Government, recognizing that, decided to take a particular approach, but understanding also that you could not tell the criminals to wait while we change the police organization; give us some time to bring it up to scratch.

It does not work so. We had to find ways of putting some almost immediate things in place and that was the reason for the birth of SAUTT, and I will come to that just now. That was the reason for SAUTT. So that the question about investigative capacity, capability, new scientifically-driven type of investigation can, in fact, be started as we imbue that into the wider police organization. That is the reason we introduced policing for people. And while we started it in the model station—because you are talking about a whole new approach for which law enforcement is supposed to be conducted in a society like ours—again, like anything else, you have to start it on a pilot basis, otherwise, all we would have been doing—I cannot use the big word that you used to start your debate; you were saying "otherwise, it would be just scanty"; I think that is the genesis of the word of Sen. Prof. Deosaran—otherwise it would be more superficial than anything else.

3.30 p.m.

In that context, I want to shape my contribution in this particular debate. I have listened to concerns raised. The Professor also raised a couple things. Why is there such a heavy reliance on the witnesses, especially eyewitness testimony? You would recognize and I think that Sen. Prof. Deosaran knows very well that there are certain types of crimes for which eye witness testimony is the only thing that is available. He knows that. Gang related types of criminal activities especially murders require a heavy reliance on witnesses because of the nature that type of activity requires. I will say some more about it.

As I started off, I said that law enforcement welcomes the amendment to this Bill because it will provide them with the means of a better opportunity to deal with the issues as they relate to witness intimidation, witness elimination, et cetera.

Successful prosecution depends on among other things, the availability and admissibility of evidence. Too often career criminals are allowed to walk free due to a lack of evidence either because evidence is unavailable or inadmissible and

they cannot be relied on in a court of law. Evidence in law is material submitted to a judge or judicial body to resolve disputed questions of fact. I think that the Professor indicated that in a court of law you recreate the conditions and circumstances, so that at the end of the day you would be in a better position to determine who is right or wrong and whether or not the person so accused is guilty and can be convicted of committing the particular offence.

Without it there would be nothing for the judge or jury to adjudicate upon. More importantly, without evidence offenders would not be able to be brought to justice. This Government is committed to protecting the citizens of this country and this Bill would play its part in ensuring that evidence is available to the courts so that the perpetrators of crime can be brought to justice.

The hon. Attorney General in his presentation made mention that this Bill before us is a part of a series of measures which Government proposes to implement in order to improve the administration of the criminal justice system in Trinidad and Tobago. We are aware that the criminal justice system consists of three major branches, the law enforcement as I said earlier, the courts and correction prisons. When we speak of the administration of justice, reference is usually made to the country's criminal justice system, which simply put, refers to the system used by a government to maintain social control; prevent crime; enforce laws by arresting perpetrators and administering justice.

Criminals are apprehended, tried and punished by agencies of various organs of the State charged with those responsibilities, including law enforcement, the courts and the prison. This system allows to deter potential and repeat criminals, as well as rehabilitate those who can be rehabilitated. This Government through legislation and the Ministry of National Security has strived for a proactive and preventative approach for combatting criminal activity, whilst improving mechanisms for witnesses to give evidence without fear. The criminal justice system in Trinidad and Tobago, as was said earlier, is seriously under attack. It is being eroded for a number of reasons one of which is that criminals are allowed to walk free because evidence cannot be obtained or even if obtained, may be held inadmissible in a court of law.

We have identified the primary areas for the Bill. To repeat, the four areas are:

(1) Extended the grounds upon which a written statement made by a person in a document shall be admissible as evidence of any facts stated therein of which oral evidence by that person would be admissible;

(2) admissibility of a previous inconsistent statement;

(3) admissibility of evidence by video or audio recording; and

(4) admissibility of bad character evidence.

Further, the Bill provides that statement is admissible as evidence of the truth of its contents. As indicated by our learned Independent colleague—

Sen. Dr. Nanan: Mr. Vice-President, Standing Order 32(6).

Mr. Vice-President: I am sure that the Senator knows of the Standing Order and if he is in violation of the Standing Order, he would refrain from doing so.

Sen. The Hon. M. Joseph: Thank you very much, Mr. Vice-President. I would be the last person to break the very rules of this honourable Senate. I am referring a little copiously to my notes at this particular point in time. As you will see, I will refer from time to time more deliberately to the notes. I have indicated the areas in which the legislation is designed to ensure that evidence is now admitted under various circumstances. I identified the four circumstances under which amendments are being made to the existing 2007 Evidence Act, so that law enforcement would have a greater opportunity to have witnesses testify under circumstances under which previously, they would not have been able to do.

Already existing in the Evidence (Amdt.) Act, 2007, are identified circumstances under which that can happen: if the witness is deceased; is unfit by reason of bodily or mental condition and is unable to attend court; cannot be found after all reasonable steps have been taken to find him or her; is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person and now, fear is the other variable entering into the equation, if you can refer to it as that. Law enforcement recognizes that there are circumstances in which witnesses are fearful for, not just their lives, but the lives of their families and loved ones, in cases where they can be threatened. We welcome circumstances under which the question of fear can now be used, as I said, to provide law enforcement with the ability to treat with persons who may use that as a means of not being able to give evidence or to testify.

It should be instructive for this honourable Senate for some information—Sen. Prof. Deosaran in his contribution felt that some more information ought to have been provided when the Attorney General piloted this piece of legislation, as it relates to the circumstances under which persons were fearful or refused to participate in the process. I sought to get some information from the law enforcement as it relates to the number of matters dismissed in court. I think that this is important. These matters were dismissed in court as a result of the

following: witnesses failing to attend court; witnesses refusing to give evidence; witnesses not remembering statements and evidence being retracted. This is on the part of the witness.

The Professor made a very important point. The point he made was that these were not the only reasons matters could not go forward. In some instances you also had the question about police not attending, et cetera. Let me indicate as it relates to the latter. In the not too recent past, as you would have recognized, the Acting Commissioner of Police has taken steps to ensure that the question of police not attending court and matters being thrown out is addressed in a rigorous way. Action is now being taken to address that. At least you are seeing some changes in that regard and not just in terms of police officers not attending court.

You saw recently in the Chaguanas Police Station some prisoners escaped. You saw action being taken as it related to that. You also mentioned the issue with respect to the St. Joseph Police Station. The commissioner has also taken action in that regard. You are actually seeing some changes in the way in which police discharge their responsibilities. That is being addressed.

Let me deal with the amount of information that we have. As I said, we are talking about matters that would have been dismissed as a result of witnesses failing to attend court, refusing to give evidence, not remembering statements and evidence being retracted. From January 2004 to November 2005, according to the information provided to me by the police, 22 matters were dismissed for a number of reasons. I will not go into detail. We could break down the 22 and say how many were under any of those headings I referred to earlier. This is the global. December 2005 to December 2006, 15 matters were dismissed. January 2007 to December 2007, nine matters were dismissed. January 2008 to December 2008, six matters were dismissed. A total of nine matters have been dismissed for the year because the main witnesses retracted their evidence.

There is also mounting evidence to suggest that there is a strong correlation between the release of persons acquitted of murder and a peak in the incidence of homicide particularly those that are classified as gang related. Again, information was provided to me. If you look at 2009 we had spikes. In February there was a spike. We had 56 murders in February 2009. There was another spike in April. There were 53 homicides. There was also another spike in September with 55. Again, enquiring, we are saying that there is a correlation.

Five persons were acquitted of murder and released in January 2009. We recorded 56 murders in February. One person was acquitted of murder and

released in March 2009. The country recorded a total of 53 murders. Later on I will give as much as I can give this Senate more details to underscore the correlation for which I just spoke. Four persons were acquitted of murder and released in June 2009. The country recorded a total of 47 murders that month. Seven persons were acquitted, released and murdered during the period July to August 2009. The country recorded a total of 55 murders for that month of September.

3.45 p.m.

Mr. Vice-President, forgive me again. I will go into a little more detail in terms of what I will be saying and I seek your permission so that I do not invoke Standing Order 36.

Sen. Prof. Deosaran, had asked. Gang-related homicide, by its very nature is far more difficult to detect using scientific evidence, due to the lack of contact between shooter and victim and, therefore, without exception, investigations are significantly reliant on witness evidence.

Law enforcement investigators invest much time and effort in the area of victim care, for example, family liaison and witness care, and generally build up a trusting relationship with families and witnesses. In general, the witnesses are good, law-abiding citizens who are family members of the deceased and, without exception, terrified of the prospect of giving evidence.

The Homicide Investigations Task Force is currently achieving a 36 per cent reduction rate on 55 gang-related homicides for 2009. It is estimated that this detection rate would have risen to over 50 per cent had this legislation been in place. There is evidence to suggest that approximately 50 witnesses with relevant evidence have been lost due to fear of violence or intimidation. It is very difficult to estimate the impact of the legislation should it be passed, but our senior investigating officers believe that there are approximately 17 potential further offenders who could have been brought to justice if further measures had been put in place to assist witnesses in relation to the fear of intimidation.

It should also be borne in mind the significant impact of these suspects still on the streets. These people are responsible for multiple homicides on a very regular basis. In one of the cases which we are still prosecuting, one of the accused is believed to be responsible for 13 killings in the six months prior to the three with which he is currently charged and were he to be released due to intimidation of the witness, there is nothing to suggest that he will not continue to exact revenge on all involved in his case and continue with his killing spree.

I read this verbatim because it was provided to me by law enforcement.

Mr. Vice-President, I want to underscore how important the legislation is from the law enforcement perspective and, at the same time, underscore the recognition that there is also a need for law enforcement to step up and to improve the way in which they conduct their investigations.

Some mention was made, I cannot remember where, about the Police and Criminal Evidence Act, 1984, PACE, in the United Kingdom. Sen. Dana Seetahal SC may have mentioned that. While we do not have a PACE, what we are using is within the spirit of the PACE, the whole question of the chain of evidence. The Special Anti-Crime Unit of Trinidad and Tobago (SAUTT) is leading in that particular direction.

We also talked about training. We are training officers in obtaining evidence—I hope that Sen. Seetahal SC is here because she continues almost to insist on the question of obtaining evidence to be used in criminal proceedings. During the period January 2006 to October 2009, a total of 2,299 police officers benefited from various evidence-based training courses, forensic awareness, crime scene management, investigative interviewing, fingerprint evidence recovery and recording, digital photography, level one and two investigators, courtroom familiarization and recording statements offered by the Special Anti-Crime Unit of Trinidad and Tobago Specialist Crime Academy. This is to underscore an understanding that there is a need for law enforcement to operate at a higher level of performance than which they are currently performing.

As Sen. Prof. Deosaran has indicated, we have recognized that law enforcement has to be problem oriented and evidence driven. In almost every jurisdiction where we see a reduction in crime, we see crime mapping. This is the reason for the implementation of the Crime and Problem Analysis Unit (CAPA), that is providing real time. Prior to that, we had modus operandi, where you used to get monthly statistics. At the end of the month, we had all these crime statistics. That is historical. We are now at the point where we are getting real time information being analysed and now being used as a means of tasking and deploying police officers. There are some other challenges that we still have to treat with.

Sen. Oudit: Where the Minister referred to communities where crime is decreasing, is the Minister referring to Trinidad and Tobago or elsewhere?

Sen. The Hon. M. Joseph: I am referring to elsewhere. I was saying, where crime is decreasing in various jurisdictions, you will see that the key issue is an understanding of the crime pattern—and this is where I am talking about crime

mapping. You hear about COMSTAT and all those. Those are mechanisms used to look at crime patterns, where they were occurring, when they are likely to occur and deploying accordingly.

The first time I mentioned this was four years ago at a post-Cabinet press conference. I said that you cannot have crimes being committed between 12 at night and 4.00 in the morning and you are not there. I was accused of saying that police officers are sleeping.

Let me back up. When we had the crime talks sometime ago involving the Leader of the Opposition, et cetera, I will never forget—and I do not want Mr. Panday to believe that I am trying to put him on a scene—Mr. Panday indicating—we were looking at the legislation, et cetera—that the issue is really the management of the police organization. We know that. When Mr. Giuliani came here, it was about the management of the police organization. What did we do? We brought legislation again, with the support of the Opposition, to change the way in which the police organization is now managed.

One of the reasons why the Commissioner of Police can now be proactive and more confident is that he now has the authority. I will never forget that we had a former commissioner, God rest his soul, who used to refer to Commissioners of Police as toothless bulldogs. The decision-making and disciplining were far removed. They were in the hands of the Police Service Commission. It is now in his hands. He has responsibility for assistant commissioners all the way down, so that you are now seeing a change.

Coming back to Mr. Panday, he said that one of the biggest mistakes we made was to have a police organization with a 40-hour work week. I do not know who made that decision back then. I suspect it was taken when we moved from police force to police service and introduced a 40-hour work week. Mr. Panday said we would do well if we are able to remove that 40-hour work week, but in order to move that 40-hour work week, we were required to buy that out.

Given the nature of law enforcement and the requirement of law enforcement officers, you cannot have that. That is why we also took a position—and we have not progressed as we would have liked to—to change the way we evaluate police officers. I do not know if you realize what has been happening in the past. Police salaries are determined on the basis of a comparison with what Petrotrin and T&TEC security people get. I have made the point that there is no comparison. The only comparison has to be with international others. Police work is unique to police officers.

I think you all understand the power and authority of police officers. That is a reason we raised the bar with five O levels and a host of other things. The other piece, notwithstanding the fact that I said it here in the last budget debate, is that we increased police salaries, in some instances as high as 90 per cent and 46 per cent. We still have to reach the point where they are remunerated on the basis of their relative worth and now, more importantly, their relative worth is such that they ought not to be "pulling bull" and having another job. They ought to be police officers and it ought to be a career. It cannot be something they are coming into. We have addressed that by way of polygraph and all the other things, even though my hon. Senator colleague one time asked whether the test is relevant.

I am underscoring the fact that the concern raised by hon. Senators in this debate so far concerning the competence, capability, the skill sets, et cetera of law enforcement is absolutely correct. We are not disputing that and we are saying that measures are being put in place to raise the level. Sometimes we are being harsh.

Sen. Prof. Deosaran talked about witness bashing. I also made a comment and part of the reason I get so many blows is that I have been advised: Come and see how bad police are. That does not help. It does not help any organization, no matter how bad it is, to be publicly ridiculed. I have a philosophy. I praise in public and criticize in private. You should ask some of them. I am sure some of them cannot wait to see the back of me.

It is not to say that we do not recognize there is a whole lot to do. It is like coming to a dance late; you cannot miss a set. There are lots of things, but simply saying that and waving a magic wand will not do it. For example, with respect to the Police Academy, we have now talked about moving from the Police Barracks to the Police Academy. We had refurbished the Police Academy and we had to spend a couple million dollars. It is a historic building, so we had to make sure and maintain the outer image. We have improved inside. There are modern classroom facilities, state-of-the-art, but do you know what was missing? We were missing some competency as it relates to the Police Academy and we have now brought on board a provost—pretty soon, we will be talking more about that individual—who has about 15 years experience in terms of running a police academy. As soon as he came in, he could tell us about things we were doing wrong and that we need to address.

Yes, as much as we lament the fact that we are not where we want to be, the point is that we know we are doing things, so that we can look forward to seeing changes. I remember the last time you asked how long you would have to wait.

Like anything else, the Government is not taking any short cuts in terms of the strengthening of law enforcement in order to provide us with the results we want to accomplish.

4.00 p.m.

Mr. Vice-President, I have spoken about the training and our capacity building. [*Interruption*]

Sen. Oudit: With respect to training, Minister, I do not want to take up too much of your time, is that across the board throughout the country, as in outside the city areas? Are we looking at rural communities?

Sen. The Hon. M. Joseph: The answer is yes; training across the board. When I was talking about policing for people, there is a perception that we need—every time you hear commentators, you hear them say reintroduce community policing. It is not about reintroducing community policing. You would recall when community policing started, it started as a little unit. In most jurisdictions, there was a unit with two or three persons involved. That has now changed. All across the world, there are no community policing units; community policing is now part and parcel of policing. It is a relationship between police and community. Given how we were structured before with all the specialist units, you lose contact with the community. That is the reason I said policing for people, while we introduce it as a model, at the end of the day, that is what policing across the community is supposed to be.

If my police station district falls in a rural area, praedial larceny would be a major activity there. I do not need to have a praedial larceny squad. Those are the issues with which I must understand my community. I must know every school, every business, et cetera, and understand that is what we are moving towards. We are moving from where it was police against community, them versus us. That is the historical context from which we came. We are now moving towards a modern society. There is the whole question about the relationship. It is not happening overnight and we are getting there. Whereas before you could not see results, things are happening and we are seeing results.

Let me make a very important point with respect to the Witness Protection Programme. Mr. Vice-President and hon. Senators, with all due respect, the whole question of a witness protection programme is a programme that is not for every witness. A witness protection programme in any jurisdiction, all over the world, is for high risk witnesses. We hear people criticizing, "You do not have a witness protection programme." With all due respect, I am sure that Sen. Prof. Deosaran

understands that one of the hallmarks of developed societies is to make sure that they have a system where the witnesses can be protected, which means matters can be heard expeditiously. The long delays, et cetera, are not part of their criminal justice system. You would notice that I am very careful. I do not want anyone to say next morning that the Minister of National Security criticized the judges or this one, et cetera. I go back to the point that the Professor raised: Why did we reach to this point? Who is to blame? All of us have to take some responsibility. You cannot have a matter that takes three, four or five years—You cannot! It is not a situation where we have a terrible witness protection programme.

I have answered this question numerous times. Let me, again, for the information and for the record and forgive me if I refer slavishly to my notes, Sen. Dr. Nanan. The threat to the justice systems of the region was recognized by a Conference of Heads of Government at its 17th Meeting, in 1996. Let me say that again. The threat to the justice systems of the region was recognized by the Conference of Heads of Government at its 17th Meeting in 1996. Agreement was, therefore, formulated in response to this threat to the justice systems brought about by the escalation in the Caribbean, of organized criminal activity. I am talking about 1996.

In July 1999, the Heads of Government of seven Caricom countries signed the Agreement Establishing the Regional Justice Protection Programme. I repeat, in July 1999, the Heads of Government of seven Caricom countries signed the Agreement Establishing the Regional Justice Protection Programme. One of the commitments contained therein was the obligation to establish relevant legislation to treat with the protection of witnesses. Of course, you would know that it is history. In 2007, we had put everything in place.

Mr. Vice-President: Hon. Senators, the speaking time of the hon. Senator has expired.

Motion made, That the hon. Senator's speaking time be extended by 15 minutes. [*Hon. C. Enill*]

Question put and agreed to.

Sen. The Hon. M. Joseph: I thank hon. Senators very much for giving me the additional time.

In 2003, the number of witnesses supported by the Trinidad and Tobago Justice Protection Programme, 27, the number of witnesses who voluntarily withdrew, 2; 2004, 30, number of witnesses who voluntarily withdrew, 2; 2005, 44 supported, the number who withdrew, 2—"It look like dey does withdraw in

twos"; 2006, the number of witnesses supported, 63, the number who withdrew, 1. In 2007, the number of witnesses supported, 76; the number of witnesses who withdrew, 4. Let me indicate that is just the witnesses. In terms of their family, et cetera, the number increases. We have situations in the region where witnesses are sent to the region. I am saying that because, from time to time, you hear a couple of disgruntled people go to the media and say that the Witness Protection Programme is not working.

First of all, there are a couple of challenges that they have to adhere to. Before a person could get into the programme, the DPP has to approve that. There are certain conditions and the DPP has to approve them. Clearly, there are issues with respect to identity and how they have to operate within the programme. There is a certain amount of freedom that does not exist during the period of time, while they are in the programme.

In some instances, depending on the nature of the risk, they are sent to other countries. We have witnesses in the United Kingdom, the United States, Canada and other countries in the region. Needless to say, the choice places, of course, you know where they want to go. There are choice places such as the United Kingdom, the United States and Canada. In order for them to be accepted there, there are certain requirements, but there are other places in the region where we have witnesses. The impression that this programme is non-existent—but it is not for everybody who is supposed to be in the programme. We need to have a system. With respect to what we are doing today, the legislation is going to bring us closer to ensuring that the criminals, at the end of the day, do not have the upper hand. Yes, there is a balance that has to be struck, as it relates to how do we make sure that in so doing—I think there is a saying that it is better for—I cannot remember how it goes—for 10 to be free than one innocent person to be—[*Interruption*]

Sen. Jeremie SC: That is nonsense!

Sen. The Hon. M. Joseph: That is nonsense? You will talk about that; not me.

I hope that I have touched—I am not going to get into the intricacies of the law. I think the Attorney General will address all those issues, when he is winding up.

I hope that I have brought to the attention of this honourable Senate, the concerns raised by law enforcement and the fact that law enforcement welcomes this piece of legislation. Yes, we recognize that it is not a silver bullet. Yes, we pay particular attention to the issues raised, as they relate to training and other things.

Sen. Prof. Deosaran talked about phone tapping as evidence. I think I may have said that an omnibus Bill is currently engaging the attention of the National Security Council and that the Crime and Justice Commission has signed off. It is a package and the Intercept Legislation Bill is going to be one of these pieces that would also address some of the concerns, because we recognize that in modern societies, all these pieces of legislation are in place to help law enforcement to be more scientific and not rely, unless it is absolutely necessary, on eye witnesses, given your concerns. It is going to make some interesting reading about witnesses, the psychology of witnesses and the sociology of them and how they forget. They are not as reliable as possible.

I think I have touched those issues that I need to respond to and I hope hon. Senators, that you would in fact support the legislation and vote for the legislation, so that at the end of the day we would realize that this crucial moment in the history of this Parliament, we passed legislation that assisted law enforcement in turning the tide against the criminals and criminal activity in Trinidad and Tobago.

I thank you very much, Mr. Vice-President.

Sen. Mohammed Faisal Rahman: Thank you, Sir. I must say that today is a different experience for me. I rise with a great deal of pleasure to discuss this particular Bill. It is a year and almost 10 months since I have been in this august Chamber. I believe, if my memory serves me right, it is the first time we are addressing a Bill that seeks to look after national interest, rather than conforming to foreign impetus and make good legislation. I am really very happy that we have this Bill before us today.

I cannot say that I am completely happy with the Bill as it is. Those who would have spoken before me have made very important points, indeed. I will touch on some of those points without being too repetitious, trying hard not to be repetitious, but some of these matters really deserve a second look.

This is a Bill, Sir, that requires very careful dotting of the i's and crossing of the t's, because it is not the panacea that we might expect it to be, for the failing cases that have come before the courts.

First of all, I would say that this Bill, as the Minister of National Security has hinted, is just one in a large package and as such, it is going to do nothing to reduce the murder rate. I want us to be very, very matter-of-fact about that. With a detection rate of about 10 per cent and I understand it is climbing now—[*Interruption*]

Sen. Joseph: It is not 10 per cent, it is 20 per cent.

Sen. M. F. Rahman: It is climbing. I am granting you that. Up until recently, there was a 10 per cent detection rate. The conviction rate is still 1 per cent and we are depending on this Bill to improve that. I have the 10 per cent on my mind and we now hearing that there is a 20 per cent detection rate.

4.15 p.m.

I would say that it was a pleasure hearing the confessions of the Minister of National Security today bewailing the circumstances that he finds himself in after all these years of governance, and sharing with us his frustration at being laughed at four years ago by his colleagues when he said some words of wisdom. Now, this is a very unfortunate thing. It seems as if it requires a lot more than common sense for the Government to understand the need for certain matters to be put into place. This is where we have to look at this particular Bill with a very careful eye.

The first thing that I want to ask is: Who is going to be responsible for taking this audio-visual or video evidence? Is it a segment of the police force? Is it going to be a professional film making unit? I ask this for two reasons. One week ago, on "The Big Story" on CNC3, Pastor Dottin, who is well known to this country, and who happens to be a member of the Police Service Commission—a friend of mine told me this on the telephone only yesterday—was reported to have said that crime has reached to such a state where senior police officers are recruiting junior police officers to commit the crimes that the police service members are committing. This is a matter that is on public record. CNC3, run the story again! Look at it! Audio-visual! Call up the story of last week Monday and you are going to see the evidence of Pastor Dottin.

Now, if we are going to be entrusting to the police officers or senior police officers to do this recording, we are starting off entirely on the wrong foot. We have a serious situation that confronts us. You could bring this Evidence (Amdt.) Bill and pass it, but when the evidence comes up—this is where the film making aspect comes about. You know, when you are making a movie, you would shoot hundreds of thousands of pieces of footage and then you would select the parts that you want for the film you want to make.

I want to disabuse this Senate where nobody has confidence in audio recording. I want to tell you that technology today discredits video recording similarly. It is the easiest thing in the world to fabricate video evidence or to tamper with it. This is the beginning of where the whole set of problems start.

I want to know, what is essentially defective about a proper written statement taken by reputable police officers and judicial officers and signed and attested to by the witness and preserved for presentation in the court which the witness can deny, repudiate, claim amnesia about or do all of the fancy things that he is going to do either because he has been bribed or threatened with his life.

The question is: What makes an audio-visual piece of presentation in the court which requires a whole set of paraphernalia and which is going to cost the court a whole set of additional remodelling and changing superior? I am a man that uses my pen. Nowadays, I use my computer, but writing to me—we have writings handed down in literature for centuries, and it is recorded and you cannot dispute it. What is it that makes video recording greater weight as evidence than a signed statement attested to by reputable officers or whoever you want to take for preparing this document? What is it? Do you want to give an answer to that?

Sen. Seetahal SC: Now, I just want to clarify something there. It is not that the video recording is better than the written statement. If one looks at page 9, one sees one of the conditions for admitting this video recording is where the witness's recollection of the events is likely to be significantly better in the video than when the person gives oral evidence. So, it is not that if the witness—the witness is going to be there. That is the point that people do not understand. This is a video recording previously given being put in as evidence-in-chief.

The witness will be there to be cross-examined. Only if the witness's memory at the time she gave more details in the video recording would it be put in evidence. If the witness agrees that what was said in the video is true, then it would be put in. If the witness denies that, then it is not going to be treated with any more weight. So, it is not that. It is merely to facilitate easier giving of evidence. That is it. Like a kidnapped victim, immediately or soon after having been kidnapped, the witness gives a long—well, you kept a true edition of the event, then you play that in, but if the witness is denying it and saying that is not so, that would not go in like that.

Sen. M. F. Rahman: Well, with due respect, I think you have complicated the matter in my mind a little more.

Sen. Dr. Gopaul-McNicol: Sen. Rahman, could I just ask a question?

Sen. M. F. Rahman: Yes.

Sen. Dr. Gopaul-McNicol: Did I just hear Sen. Seetahal SC say that the witness would be cross-examined in the taping. Is this in the legislation? Did I miss that?

Sen. Seetahal SC: Yes. Could I point that out?

Sen. M. F. Rahman: When am I going to resume my contribution? You see, what I got from Sen. Seetahal SC is that the person, at the time of the video recording, is likely to remember more. Why is that person at the time of the manuscript and the preparing of the evidence not going to remember more at the very instant time which is early in the stage of events? I cannot accept that there is any possibility, except the person is excited about acting in a movie and says: "Hey, I am going to give a great performance." And then she is going to remember things that did not even happen. So, I think that you are going to be prejudicing the matter of the evidence in the first place. How could it conceivably be that two days after the event—whether the testimony is audio, video or a manuscript—What is the difference in recollection? I cannot understand it. I simply cannot understand it. That falls flat. [*Interruption*] Okay, point taken, right!

Now, I would like to continue. I am going to tell you that four or five years ago, I was writing in the press that written statements from certified witnesses should be allowed as evidence after they cease to live, because of them being erased, eradicated and murdered by the criminals. So, I have an understanding that there is a benefit here. There is a distinct benefit. If you want to go hi-tech for the purpose of being hi-tech and have to establish a whole recording organization and leaving it in the hands of police officers who may well be corrupt, I want to question the benefit of this whole evidence thing which brings in video that is totally irrelevant to the verification of truth.

Now, we are hearing that the video evidence is going to be used as evidence-in-chief. That is very clear. I have learnt about evidence-in-chief in this debate. Thank you very much. The point I am making is this. I understand that there is going to be a cross-examination of the witness after that evidence is put in. I was campaigning for this type of admissible evidence postmortem. So, am I now to understand that notwithstanding all this hi-tech thing that we are getting into, if the witness had died, is the evidence-in-chief worthless? Am I to understand that there is no cross-examination—

Sen. Jeremie SC: We dealt with that already.

Sen. M. F. Rahman: Well, I would like to know what is the situation. First of all, I am saying that audio visual has no superiority over a written testimony. This is agreed to by the very honourable, brave and fearless senior counsel. So, I am saying that if this is treated as evidence-in-chief, subject to cross-examination and

your good witness dies, what becomes of the evidence-in-chief? I would like a quick answer right now as to whether it is still going to be admissible to move the jury or the judge to come to a determination. Are you going to answer that?

Sen. Jeremie SC: Yes.

Sen. M. F. Rahman: Thank you.

Sen. Jeremie SC: Is the question what happens to evidence given when the witness has died? We dealt with that in the last Parliament. We passed an Evidence (Amdt.) Bill which Sen. Mark described as one of the worst pieces of legislation he had seen in his 17 years in the Parliament.

Sen. M. F. Rahman: Forget Sen. Mark—

Sen. Jeremie SC: The statement is going to be allowed in now, subject to certain safeguards.

Sen. M. F. Rahman: So, am I to understand that the evidence would be permitted, but without a cross-examination because the witness has died? So, I am saying that your written statements stand as good as ever.

Sen. Seetahal SC: But not your video tape—

Sen. M. F. Rahman: Look at that! Now, here you have a video recording that is absolutely useless, because the learned senior counsel is telling me—I am speaking to you Sir, but I would seek your protection. I am not hearing myself when there is this crosstalk. The same thing that is disturbing the *Hansard* is disturbing me equally. With all the hi-tech this and highfalutin this and that and the other that we are trying to implement now, video recording will not be admitted as the written evidence will be. For heaven's sake, what is the purpose of all this video recording? I cannot understand it! Are you trying to support the local film industry that you have set up a couple years ago? This is ridiculous! We are not going to go to that stage of making a farce of things. I am not going to fall for that.

Mr. Vice-President, in my humble view, the Evidence (Amdt.) Bill needs more than a second look. I am going to support all those who have spoken ahead of me suggesting that this matter be put in the hands of a joint select committee. There are many things that I want to address here today. If on the first matter I raised, the whole thing collapses in terms of justification, where are we? All that Sen. Prof. Ramesh Deosaran has said and all the woes recited by the soul-baring Minister of National Security today, notwithstanding all of that, we are here

debating a Bill that makes no sense. It is just another way of complicating the issue, because it is not going to help. It is not going to help witnesses, and this is the point. We are trying to guard against witnesses who are being murdered. We are not only trying to guard against people who say that they cannot remember, because the witness statement is just as good. That is what you said.

It is a crying shame that the laws regarding perjury have been honoured in the breach so badly that we have not been taking any punitive action against perjurers who have been allowing the most important trials to fall by the wayside. There must be an increase in penalties for perjurers who come and perjure their souls and beings and cause criminals to walk free. I am not saying that people should be brave and face the bullet and say that I would give testimony whether it cost me my life or not. I sympathize with the people. But I am saying that as a device to refresh memories, perjurers should be jailed instantly.

There are so many facets to this whole matter. We are looking at the last piece of the crossword puzzle—not the crossword puzzle, but the jigsaw puzzles. We are trying to refine the last piece of the jigsaw puzzle that goes into the whole omnibus situation that we have learnt from the Minister of National Security that we are trying to correct with so many additional pieces of legislation looking at different aspects. Today, we are putting the cart before the horse. This Bill is a prime example of putting the cart before the horse. We have come here to deal with a matter that comes at the end of the chain of events. This is a very unfortunate circumstance. Now, I am glad I made that point at the time that I did. I feel entirely justified as a layman to stand and look at this Bill. We have had the erudition of senior counsels—

Mr. Vice-President: Hon. Senators, it is now 4.30 p.m and we will take the tea break now and resume at 5.00 p.m. This Senate is now suspended until 5.00 p.m.

4.30 p.m.: *Sitting suspended*.

5.00 p.m.: *Sitting resumed*.

Sen. M. F. Rahman: Thank you, Mr. Vice-President. Just before the break I was going to make the point, I feel a sense of justification standing here today making my contribution on this very important Bill. I want to make an important point—while we have to rely upon the legal minds in our society, senior counsels on this side and on that side to guide us on legal matters—that it is the lay people of a society that demand and determine when certain laws are to be brought into existence and it is they who decide eventually when certain laws are to be removed from the statute books.

The legal minds are there to frame, they are architects of the legislation, but the genesis of the legislation does not lie in the minds of the legal people. Because for years we have had the necessity to bring this sort of safeguard into the legislation into the statute books and nothing has been done and we have a bewailing of the situation while the Minister of National Security genuinely makes a case that even an institution like the Witness Protection Programme has regulations and rules whereby people may enter into the programme. I would like to ask a very simple question: If the rules and regulations which govern the inclusion of witnesses for protection are difficult or impractical, why not change them? Amend your witness protection regulations so that you can rope in more people to be protected who deserve to be protected, particularly in these cases of high incidence murder.

I want to fault the Government in more than one way in that the security of the State has been compromised in very many different areas. It is no secret that criminals in the maximum security Golden Grove Prison are able to get their cellphones and to put out contracts on the lives of witnesses. We cannot even have prisoners in our custody insulated from contact with the outside world to the extent that they can be frustrated in their various plans.

We have a situation here, Sir—and I want to bewail this very seriously. The Minister of National Security has just told us that there is a pattern between when people are acquitted and when there are spikes in the murder figures. He quoted certain months. The police authority, the State security and all the law enforcement arms have not thought up to now, after a pattern has been established for more than a year or two—

Sen. Prof. Deosaran: Track it down, track it down.

Sen. M. F. Rahman: Not only track it down. You know a certain "fella" is going to be acquitted or he has been acquitted, put him under surveillance. [*Interruption*] Keep him under surveillance.

For heaven's sake, you know there is going to be a spike in murder, you know the man who is going to do it, you know where everything is taking place and you give him freedom. We have a blimp in the sky; we have secret service; we have all sorts of arms of the State operating and spying on—

Sen. Prof. Deosaran: Innocent people.

Sen. M. F. Rahman: Innocent people. The Senator has put the words in "meh" mouth.

Sen. Jeremie SC: But you say it first.

Sen. M. F. Rahman: After he put them in "meh" mouth I had to spit out the words. [*Interruption*]

You want to tell me that you want to bring an amendment to the Evidence Act to implement a video system that is totally irrelevant when the witness dies? So what are you doing? Is this another one of the chess moves to convince the population at large that the Government is doing something to address the murderous situation? Is this what we are about? I was told by Senior Counsel, Dana Seetahal, just now when we were leaving, that when there is an audio-visual recording there is a transcript done of the entire thing and the witness signs that, so in the event of the witness dying the transcript is then presented into evidence according to the amendment which was vociferously promoted to me just now, so that it is not lost.

My question then, if the transcript is the original fail proof and foolproof device, what in the name of all that is holy is the purpose of this video recording whole "tra-la-la"? I cannot wrap my mind around any necessity here for bringing this video evidence into being. I simply cannot understand it. At the end of the day, you are going to rely upon the signed statement that the transcript has. Correct? So what is the story? What are we doing? We are making a very impressive attempt and we are being called upon to support this very important piece of legislation in the interest of bringing the crime down. This has nothing to do with the crime. This is after the crime has been committed, and this is before additional crimes are committed by the people who you do not put under surveillance.

Mr. Vice-President, something is rotten in the state of Denmark. This is a hopeless situation. I know that we have been calling for this matter to go to a joint select committee, but upon mature reflection—and that brings me to another point—we do not need this video recording business. It is totally useless and pointless, except as a piece of PR to tell the people that we are setting up a whole division to film people to make sure that you can use the evidence. When they are dead it is no good, you know.

Now, the matter about after mature reflection—Sen. Prof. Deosaran quoted something which I do not remember now, but I remember a saying: Believe half of what you hear and none of what you see.

Hon. Member: That does not sound right.

Sen. M. F. Rahman: He gave a good explanation why evidence can be changed for very good reason.

I want to say, Sir, when a case takes four years to come to court, which witness who may have survived the threats and survived the assassination, can really be called upon at that time to certify his prior evidence? We have a phrase here about contradictory evidence—I do not know if that is the right word, but something about contradictory evidence—

Hon. Member: Inconsistent.

Sen. M. F. Rahman: Inconsistent, thank you very much—which, Sir, is the inconsistent evidence. The one they gave first or the one they give last? You understand there is a conflict there, because if I say something today and I go back home and say, "Oh boy, you know something, I wonder if I saw the right thing, no, no, I make a mistake." This is where freshness of memory based upon false perspective has to be corrected by mature reflection and pondering about the matter. I can see no reason why all of the evidence, both the prior and the later, should not be presented to the judge or the jury for them to decide in the whole context of all the—[*Looks at Sen. Prof. Deosaran*] I am looking at you too much, you know. [*Interruption*]

I do not know why I am looking at him, but he is paying such rapt attention. It is always good when you are giving a speech to focus on somebody who is paying attention. [*Inaudible and laughter*] So, he is paying such rapt attention that I am confessing that I am looking at him too much, but anyway he is not unpleasant to the eye. [*Laughter*]

Mr. Vice-President, I was on the issue of mature reflection and reconsidering with a clear mind—you know something, I was going to say a sober mind, and that is another matter. "Fellas in a bar, everybody drinking and a murder takes place; you drunk like a top and you giving evidence." When you go back afterwards with a sober mind—now the sober mind does not apply to me, because I like to think I am always sober, but it is a very important issue. You want to put it into the statute books that what you say when you were drunk has to stand up now and what you are saying now has to be the lie. This thing has to be rethought a lot more.

Sen. Dr. Saith: Withdraw the Bill.

Sen. M. F. Rahman: Yes, you are saying the words man. I hope you vote against the Bill. Withdraw the Bill. [*Laughter*]

Mr. Vice-President, this Evidence (Amdt.) Bill is not worth the paper upon which it is written. You know the reason for that? We are condemning the Privy

Council, but we gone and extracting wholesale—and I forget the expression that the good Attorney General used, it was not plagiarism. What was the expression you used about knowledge of learning, I cannot remember?

Sen. Jeremie SC: Precedent.

Sen. M. F. Rahman: Precedent. Yes, but I would like to tell you, Sir, precedent is no criterion for correctness. You may have a precedent that is entirely wrong and I want us to bear that in mind. When you lift out of the British statute books information that is well suited in the context of their society and bring it wholesale into a Bill that we are trying to amend another Bill with—

Sen. Jeremie SC: Jamaica.

Sen. M. F. Rahman:—and implement measures that are inappropriate to our society, then we are spinning top in mud.

I am sorry, we want to support the Government in whatever will reduce crime and will reduce the incidence of seemingly—you know you are not guilty until you are proven guilty. So we have to say all of those "fellas" who get away with murder for whatever reason, they are officially innocent according to the statute books. Now we have to look at the statute there. We have to look at the statute and start to decide whether circumstantially a man can be detained in prison, not executed, but restrained in his freedom because he is a public menace. We have to look at that. Are you considering that at all? Are you considering that we have to start to look at putting ankle bracelets for monitoring the movements of people who are deserving of that sort of thing?

You know, Sir, one man cannot be guilty of 13 murders and it is known to the Government and simply because they cannot get the—I was going to say they cannot get the evidence, but they are not going about getting the evidence properly. You are not putting him under surveillance; you are leaving him free to work all of his mischief. You know in a house you have a little child who is always up to mischief; you have to keep an eye on him. You have a criminal turned loose and this criminal is going around and murdering people and you are telling me there is a spike in the thing and you are aware of the pattern, and what are you doing? You are doing nothing about it.

So we have to think in terms of the omnibus legislation that is being contemplated, taking measures to emasculate the efficiency of the criminal element. We have to be able to restrain them so that we do not have the mayhem that is taking place now continuing.

So I was saying, Sir, that notwithstanding the erudition of our senior counsels, it takes simple lay people like ourselves to start to really say, this is a good law and that is a bad law, and this is a law we need and that is a law we do not need. As a layman, Sir, I say this amendment is something that we certainly do not need. I certainly welcome the knowledge that written testimony is acceptable after the death of a witness. I think that is a wonderful thing. The very fact that the transcript is the only thing that survives after the death of the witness, well then do away with this video matter, because the video matter as I tried to explain earlier, is itself subject to corruption and worst of all, in the hands of senior police officers, who, according to Pastor Dottin, are organizing their own crime cells in the police service. What are we doing? We are opening the way for more crime.

5.15 p.m.

Mr. Vice-President, there is a very big incentive to getting a criminal free. They pay money for that. They do not only threaten to kill you if you give evidence, they offer to pay you if you can find evidence to let them off. So we are having an industry being spawned into the police service where greater and greater levels of corruption are being seen. I want to ask a very important question. We heard from the Minister of National Security, that the Commissioner of Police has the power now, from the highest rank to the lowest rank, to take action against police personnel. Less than two or three months ago, we had two police stations, where arms and ammunition were found, as mentioned, and what has taken place, they have deployed these police officers into other precincts, and the very same Minister of National Security told us on a prior occasion that the law does not permit them to suspend. So he is telling us that the Commissioner of Police now has the authority to deal with recalcitrant police. He is either making a mistake now, or he made a mistake then. Because the two issues are in contradiction to each other, much like the evidence before and after.

Now, Mr. Vice-President, I want to say something further. The matter about the simple majority, vis-á-vis, the statement in the actual Bill that we have before us, which the Attorney General had put us on notice that he is going to change by amendment, a Bill is brought before us where the Government in its considered wisdom, presents to us the necessity to have a three-fifths majority. Now, do not tell me that is a typographical error. That has to be a blunder of tremendous proportions. It gives me pause, because while it is said that what was passed before, with regard to the evidence and so on, was passed by a simple majority and was never challenged, I want to say this, that because it was not challenged then, it does not mean that it would not be challenged later. Because you see, the

amendment that was made before in 2007, I think it was, has not threatened the freedom and life of the kingpins. But the day that happens, they are going to challenge it. Having been forewarned that this requires a three-fifths majority, I want to say that the Evidence (Amdt.) Bill that is before us today is seeking, perhaps not overtly to contradict the Constitution, but it is seeking to take away the right to life of individuals who can be found guilty by virtue of its implementation.

I want to say that if this Evidence (Amdt.) Bill is passed, it impacts upon an individual's right to life. Impacting upon an individual's right to life is a precursor—not a precursor, a far greater violation of human right, than simply denying a simple right under the Constitution. So I want to say, that out of an—and I am not saying that I am supporting the Bill because I think that is an unnecessary piece of legislation. But I am saying this, if they go through with this simple majority, you know the Bill gone through. When I say gone through, it is passed. But I want to say this. Prepare for the Bill to be challenged by a competent lawyer along the way, when his client's life is in the balance, and out of an abundance of caution, it would be a wiser thing to seek the three-fifths majority, by convincing the Independent Senators at least, to support you on this matter. Because it has not been challenged before, does not mean that it will not be challenged in the future, and I am glad that I have repeated that point, so that this matter should sink into the minds of the Government. It is extremely important. As I started off saying, this is a Bill where the t's must be crossed and the i's must dotted with scrupulous concern.

Do not worry. We are going to go a little distance here. I hope I can get my extra time if it is necessary. I know I am going to be at the firing line here. Not to worry.

Hon. Senator: Firing line?

Sen. M. F. Rahman: I have covered this already. I have phrased it rather well here. The matter about certification, witness testimony, be it handwritten, typed, signed, videoed, or whatever, requires a degree of verification and certification, and—what is the word for it?

Sen. Jeremie SC: Authentication.

Sen. M. F. Rahman: Authentication! Authentication. Thank you. A word just jumps out your head and you lose it. Thank you. The authentication of these very important documents is a matter that has to be very, very carefully insured.

Now, Sen. Oudit mentioned about the cocaine eating rats. I am glad she did. I had that in my notes. The thing is this, it is the two-legged rats and everybody knows that, and that is not the only piece of evidence that has been disappearing. Talking about little flash drives and so on, where all the evidence is and little CDs and so on.

Mr. Vice-President, you know we really setting the stage for a total state of confusion in the evidence room. Could you imagine they are searching for a flash drive that was not labelled properly, that suffered the effects of damp and moisture? I do not know if you remember in 1990, when they invaded this Chamber and the Lower House was sitting, they blew up the police headquarters. Now I will tell you something. One of the hallmarks of our crime pattern is that it is escalating in violence and with severity. Escalating in violence and with severity, which means to say that the most violent of crimes have not been committed as yet. You are looking for people who have the means and the connections to blow up storage rooms, and I am saying this without any fear of contradiction. If Pastor Dottin can get up and say in the big story what he said, you know we are very much at risk. We are looking to have evidence rooms where goods are stored burnt up, blown up, pilfered, destroyed. When an accused in police custody can face execution in Rio Claro, openly—I do not know if the "fellas" even covered their faces, and we do not have CCTV in the precincts of the court—you think these people have any concern with sanctity of anything?

Mr. Vice-President, I do believe that if you had testimony certified in writing, and you had copies of that made and authenticated by a JP, a Commissioner of Affidavits or whoever, you have a better chance of preserving your evidence, placed in different storage areas. As it is right now, I am sorry to say that the whole system that is being contemplated here, is flawed and it has as much security as a piece of Swiss cheese.

Now, one of the things the Minister of National Security conceded is that the whole law enforcement caboodle has to be adjusted. And like I said, they are taking the last piece of the jigsaw puzzle and trying to insert it with a foreign import of a device that does not really suit here. Now, the reason why criminals are going free is because criminals are in greater activity, and there is a greater presence of them. And so we come to the simple matter—and I disagree with the Minister of National Security. There was the time when the police and the village people behaved like family between themselves. The alienation has taken place in more recent years and this has given a generating effect. You know there is a term called "the pleasure principle". The pleasure principle, which Sen. Prof. Deosaran

is familiar with from his nodding. I am still keeping my eye on him. When a man gets pleasure from an activity, that is the activity that he chooses which probably accounts for population explosion in some countries. But when you have people committing crime and getting away scot-free, and getting goods to their benefit, they will continue. Nothing succeeds like success, and a successful criminal career is a self-sustaining and self-breeding occupation. You follow?

So that what we have, unless and until you can arrest crime at the very beginning of the cycle, you are going to have unsolved murders and criminality, and reduced percentages of convictions. So it is like, if you want—you know when Hercules had to clean the Augean stables, he did not go to the river where it was. He went higher up and diverted it, and caused the flow to come in the direction of the stables and washed it clean. If you want to stop the criminals from getting away, you have to stop the criminality, and you have to go higher up the chain to be able to arrest that.

Mr. Vice-President: Hon. Senators, the speaking time of the hon. Senator has expired.

Motion made, That the hon. Senator's speaking time be extended by 15 minutes. [*Sen. W. Mark*]

Question put and agreed to.

Mr. Vice-President: Senator, let me say that you did say at the outset that you would be repetitious, but please, try your best to bring some new points to the debate, and I am just cautioning other Senators that I will be not be allowing this repetition for the reminder of the evening. So if you have new points to bring, please bring them.

Sen. M. F. Rahman: Thank you very much. And here I was congratulating myself that I was bringing such new issues to the table, and bringing such new perspectives to the older points. But anyhow, we delude ourselves. [*Laughter*]

We need a greater will and resolve, and we can do without the sob story—I am sorry to say this. I was inclined to feel sorry for the Ministry of National Security—from the Minister of National Security every now and then. Because you know what, the Government has to come to grips with the crime situation. The problem is crime. The problem is not murderers getting free as the first issue. The first problem is crime; address crime. I want to ask a serious question here. The Minister of National Security has pleaded that this matter requires a great deal more than a simple device here and there. So I want to ask, why did he at the

beginning of this year promise faithfully that the murder figure will not approach last year's, when he knew he was nowhere near implementing what is necessary to bring down the murder rate, or to achieve conviction?

Two years ago, I remember him saying that no more kidnapping will get through, I can guarantee you that, when they put the blimp in the sky. Now there is a reduction in kidnapping, but it is not because of any—easier crimes can come about now. They can walk into your house and move away with your TV and your laptop, and beat you up, especially with people who are not very wealthy. They are doing it with alternate means and the pleasure principle continues to have effect.

5.30 p.m.

Sir, I believe the terms "fair trial" and "fundamental justice" are mentioned in the Constitution. I think that in the interest of the Government and in the interest of justice, we may have to revisit the meaning of those words.

I have recurring in my mind, the words of the Commissioner of Police who, a few days ago, found himself saying something very awkward and had to sort of re-tailor it. He was, in a way, glad that they shot the three bandits, and then he immediately had to come back and say, "Well, we are not really glad", but he had to try and extricate himself from the position.

I have a simple question to ask, and this may be very revolutionary. I know it is not illegal to say it in the House, but it may be very, very thought provoking. We may have to look at legitimizing certain aspects of curtailing criminality, that normal justice routes do not at present tolerate or condone.

Whatever law we pass, becomes the law; it is a funny thing. For years we had prohibition; nobody could drink without getting prosecuted. The day the prohibition was repealed, one of his friends asked Elliot Ness—that was the big "fella" in prohibition—this is a matter dealing with the question of prohibition, Sir—legitimizing by law. When the prohibition ended, he asked Elliot Ness what he was going to do, and he said, "Well, I am going to have a drink." He was arresting people for drinking before, and the law was changed. So the law legitimized that which was illegitimate and illegal in the first place. I am saying now that we have to do some creative thinking to decide how to legalize means and ways of containing the criminal element. There is a saying that you have to fight fire with fire. The time has come when I believe we have to find the proper brand of fire to fight the type of fire we are faced with right now.

The police already have a record of extrajudicial killings; I do not believe we have ever had a police officer brought before the courts for taking a criminal's life. [*Interruption*]

Sen. Jeremie SC: Mr. Vice-President, that is not true. It is unfair to the police service and to the many persons who serve in the police service with dedication and bravery everyday and, as a matter of fact, it is imputing to them illegality in the discharge of their functions. To the extent that you say that they have a reputation for extrajudicial killings, that is not true.

Furthermore, to say that they are not brought before the courts, I know of instances and I have to provide representation for police officers routinely; not every day, but every month, in respect of killings. These matters go to court and there is a finding one way or the other; so it is not true to say that they are above the law.

Sen. M. F. Rahman: Mr. Vice-President, I am much obliged for your clarification.

Mr. Vice-President: Senator, could you please, at least, use your last nine minutes or so on the Bill?

Sen. M. F. Rahman: Sir, all right; we are going to try to say the Bill, the Bill, and that might attach it somehow.

If I may respond to what the AG just said; while he made a good point, there is no evidence of extrajudicial killings, once the police does not prosecute, it was legitimate. It was under circumstances which could not be avoided. But we had a gentleman by the name of Mr. Randolph Burroughs, who had his own reputation—[*Interruption*] that is a matter—all I am saying is to legitimize it, so we do not need to have this kind of farcical Bill here.

Sen. Jeremie SC: May I just interrupt again?

Sen. M. F. Rahman: You are standing up already.

Sen. Jeremie SC: Yes.

Sen. M. F. Rahman: "Yuh want to sit down?" No, we have heard enough. I only have eight more minutes, thank you.

I want to support Sen. Prof. Deosaran with regard to the forensic evidence. I have never seen it practised in Trinidad and Tobago. Forensic evidence includes taking a suspect's hand and putting it under radiation or some sort of thing to see whether it just fired a firearm. I do not think that we have that in Trinidad and

Tobago. You are going to take a suspect to the cell, he washes his hands and fixes up himself, and you have no attempt at extracting forensic evidence that is vital to the case. Matching bullet casings, rifling on the slugs and getting the suspect with gun powder on his hands, all these things—we have brought in people from Scotland Yard to teach our police officers about forensic data. This is very, very important. This is one of the pillars of crime detention in the 2020 countries that are First World. This Bill does not advance anything in those directions.

I have an interesting question. Of course, this was covered. I was going to ask about the hearsay evidence being the nomenclature under which these videos could be classified, but I do not think that is reasonable, so I would not try to make that point.

Yes, Sir; I want to repeat that we need, out of an abundance of caution, to look for some sort of justifying majority when we bring this Bill. If you do not get it, it means to say that there was really not a good case to be made for this Bill. I believe that from the agreement I seemed to have had from the persons I see on my right, there is cause for concern and we should readdress this matter.

I understand that we have implemented our DNA laws, but have we established a DNA lab in Trinidad and Tobago?

Sen. Jeremie SC: The Minister of National Security would tell you yes.

Sen. M. F. Rahman: We have a DNA lab? That is wonderful; I congratulate you; that is a big thing. I would like to see a lot more labs. So we are doing our own DNA testing?

Sen. Jeremie SC: Yes.

Sen. M. F. Rahman: Good. The rest of it would have been safeguards. I do not know if you have regulations that would accompany a bill.

Coming back to the making of video in the first place, it is not farfetched to consider, as a very reasonable claim, that a witness could have been threatened by the police to give the evidence which he gave in the first video recording. So although he may sit there and give all the evidence as a witness, there is nothing to certify that very evidence, in pristine conditions, was not, in fact, given under threat or coerced. We really have to look back at what constitutes contradictory evidence, which is the evidence that the judge and the jury are supposed to really look at, at the end of the day.

I want to repeat that the question of perjury should be re-addressed more robustly and that serious penalties be implemented for this matter.

There is another point here. One of the grounds for refugee status in countries like Canada is if you could tell the Government, and prove to them, that your life is at risk in the society in which you live because of crime. That is one of the grounds on which you could get a hearing for refugee status. We should have, in this country, a meaningful programme of compensation for people who lose their lives at the hands of criminals, and witnesses who are eradicated. I think it is very unjust to offer $25,000. I think the ceiling now is $25,000 or some such thing. So when citizens lose their lives in a way that was caused by dereliction of the State, I believe that we should have a national insurance programme which pays out serious death benefits. So that people who die, in these circumstances, could get a compensation that is more dignified and fitting and would help the survivors of the tragedy.

I saw in section 15X that current cases would not be affected by this video thing. I do not know if that is very smart, if you are going to put it in at all, because you are going to have current witnesses being rubbed off, until you implement this thing. [*Interruption*] Bumped off. You know, Sir, I have actually covered my major points.

Hon. Senators: Yes.

Sen. M. F. Rahman: No, not everything, but a lot of it was said by others and I did not want to be repetitious, although the Vice-President seems to think that I was very much so.

Anyway, Sir, it has been a pleasure. I want to record my satisfaction that as a lay person I could stand here and present certain perspectives that may not have been considered by the more learned in our society.

Thank you indeed.

Sen. Helen Drayton: Mr. Vice-President, I will be brief. I will just address a few matters and questions which the Attorney General may wish to answer now or in his wrap up.

The first has to do with the definition of video. It says:

> "Any recording on any medium from which a moving image may, by any means, be produced and includes the accompanying sound track."

Does this include computer visuals and audio? If that is so, that would be a concern, because it is going to be totally unreliable. Probably that definition needs to be modified to say “excluding.”

Sen. Jeremie SC: Yes.

Sen. H. Drayton: So you are going to address that? The other point has to do with clause 8 which states that:

> "A statement made by a witness in a video or an audio recording may be admitted…whether or not the statement was made on oath."

My question is why. If such a statement is given voluntarily, why would the person not want to make the statement under oath? That also has implications with respect to the rules governing the acquisition of such material. I am certainly not satisfied with that clause as it is.

With respect to parts of videotaped evidence, the explanatory note states that:

> "…section 15I would provide for the admissibility of the whole or any part of the video or audio recordings"—let me put on record that I disagree with audio recordings—"of the voluntary statements of prosecution and defence witnesses, including the accused, having regard to the prescribed guidelines..."

Maybe here the guidelines—the rules, would cover it, because I need clarification as to what is meant by "or any part of the video or audio recordings". Should that be interpreted to mean that such material could be edited or parts extracted and submitted as evidence? I would imagine that should be of serious concern, because that would be tampering with the evidence. I think that needs to be cleared up as well.

With respect to section 15C, and this has to do with the witness who is fearful for his life, I too would like to touch on this. I am just wondering whether the bar is not being placed too low with respect to videotaped evidence, whether the witness is available or not. I could understand if a witness is fearful for his life, bodily injury or the life of a relative, but to extend it in the broad way that the Bill suggests—For instance, it says that: "fearful is to be construed widely and includes—so I wondered whether there was a need for that clause and whether, in fact, it was not that the situation of fear is not adequately covered under section 15C.

There are a few other points I would make. I will not dwell on matters which have already been discussed. But I do wish to emphasize, as others have, that since so much evidence is placed on the testimony of witnesses and witnesses have been killed, and remember in the submission of the Attorney General and the example that was given by Sen. Seetahal SC, a lot of emphasis was placed on that aspect, that reason, for video testimony being necessary.

5.45 p.m.

I think in defining that, it was said, where the individual is a high risk. And since that not only frustrates the justice, then it is fair to emphasize that robust systems must be in place to secure and obtain such evidence by the time this Bill is proclaimed. If not, then it is fair to also wonder or even state whether, in fact, we will not be creating another avenue by which criminals would now become more efficient in taking out witnesses sufficiently early before the videotaping can be done, and further, whether, in fact, we will not be putting more innocent persons at risk of their lives; those persons who are charged with the videographing and who are also custodians and witnesses to such materials.

So I think that this is a very serious matter and whilst it is one which is really a logistic that supports this law, it is very reasonable to emphasize that need. It is also because of situations which have occurred in very recent times and very fresh in our minds. It is reasonable for the average person to perceive that this Bill is very much as a result of a lack of proper—I want to emphasize—management systems; systems, yes, to protect all types of evidence more than anything else.

I am not being critical here; I am not being blameful of the police; I do not think that the police should be blamed in these matters at all. I think it is really one of governance and management and I think the Minister of National Security said that. But I do not think that any reasonable citizen would believe that by waving a wand, the level of crime would disappear.

When we speak of management, I have no compunction in saying that when you have systems in place—and I will emphasize it—that are so archaic—and I refer to the Police Service Commission; I am not talking now about the people who are serving; they are dedicated, hard working, committed people operating a system that really belongs to another time, not in a time like this when crime is on the forefront and has become so sophisticated.

I also want to say that with respect to the police, it is time that the public begin to condemn the criminal and rally more around the police. You know, you hear a lot of stories and a lot of comments with respect to rogue police, but when you think about it, there are rogues in every profession, whether it is the clergy; whether it is medicine; whether it is science and technology; whether it is the construction industry, and there is no evidence to suggest that the number of rogues in the police service as a percentage of the total, is anymore than in any profession.

So I think that we really need to begin more positive reinforcement. You know, it is said that encouragement reinforces positive behaviour and negativism

reinforces negative behaviour. So I think that it is a time when all citizens, especially leaders in the community, need to take time to find out what is happening; what is being done. Suffice it to say, if there were not dedicated and committed policemen and women serving us, then the crime situation, indeed, will be much worse.

Further, I was reading this morning—it is just a little odd spot in one of the newspapers where, in the state of Ohio; I do not know if others saw it—the citizens are so concerned about crime and in going to the police, the police literally threw up their hands and said, "well, you know, maybe some of you should leave." I mean, it just reflected the frustration on the part of the police and how widespread and how complex the situation is.

So let me just say that if those systems are not in place, then not only is justice denied but the rights of the accused and the innocent under sections 4 and 5 of the Constitution will, indeed, be infringed. It is not just a question of the Constitution, because human civilization has advanced considerably since our Constitution was established. Therefore, there are other aspects of human rights, and where access is denied to protection, then rights are denied.

I certainly will not challenge the Attorney General and senior counsel that this Bill is procedural and it does not infringe sections 4 and 5 of the Constitution. However, knowledge of our culture and where we have seen failure to secure evidence, failure to protect witnesses—and I heard what the Minister of National Security said about witness protection, which is commendable, but then you hear about situations such as cellphones being available to prisoners where there are suspicions with respect to the death of accused persons behind the prison walls. I am hoping that in his summation, the Attorney General will say that, indeed, there will be robust rules supporting this legislation before it is implemented.

Thank you. [*Desk thumping*]

Sen. Dr. Jennifer Kernahan: Thank you, Mr. Vice-President, for giving me the opportunity to contribute to the Bill before us, to amend the Evidence Act, Chap. 7:02.

We in this country are at a very critical point with respect to what is happening in the criminal justice system. I think we would all agree that there is this obvious and very progressive degeneration of our criminal justice system which has led to our society being enveloped in an aura of fear and intimidation.

We have in this society today, NGOs being formed around the issue of missing persons. Previously we would have NGOs being formed around issues of ensuring

a better quality of life for disadvantaged people, for poor people and so on, but we have reached the stage in this society where we have NGOs being formed to solicit and beg the Attorney General, the Minister of National Security, anybody who would listen, to deal with the issue of missing persons in our society: children, young children, older persons, young men, the whole gamut of age and gender is represented in this group.

Just last Saturday there was this rally in Saith Park by members of the NGO and you had, for example, the mother of Leah Lammy crying out that she felt abandoned by the protective forces in this country because nothing has been heard or seen of her precious little daughter since she was kidnapped and her perception is that nobody cares.

This administration has presided over the degeneration of the criminal justice system over the past seven years, to the extent, as everybody here has recognized—as the Minister has recognized—that we have reached the point—and we have been warning this Government of this over the past seven years—where criminals commit brazen acts of violence; actually murder and eliminate witnesses before they even have a chance to testify in court.

This degeneration of the criminal justice system has been accompanied by a new system, a system of street justice in which justice is dispensed on the streets. A lot of people, as many of us know, no longer go to the police to resolve problems; they no longer go to law enforcement and so on; they go to the gang heads and the gang leaders and so on and justice is dispensed on the street, and the first and last option of street justice is capital punishment—murder.

In fact, a judge a few months ago, in discharging two young men accused of murder—he discharged them because of the lack of witnesses; witnesses, as we heard here this afternoon, would come and say they do not remember and he had to discharge these two young men, but he said to them: "You know, you all are being discharged; you are going free, but I hope that at some subsequent time you do not turn up dead."

So it is an established procedure in this society now, an established train of events that murder of witnesses—because of the intimidation and so on, they would probably get off in the courts but street justice catches up with them. A few months or a few weeks after, these murder accused are found dead and murdered. This is what we have reached to in this society. Based on the new system of street justice we have two sides of the coin, because we are seeing the criminals perpetrating this new method on the streets and I have also seen an alarming number of suspects being killed by the police in the process of apprehension.

A senior counsel in this country recently, Ramesh Maharaj, when he went down to the Beetham Estate to deal with the issue of the two young men, Fabian Mauge and Ricky Roberts, who had been killed there, he made a statement to the press that last year there were 29 cases of extrajudicial killings and the year before, 28 cases of extrajudicial killings. So that is my authority.

So I am saying that the degeneration of the criminal justice system has been accompanied by killings and street justice on both sides of the fence. You have street justice being meted out by the bandits and you have street justice, apparently, being meted out by the police and agents of law enforcement who apparently are not properly trained to apprehend criminals or suspects without the use of lethal force.

That is a very worrying development in this society, because when suspects are killed by the police in the attempt to apprehend them, what you have is a violation of the Constitution of this country of the right of every citizen, of the right to life and the security of persons and the right not to be deprived thereof except by due process. So when you have dead suspects going into the morgue, these are citizens of this country whose rights were violated, the right to due process, and we must understand in this country when the rights of one citizen is violated, all our rights are violated. None of us are immune.

The cause of the degeneration of the criminal justice system is very complex, we know; there are a lot of social causes; there are economic causes.

6.00 p.m.

There are causes to do with the criminal justice system and the lack of magistrates and facilities in the courts. The issue of young men being killed by police officers in the course of purportedly apprehending them is not helping our society. It is very dangerous. What is also not helping is this new trend when these very sad events occur, the officers involved are being called heroes publicly, awarded and celebrated. That is not helping the criminal justice system in this country to invoke any sort of trust in or credibility of the protective services.

I ask the Minister of National Security and all the Senators in the Senate today, when we see officers who are not properly trained to apprehend without the use of lethal force and violate the constitutional rights of every citizen of this country to due process, what is the message being sent to the young, impressionable minds, young men 13, 14 and so on coming up in this society? The message is that life is cheap; the court is a “long time” thing in this country and it is okay to be violent and take a life. Apparently, those young people are looking on and learning these messages. Young people are drinking this with their mothers' milk.

Young men are taking in these subliminal messages. Just the other day there was a case of a young boy who was murdered in a confrontation with his peers after football. Life is cheap. We have to look at what is happening in the context in which the Attorney General has presented this Bill which seeks to do three things. The Bill before us seeks to provide for the admissibility of a previous inconsistent statement in criminal proceedings as evidence of which oral evidence by that person would be admissible. It proposes to make a provision for the admissibility of video or audio recordings of voluntary statements of the prosecution and defence witnesses. The Bill before us seeks to abolish the common law rules governing the admissibility of bad character evidence and provide for the admissibility of bad character evidence in accordance with prescribed guidelines. These three areas this Bill seeks to accomplish.

The Attorney General in his presentation acknowledged that the amendments to the Evidence Act were modelled after the British Criminal Justice Act of 2003. The Attorney General also said that the Criminal Justice Act of 2003 was preceded by a white paper outlining a comprehensive plan for the reform of their criminal justice system from crime prevention to punishment and rehabilitation of offenders. These issues of witness audio recordings and admissibility of statements of bad character were not done in isolation. They were done in the context of a whole white paper policy statement that sought to improve the criminal justice system from prevention to rehabilitation.

This is where the Attorney General's presentation falls. Looking at the White Paper and the British policy statement, it is clear to us that they were not just concerned with securing conviction, as the Bill before us purports to do. In the White Paper and reform of their legislation, they were concerned with crime prevention and how to deal with the whole issue of bringing punishment in line with criminal rehabilitation, so you would not get repeat offenders. The White Paper said:

> "Justice for All Presented to Parliament by the Secretary of State for the Home Department, the Lord Chancellor and the Attorney General by Command of Her Majesty in 2002.
>
> The people of this country want a criminal justice system that works in the interests of justice. They rightly expect that the victims of crime should be at the heart of the system. This White Paper aims to rebalance the system in favour of victims, witnesses and communities and to deliver justice for all, by building greater trust and credibility."

This is what we want too. We want a criminal justice system that works for all and balances in favour of the victims and communities. We want to build greater

trust and credibility with the agents of the criminal justice system. This is what everybody wants. We are seeing that there is a problem with credibility with respect to the Bill before us. This administration has a problem of inability to deal with the major problems of the criminal justice system.

A criminal justice system can only be effective if you have detection, conviction and proper punishment of the offenders. Over the past seven years we have seen that there is a serious problem with respect to this administration and the inability of the criminal justice system to detect and convict. The whole fundamental of the Bill before us is based on the ability to detect and convict. I will show later on. Our people are not only concerned with the problem of the inability of the criminal justice system to detect and convict because that is tied in to the question of bad character—the issue of bad character comes in if you have a convicted person before you—we are also concerned with the lack of proper respect for the lives of citizens, especially suspects, on the part of the protective services.

What is happening now is that our society has become immune to death. Every day is a normal thing with gunshots. We do not believe that the Bill before us, in the absence of the overall policy which we have asked for—in what context are you bringing this piece of legislation? The Attorney General said this is part of other pieces of legislation which will be brought. We are asking the Attorney General to give us a policy paper, an overall concept of where he wants to take the society; how he intends to take the society; rehabilitate the criminal justice system; deal with all the major problems of detection, conviction, punishment and corruption within the law enforcement agencies.

My colleague, Sen. Drayton spoke about the issue of positive reinforcement. I think that it is a little too early for positive reinforcement. We have to deal with rooting up the corrupt elements in the law enforcement agencies and deal with the issue of positive reinforcement later on.

The Minister of National Security spoke to the fact that over 2,000 members of the police service have been trained in evidence gathering and now they operate at a higher level and are more problem-oriented. They are trained in apprehension. There is no indication of this in our everyday lives in the way major law enforcement agencies operate. We believe that if the problem is resources and the technology to deal with the population in a way that would not infringe our democratic rights and freedoms that are enshrined in the Constitution, then we must say so and deal with that. We must give the protective services the tools and the technology that would enable them to do their job in conformity

with the Constitution of this country. Nothing less is expected of the law enforcement agencies of this country to deal with law enforcement in the context of the Constitution of this country.

Every day the Government speaks of developed country status and our aspirations to developed country status. They have gone to one of the purportedly developed countries to look at models for legislation to implement here. I remind us that in other developed countries they also have to deal with violent criminals. They have to deal with people who are involved in organized crime and are mass murderers. In their societies they deal with this by rounding them up, putting them in jail and letting them have their day in court. Recently in Oklahoma, a violent crime family, La Familia, over 300 persons were rounded up. They said that it was one of the biggest operations in the United States of America. That is a very violent and dangerous group of persons and they were rounded up. We saw them in handcuffs going to jail. I do not understand why all of a sudden we have this trend that apprehension of criminals in this country has to be accompanied by three, four or two deaths.

It seems to us on this side that this administration is very selective about what aspects of the British systems they wish to follow. We are asking where is the political will and public policy to deal comprehensively with the prevention of crime to which they purport to aspire. We are being asked to approve the Bill before us which may not even achieve its objective.

Clause 7 of the Bill deals with a person giving oral evidence, admitting to making a previous inconsistent statement or if it is proven that he makes a previous inconsistent statement, the statement is now admissible as evidence of any matter stated in it, of which oral evidence by that person would be admissible. Clause 7 is amending section 15 of the Act by inserting clause 15H with these provisions.

Part of the raison d'être of these amendments in clause 7 is that witnesses may not retract their testimony or statements because of fear or intimidation. Clause 7 may not give the desired result because what you may find is that witnesses may be unwilling to give statements to the police under these circumstances under these new amendments, in the first instance. As we speak, in this country witnesses are terrified of giving statements to the police saying, "I have seen this or I have witnessed this." This Government recognizes this and that is why we now have 555 where people are asked to call anonymously to tell somebody on the other end of the line that they have information concerning this or that crime or you have witnessed this or that.

6.15 p.m.

The Government is very much aware that we have reached the point where witnesses are unwilling to come forward and give evidence. Are we now in fact attempting, in this Parliament this afternoon, by way of clause 7, to lock the stable door after the horse has bolted? Where are the statistics with respect to the trend in "I see" witnesses in this country over the past 10 years? Where are the statistics to allow us to understand the level of criminal convictions with the help of "I see" witnesses? How relevant is the participation of witnesses in achieving convictions in Trinidad and Tobago, given what has happened over the seven years and the trend of intimidation and elimination of witnesses?

Is it that the system of "I see" witnesses is no longer relevant to criminal prosecution in this country? Do we need to intensify the use of forensic evidence? We are convinced that clause 7 testifies to the fact that the Government is always a day late and a dollar short. It is being brought in the context of open and brazen elimination and intimidation of witnesses over the last seven years. What do you do? You bring a clause saying that you will videotape or audiotape a witness's testimony and that they cannot recant previous testimonies.

What makes us think that we want to support this legislation? What makes us think that this will not exacerbate the situation of witnesses being fearful of giving testimony? What the Attorney General is saying to potential witnesses at this time is that even if they are dead, eliminated or killed, they will be able to convict.

Clause 7, which deals with audio-visual recording and previous inconsistent statements being taken to court and so on, means that there is no comfort for potential witnesses. There is no encouragement, especially as the Minister of National Security said this afternoon that only high-risk witnesses are taken or recommended for witness protection. We know that you do not have to be a high-risk person to be eliminated in the street justice meted out by criminals in this country. The slightest infraction in this country marks you for death or execution. If you have to go to court to testify against someone in a serious criminal trial, whether or not the Attorney General or the Ministry of National Security deems you high risk, the criminal deems you high risk. The mere fact that you are so boldfaced to testify against them, you are marked for elimination.

Nothing that has been said here by the Attorney General or the Minister of National Security gives comfort to potential witnesses. This is purely an act to increase the conviction rate, which the Government and all of us want to do. At the same time, it may be counterproductive because you will have witnesses who

know that their video recording will be used in the court whether they are dead or alive. In the absence of any real assurance of a protection programme that will assure their lives and that of their families, they will not be willing to come forward. It will be dangerous for them under the circumstances.

PROCEDURAL MOTION

The Minister of Energy and Energy Industries (Sen. The Hon. Conrad Enill): Mr. Vice-President, in accordance with Standing Order 9(8), I beg to move that the Senate continues to sit until the completion of this Bill and the House of Representatives amendments to the Commission of Enquiry (Validation and Immunity from Proceedings) Bill.

Question put and agreed to.

EVIDENCE (AMDT.) BILL

Sen. Dr. J. Kernahan: Thank you, Mr. Vice-President. In clause 7, 15M(1)—many of the sections deal with the issue of bad character. In section 15M(1) and following, there are a number of sections that deal with the whole issue of the reassessment of the admissibility of evidence based on bad character. It is very extensive.

There is a whole rebalance of evidence-based format where the court has a lot of jurisdiction. This Bill is based on the ability also of the prosecution to bring into evidence, for the judge and jury, the question of the bad character of the suspect. As far as I understand, the bad character of the suspect has to be based on a previous conviction; it is not based on charges or any other issue.

We have a criminal justice system based on a very low level of detection and conviction. So, where is the relevance of all these clauses in this Bill related to bad character and how often will they be invoked at the level of the court when the level of conviction of offenders is miniscule? How many accused will be affected?

The Minister spoke to assisting law enforcement in turning the tide of criminal activity. We would like to do that. Everyone feels threatened by the rising tide of criminal activity. Every one of us would like to contribute to turning the tide, but we have to be convinced there is a serious effort to turn this tide. We are not convinced of that.

We have told the Government over the years that certain of their policies contribute to the rising tide of criminal activity in this country. One of the policies that has contributed is the Urban Redevelopment Programme. We have looked at

the increase in murders between 2005 and 2008 and the increase in funding for the project. There is a straight-line correlation when you look at the graph between the rise in funding for URP and the rise in murders perpetrated. You look at the reports and you find a disproportionately high number of the victims are URP foremen and members of the URP gangs. Over 33 per cent of murders, according to the statistics, are concentrated in a small area where there are high levels of URP ghost gangs and illegal activity, with the connivance of the people in charge of those programmes.

We want a criminal justice system that works in the interest of justice and we believe that the people of our country are entitled to the level of personal security provided for in the Constitution. We believe also that the policies of this Government have provided for the development of a culture of death, violence and murder, which has touched every life in this country. We are saying that the Bill before us is an attempt to deal with an immense problem that they have allowed to grow; that they have created and financed, and it is not easy to put that horse back into the stable.

Based on my contribution, I have shown that the very measures purported to take effect in this Bill, to get the horse back into the stable, are counterproductive and could possibly lead to a more unstable situation in terms of criminal activity. We are saying that the delivery of justice, as was said in the introduction to the White Paper, the British policy paper, must be based on trust and credibility. It must be based on the ability of the population to trust the members and agencies of law enforcement. It must be based on the credibility of the agencies of law enforcement with respect to the delivery of a service to us that we can feel proud out of and identify with.

There is a huge gap of trust and credibility. The trend of extrajudicial killings is not helping to bridge that gap.

Sen. Joseph: On a point of order, I do not know what the hon. Senator is referring to when she talks about extrajudicial killings.

Sen. Dr. J. Kernahan: I thought I made myself clear. If the police are not properly trained to apprehend suspects without using lethal force, that is an act of aggression against the constitutional rights of every citizen to due process.

I quoted Ramesh Lawrence Maharaj SC, when he referred to 29 extrajudicial killings, which means, outside of the due process, last year and the year before. The celebration of the killings of suspects by the police who are not properly

trained to use non-lethal force and who apparently have not been given the resources to use non-lethal force—there are all sorts of resources to use non-lethal force, stun guns and so forth.

Mr. Vice-President: I do not think we are here debating the police service. We are here debating the Evidence (Amdt.) Bill. If you could relate what you were saying about the police service to this Bill, we would be grateful to listen. If you are not linking it, we are not debating the police service.

6.30 p.m.

Sen. Dr. J. Kernahan: Thank you, Mr. President. I was wrapping up and I was making the point that we must have trust and credibility between the citizens and law enforcement, in order to have a criminal justice system that will function in the society. If we are saying that we want witnesses to come forward and trust the police and give them statements and they can be sure that these statements will not get back to criminal elements—[*Interruption*]

Mr. Vice-President: Senator, I just informed you that we are not debating the police service. If you could link it with the Evidence (Amdt.) Bill, go ahead, if not, wrap up or move on to another point or something.

Sen. Dr. J. Kernahan: I was relating it to the question of witnesses. Part of this Bill deals with the audio-visual taping of witnesses. This Bill is providing for a greater participation of witnesses in the criminal justice system by audio-taping their statements, so that they can convict suspects. This is what this Bill is about. You are not going to get suspects or witnesses coming forward, volunteering information, allowing themselves to be audio-taped or visually taped, in order to have their statement available in court, if they do not trust the criminal justice system and the law enforcement agencies. That is the point. That is a fundamental point.

The Minister of National Security has said it time and again that we need that level of trust between the population and the police, in order to convict criminals and deal with the criminal justice system to get it operating the way it should operate. If there is a gap in the level of trust and credibility, the level of the ability of witnesses to come forward and allow themselves to be videotaped in order to convict criminals and if they feel that they would be abandoned and it will further jeopardize their lives and their families, it will not happen.

In closing, there is the question of bad character evidence. We have 10 different clauses to deal with the admissibility of bad character evidence, by the judges who are given wide discretion in the courts. If these suspects are not

convicted suspects or witnesses, then all of these clauses are null and void, because they will not be able to enter any evidence, with respect to any person who does not have convictions. Convictions are important. With the very low level of detection and conviction in this country, this Bill is almost not worth the paper that it is written on.

I thank you very much.

Sen. Subhas Ramkhelawan: Thank you very much, Mr. Vice-President, for giving me the opportunity to speak on the Evidence (Amdt.) Bill. I had not really intended to make any contribution to this particular Bill, but I thought that I would just make a short contribution, because some of the issues that have cropped up appear to be rather controversial.

First of all, let me thank hon. Sen. Seetahal SC, for clarifying several of the areas this I was not so clear on at the beginning. I want to thank also, the Attorney General for doing his piece in the clarification and presenting of the Bill.

First of all, let me just add my uncertainty, with regard to this matter of a simple majority and secondly, to say that I support fully some of the contributions that have been made, with regard to the omission or exclusion of that particular clause that dealt with the admissibility of audio-taping. That apart, I believe that the Bill is worthy of being supported, because we have complained in various quarters about the challenges that we are being faced with in the courts and otherwise, in terms of presenting evidence and in terms of ensuring that evidence is of such a level and quality, that it can be usefully used in the courts of law. Nothing in this particular amendment or this draft legislation suggests to me that there will be any lack of fair play that those who are accused in the courts will be disadvantaged severely by the admissibility of certain types of evidence, whether they be video evidence or some of the other matters that are being presented in this Bill, including the admissibility of bad character evidence.

I was a bit perplexed by the comments of the hon. Minster of National Security, when he quoted some statistics and certain peaks in various months of the year when murders and homicides went up after, as he may have suggested, the release of prisoners or the acquittal of prisoners. I hope that he would be able to explain that further, because in the three months that he suggested that there were releases of prisoners, it was in those months that homicides went up into the 50s. Those were the only three months, I believe, where he quoted those homicides. Maybe the hon. Minister is suggesting that the police are unable to deal with those persons who have been released or acquitted in preventing the commission of additional homicides.

I believe that anything that we can do, legally and justifiably, to improve the quality of evidence, would help in the war against criminals that it is blatantly clear that we have been losing. If it is that such admissibility would help the cause, without in any way compromising those who are accused, then it is something that we ought to and should be prepared to support.

Therefore, I do not wish to repeat many of the statements and contributions that have been made by other hon. Senators in this Senate and, therefore, all that needs to be said further in concluding, is that, with the amendments that have been suggested, with regard to audio-taping and with some further clarification by the hon. Attorney General, with regard to the matter of simple majority versus a three-fifths majority, I believe I am prepared to support this particular Bill and I plan to do so at the appropriate time.

I thank you, Mr. Vice-President.

Sen. Dr. Sharon-ann Gopaul-McNicol: Thank you very much, for allowing me to participate in this debate. Mr. Vice-President, you were very clear that you want us to avoid excessive repetition, so instead of dealing with what others dealt with before, I will like to jump right into the areas where I will like us to note that were not referenced before by the previous speakers.

With respect to clause 7 amending section 15J:

> "'oral evidence' includes evidence which, by reason of any disability, disorder or other impairment, a person called as a witness gives in writing or by signs or by way of any device;"

The issue here is the word "disorder" and the ability to give in writing your evidence. While a person with a physical disorder such as a person who is wheelchair bound can easily give in writing their testimony, this is not the case with persons with mental and emotional disorders. I think we should find a way to clarify this in this Evidence (Amdt.) Bill.

For instance, a person with a mental disorder such as schizophrenia, let us say that person is a witness to some kind of criminal activity—schizophrenia is a thought disorder, which is a choppiness of thought in the expression of one's ideas and thoughts. It could come across very choppy and lacking in fluidity and coherence. Such a person will need assistance from, more than likely, an individual trained such as a psychologist, in helping that individual to articulate his thoughts and feelings in a logical and coherent manner. This is not in trying to influence the person's testimony, but rather recognizing that this is a mental disability and would need this kind of help.

Likewise, a person with an emotional disorder suffering from post traumatic stress disorder, which many witnesses of such vile and criminal acts tend to suffer from, PTSD, this person may need some sort of support as well, with respect to this clause 7 amending section 15J. For instance, post traumatic stress disorder is an anxiety disorder and if it is not addressed over an extended period of time, this individual can become depressed. In other words, anxiety disorders, if not addressed, can lead to depression. What happens in such a case when a person has an emotional disorder such as PTSD, the individual will also need the help of a trained person to articulate his or her testimony, in terms of the accuracy of it. I think we need to be aware of that.

The other issue that came up in section 15S(2) and (b) is:

> "'evidence attacking the other person's character' means evidence to the effect that the other person—
>
> (b) has behaved, or is disposed to behave, in a reprehensible way,"

When we speak of a person being disposed to behave in a reprehensible way, I would hope that we can take into consideration who are the persons who will be judging a witness who is disposed to behave in a reprehensible way. In other words, I would like us to add:

> "as evidenced by a person trained in assessing human behaviour, who can determine predisposition to behave in a reprehensible way."

I would like us to take that into consideration.

> Section 15I(1)(d) states:
>
> "the statement was given at a time when those events were fresh in the witness's memory…"

I would like us to take—I also heard several persons who spoke before me make reference to the fact that people can change their testimony very easily and about the validity of such a testimony that has been changed. I think we need to understand how memory works. There is the primacy and the recency effect. The primacy effect says that you tend to remember what you see and hear first and the recency effect speaks to the fact that you tend to remember what you heard and saw last. When people try to invalidate persons who change their testimony, I would like us to recognize that you may have to very well include, in this Bill, attaching some kind of—as well as in the Witness Protection Programme in the

Ministry of National Security—trained person who understands how memory works. It does not mean that somebody changes their testimony, notwithstanding the reality that there are people who do change their testimony willingly because of fear, or other reasons such as they were bought off, there are legitimate reasons why people may change their testimony, because of what they remember in the primacy and recency effects.

I recognize the Minister gave the operation of the Witness Protection Programme. I still maintain, Minister of National Security, that the Witness Protection Programme is a main element in this entire Evidence (Amdt.) Bill. I think that the Witness Protection Programme remains a weak link in this entire process. We cannot overlook the fact that there are many witnesses who expressed the frustration of this programme, not to mention on January 04, 2009, and July 05, 2009, the *Express* gave a wonderful documentary of several witnesses who are in the Witness Protection Programme telling their story. One witness witnessed a shooting outside the safe house where he was placed. He was told he had to stay right there, even though there was banging on the door. He was traumatized by it and he was not allowed to leave the Witness Protection Programme nor was he transferred to another safe house.

6.45 p.m.

Another witness said it took two hours for the police to come after he heard shootings outside of the safe house. Another witness spoke about the fact that the people in his village know about the safe houses where witness protection people live. So, what is the purpose of having a Witness Protection Programme where the safe houses are known? It becomes unsafe. The people are asking for some kind of safety valve around the houses where the witnesses are housed.

We have to look at the backlog of cases. I recognize that in the Minister of National Security's contribution he made reference to the fact that it is beyond his ministry, and that it is really a matter for the courts and so on. Look, it is one Government. We are one country and it is one Government, and we have to make connections. [*Interruption*] The point is that we must have some kind of fluidity and connection between what is happening in the Witness Protection Programme and the backlog of cases—adjournment after adjournment—because witnesses are either dying or falling out of the system or just disappearing and so on.

Sen. Jeremie SC: Are you suggesting a direct interface between the Executive and the Judiciary, so that we can suggest to them that they should hurry up and do

matters faster, or that they should do certain matters in priority to other matters? In other words, are you asking us to be intrusive in terms of what they do?

Sen. Dr. S. Gopaul-McNicol: I would not proceed to dictate how persons should be conducting their jobs and who are so inclined, given their positions as Government Ministers and so on, but what I do think is that there must be a system that is more fluid, and you should stick to the protocol and timeliness and so on. Let us try to recognize that witnesses could forget over an extended period of time if there is a backlog of cases. It takes years for cases to be called and witnesses can forget. That is legitimate, and we need to understand that.

In fact, in the last year—I do not know if the Minister of National Security is aware—I am sure that he would be—several witnesses were executed who were either in the Witness Protection Programme or waiting to be in the programme. Remember the famous case of Aleisha Kezzie Mc Kenzie, who was the key witness in the murder of Jason Fullerton. She was gunned down. This was in the *Newsday* dated April 02, 2009. Another witness, Fulton King, who was a key witness for the State in the murder of a G-Unit gang member, Quame Julien was gunned down.

We have to improve on the Witness Protection Programme if we intend to get the full effect of this Bill. By the way, I have to commend the Government for bringing forward this Bill. I think it is something that we need to ensure—too many cases have lapsed over the past years, and we need to rectify this situation.

I personally think that many improvements have to be made in light of the fact of the Witness Protection Programme and so on. I would still like to support what some of my colleagues said, and that is if we can refer this to a joint select committee to look at it again, I would certainly want to support this Bill.

Thank you. [*Desk thumping*]

Sen. Dr. Adesh Nanan: Mr. Vice-President, I rise to make a contribution on the Evidence (Amdt.) Bill, 2009. In my contribution, I will give a template based on this approach; I will have a few remarks for the Minister of National Security on his contribution; I will respond to the Attorney General in certain areas; I will definitely give the UNC's perspective under the hon. Basdeo Panday administration in terms of national security; and I will deal with the Bill comprehensively. [*Interruption*]

I am here debating an issue with respect to the Evidence (Amdt.) Bill, and when I listened to the Minister of National Security's contribution—over the weekend we had seven homicides—we have very little comfort. When we hear

about the administration of justice and the Minister of National Security talking about the Police Academy and that the person was hired with such competence, we have very little credibility in the Minister of National Security based on what is before us.

We have seen the amount of money spent in the Ministry of National Security; billions of dollars without much reward. The Minister of National Security also admitted, if I am not mistaken, that the Mastrofski matter cost the State over $83 million. That consultant, General Ross, might be another $83 million.

So, in terms of the remarks to the Minister of National Security, we have very little comfort in the operations of the Minister of National Security and the Government in terms of providing security and safety for the citizens. It is in this context that I make reference to the UNC and the administration under the former Prime Minister, the hon. Basdeo Panday. The Minister of National Security, in his contribution, talked about community policing as part of the police service. It was under the UNC administration that the community police was a separate unit and it was very effective.

In fact, if I recall, there was the community policing unit and the effective Highway Patrol Unit that is now non-existent under the present administration. So, in terms of the performance under the Basdeo Panday administration and the current performance under the current administration, we are talking about chalk and cheese. We are talking about large variations of expenditure between the two administrations. With respect to the statistics, we have seen a marked decrease under the Basdeo Panday administration. [*Interruption*]

I know that it irritates the other side when the truth is told, but it must be told every time a debate takes place. [*Laughter*] Anytime crime comes into the debate as in this particular debate, the statistics are there in terms of the number of police stations that were constructed. I am testimony to the fact.

When I was the Minister of Tourism, I worked very closely with the Tobago administration in handling the crime situation in Tobago. Once again, we are seeing the situation in Tobago is rearing its head with respect to homicides in Tobago. I know it irritates the other side that we had such a good record in terms of handling crime. One of the recommendations that was put forward at the time was to have frequent helicopter patrols in Tobago, and this has not been implemented by the present administration.

I know that they are going to purchase new gunships but, again, while we are waiting for those gunships, we are seeing the homicide rate in Tobago going up,

and this has a direct influence on the tourism sector. It affects all the employees in the Tobago House of Assembly and, by extrapolation, the entire economy of Tobago. That is in the context of that particular reference to the Minister of National Security and the Panday administration in terms of dealing with crime.

Mr. Vice-President, I would be dealing with the arrangement of clauses in the Bill. In this particular debate I heard sections, but we are dealing with a Bill so we are dealing with clauses not sections. When the Bill is passed and it becomes an Act we will deal with sections.

I looked at the definition of clause 7 at 15J and it says:

> "'audio recording' means any exclusively aural fixation of sounds, regardless of the method by which the sounds are fixed or the medium in which the sounds are embodied;"

Mr. Vice-President, as a musical arranger myself—[*Interruption*] In terms of the actual arrangement of sound to create music, when I looked at the definition, aural fixation—I know everybody knows that auris is Latin for ear. So, what we are dealing with here in the definition with respect to the fixation of sound—I was trying to get what they were really trying to put forward here. When I looked at the Latin word, auris means ear and aural fixation, it means that the sound that is being referred to here is really vibration; vibrations being picked up by the ear that is creating sound.

However, when I go further and I see the medium in which the sounds are embodied, I am a little confused. With the medium, is it going to be in water? Is it going to be in ice? What is really being contemplated in that particular definition? "Fixation" as the term defines deals with coagulations, so it is really concentration. So, what this definition is really saying is that concentration of vibrations, which does not make much sense to an arranger.

Sen. Browne: What steel band are you working for?

Sen. Dr. A. Nanan: Mr. Vice-President, for the uninformed on the other side, the arrangement of music is simplified in today's society. It can be done by software and computer. I would go into that in more detail as I talk about—

Sen. Browne: Stick to the Bill.

Sen. Dr. A. Nanan: I am on the Bill, because I am dealing with clause 7 at 15J, and the ability to influence the recording. If you go to that same clause 15J with respect to video recording, what is interesting is:

"'video recording' means any recording, on any medium, from which a moving image may by any means be produced…"

Do you know that you could produce a moving image by just using a flicker book? In fact, that is how motion pictures started—just writing on some pages and by putting drawings at different levels and just flick them through and you get a moving image? [*Interruption*] That is animation 101. What is interesting here is that it includes the accompanying sound-track. So, not only do you have the video image, but you also have the accompanying sound-track.

Now, I will show that in this same arrangement you could take the software and the audio recording—whether it is just audio recording or video recording with the sound-track and make adjustments to that particular recording by just cutting and pasting and you could change the whole structure.

Sen. Browne: That is right.

7.00 p.m.

Sen. Dr. A. Nanan: In terms of tampering, this is very dangerous and it can be done very simply, it is nothing like rocket science to do. Anybody with a bit of arrangement experience can do that.

Sen. Jeremie SC: Voter padding.

Sen. Mark: Well, you are a master in that. You are a master in that voter padding, you and the Minister of National Security. [*Laughter*]

Sen. Dr. A. Nanan: Mr. Vice-President, with respect to those definitions there must be some—I am sure the Attorney General will make some amendment to section 15J with respect to the definitions given.

We heard from the Attorney General in terms of the matter of bad character evidence and it is very interesting that section 15L speaks about the—

Mr. Vice-President: Sen. Mark, I think that remark that you made against the Minister of National Security—

Sen. Mark: About voter padding?

Mr. Vice-President: Voter padding is a crime [*Interruption*] and you are accusing the Minister of National Security—

Sen. Mark: I can bring evidence, Sir.

Mr. Vice-President: I do not want to know if you could bring evidence or not—[*Interruption*] Sen. Mark, could you please withdraw that statement!

Sen. Mark: Withdraw what statement?

Mr. Vice-President: The statement that the Minister of National Security is a master of voter padding.

Sen. Mark: I was not on my feet.

Mr. Vice-President: Yes, but you made the remark and I am sure—

Sen. Mark: So, if I withdraw it now, you want to say that anybody who makes a remark you are going to—

Mr. Vice-President: That is imputing improper motives.

Sen. Mark: No, I am asking you.

Mr. Vice-President: That is imputing improper motives and it is in the Standing Order, so I am asking you to withdraw that remark!

Sen. Mark: I would think about it.

Sen. Jeremie SC: Wait "nah", you are defying the ruling of the Chair.

Sen. Mark: I did not defy the Chair.

Sen. Dr. Gopaul-McNicol: But there is discrimination taking place in here, you all making statements all the time. [*Crosstalk*]

Mr. Vice-President: Sen. Dr. Nanan, could you continue.

Sen. Dr. A. Nanan: Thank you, Sir—

Sen. Mark: Here "nah", you see you—he is my friend from Arima, you know. We live in Arima, you know.

Sen. Jeremie SC: Everybody is your friend.

Sen. Dr. A. Nanan: Mr. Vice-President, I was making reference before the interruption on section 15L—

Hon. Senator: Interruption by your colleague.

Sen. Mark: [*Inaudible*]

Sen. Dr. A. Nanan: That is the abolition of the common law rules and I want to get the Attorney General's attention—

Sen. Jeremie SC: Sure, sure.

Sen. Dr. A. Nanan:—because when I was doing some background checking on this particular Evidence (Amdt.) Bill, it was very interesting, because the Attorney General gave us a history in terms of this particular amendment Bill.

When we look at the law in England and Wales, that is before the Criminal Justice Act, 2003 came into being, what had happened there was a lot of discussion taking place and it is very interesting—I am sure that the Attorney General is aware that the French practice in the court is that they read out the defendant's previous convictions as background.

Sen. Jeremie SC: We do not do that in our system.

Sen. Dr. A. Nanan: I know, that was a radical move at that time.

Sen. Jeremie SC: You want us to go that far?

Sen. Dr. A. Nanan: No, I was just giving you reference to what happened there. They read out the defendant's previous convictions as background but not as evidence.

Sen. Jeremie SC: Even if they were not relevant in crimes—[*Inaudible*]

Sen. Dr. A. Nanan: Yes, but not as evidence at the commencement of the trial. [*Interruption*] That is one approach.

What is also interesting and I found it very interesting, Attorney General, is that there was a gateway also at that time that was being considered. This Bill—especially bad character evidence—talks about different ways. In fact, the Attorney General made reference to the seven gateways that the prosecution can use to have bad character evidence be admitted into the court. When I look with respect to how they are going to approach this particular—they had four gateways, and I am sure the Attorney General will correct me if I wrong.

I need to bring these four gateways way back before the seven gateways, because that is important as we are dealing with gateways under this particular piece of legislation. The gateways in this particular time—you see, Attorney General, this is a very difficult Bill, as far as I am concerned, in terms of how the mechanism actually came forward from the days of the English and Wales and was introduced in New Zealand at the time and how the gateway—I was a little confused when you spoke about the gateways and what the gateways were actually doing in terms of the prosecution utilizing the gateways.

The gateways at the time were background information without which a court would find it difficult or impossible to understand a case. That is one of the gateways. In this particular piece of legislation—I do not know, Attorney General, if you were supposed to define these words because I found it very interesting in this particular—we were dealing with substantial probative values. I do not know if it was defined in the Evidence Act or is it standard law?

Sen. Jeremie SC: In standard law, that is—[*Inaudible*]

Sen. Dr. A. Nanan: Because right throughout the Act you are saying probative value. The other one that is here too, probably, in another part of—propensity is another word that has been used throughout the Act. Again, that was probably part of law. So, the other gateway was substantial probative value in relation to a matter issued in the proceedings.

The third gateway is related to the defendant's credibility and the defendant had attacked another person's credibility.

Fourth, it was given to correct the false impression that the defendant had painted and there was associated leave requirements. Those were the four gateways that were initially being introduced.

It is very interesting, when you look at the seven gateways which I will make reference to. The seven gateways are all parties agree; the evidence is adduced by the defendant himself including deliberately through the cross-examination; the evidence is important explanatory evidence; and the evidence is prosecution evidence and is relevant to an important matter and issue between the defendant and the prosecution and the evidence has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant.

All of this is part of that legislation and the different parts of that clause: the evidence is to correct a false impression given by the defendant.

And the last gateway: the evidence is prosecution evidence and the defendant has made an attack on another person's character.

If you permit me, Mr. Vice-President, when I was going through with respect to how this legislation will operate, it is very interesting that when you look at a particular case—and I would not read both, I will just give you a synopsis. There was a situation where a woman was attacked, she was grabbed from behind while walking down a street and the defendant admitted to the assault. So the defendant admitted that he grabbed the woman, but the defendant said that he did not intend to sexually violate the woman and he was only doing it because he wanted to punish her for being an informant.

Now, he has a conviction, but 13 years prior to that particular incident he had a conviction where he was an accomplice in a rape case where a woman was raped by two of them, and that particular incident the prosecution agreed that they wanted to bring that into evidence and they would remove the horrific parts of the crime and bring it forward. It was interesting that the High Court at that time

considered—that is why I made reference to this particular probative value. What is interesting too, you had a matter in this particular Act dealing with significant prejudice, so if this particular evidence is coming forward and it will prejudice the jury then it will not be brought forward.

In this case the High Court considered probative value as going against the defendant because he said he was innocent, which was an assault, he just grabbed the lady to frighten her because of the situation. The High Court agreed, so that particular evidence of his previous conviction came, but then the Court of Appeal ruled that there was no pattern. There was no pattern in what happened 13 years previously to what occurred. So although the High Court said yes, you could bring it into evidence, the Court of Appeal ruled against bringing that particular piece of evidence before the court.

It is interesting here when you look at the clause. If you look at that clause there is a time frame, because the clause in this particular piece of legislation also gives some idea of time, because there was a span of 13 years and they were also saying that if it was probably 12 months the evidence might have been brought forward. So, when we look at the particular clause dealing with this particular matter of time and you look at the High Court ruling and the Court of Appeal, there is a question that has to be asked in terms of time; is that particular matter being dealt with by the judge with respect to the discretion on time in this particular piece of legislation?

There was another case that was also interesting, because there was a person who committed several burglaries and the burglar went so far as to utilize the foreign currency that he got from one of the crimes and they traced him with that particular foreign currency. What happened there is although he committed those crimes in motels, initially they ruled that the evidence could be brought forward in terms of this particular crime committed—that is the burglary—but again that particular decision was overruled based on the fact that it could have been anyone committing the crime with respect to the approach by the burglar.

So what I am saying is not an open and shut case with respect to this particular piece of legislation, because you still had that matter of admissible bad character evidence—and even if you are using the seven gateways the judge could still rule that because of a time frame it will not be acceptable evidence.

The other area with respect to when we deal with propensity and probative value with respect to this particular piece of legislation in that matter with the burglar and the style of burglary, although it was the same, it was viewed that it

could have been committed by another person. There is another long case that I would not make reference to, but all cases here that I am making reference to, show that you can have a view with respect to admissible evidence.

7.15 p.m.

When I looked through the legislation, I was not sure, and I need to ask the Attorney General because this does not make sense. That is clause 7 at 15L. I do not know if the Attorney General has an amendment, because clause 7 at 15L(2) reads:

> "Subsection (1) is subject to any rule of law under which in criminal proceedings evidence of a person's reputation is admissible for the purposes of proving his bad character."

Now, if you look at the Criminal Justice Act, 2003, this had substituted his good character, so I do not know if it is an oversight.

Sen. Seetahal SC: What clause is that?

Sen. Dr. A. Nanan: Clause 7 at 15L(2). What the legislation was lifted from, it is for the purposes of proving his good character in that particular piece of legislation and here we have bad character. So I do not know if that was an error.

Sen. Mark: They did not copy well.

Sen. Dr. A. Nanan: If they did not copy well in that particular area—[*Interruption*]

Sen. Mark: But we will correct it. Bad copying.

Sen. Dr. A. Nanan: So, Mr. Vice-President, the reference I was making earlier was the length of time and that is clause 7 at 15P(3) which reads:

> "Subsection (2) does not apply in the case of a particular accused if the Court is satisfied, by reason of the length of time since his conviction or for any other reason that it would be unjust for the section to apply in his case."

That is the point that I—[*Interruption*]

Hon. Senator: [*Inaudible*]

Sen. Dr. A. Nanan: Clause 7 at 15P. I quoted a case with respect to a difference of 13 years, with respect to a matter. This is with respect to bad character evidence being brought into a trial, and I quoted a case where, because of the 13 years with respect to the offence, it was committed 13 years prior,

although the High Court ruled that it could be admissible, the Court of Appeal said that this was wrong because the time span was too long for you to say that the person who grabbed the woman was going to sexually violate her.

Sen. Dr. Saith: Is that a Trinidad case?

Sen. Dr. A. Nanan: The one I quoted?

Sen. Dr. Saith: Yes.

Sen. Dr. A. Nanan: No, that is an English case.

Sen. Mark: It is quite relevant, Sen. Dr. Saith.

Sen. Dr. Saith: [*Inaudible*]

Sen. Dr. A. Nanan: It is at this particular time. And the other one in terms of the—because there is another matter with respect to a burglar committing several burglaries, and although he was charged for another burglary, they could not make the link because they said it could have been done by anyone although the crime was similar in terms of how the burglar was approaching. He even took the money from the crime scene and went and spent it. They traced that too, and they still could not prove it.

Sen. Seetahal SC: Can I say something? Could I just say to clarify, through you, Mr. Vice-President, that would be the normal kinds of situations where a judge will have to rule whether or not it passed the test, whether or not it becomes important evidence. Currently, the judges make day to day decisions on whether it is similar fact evidence. So really, it varies depending on the circumstances and the facts, the pattern in the case and the time, of course.

Sen. Dr. A. Nanan: Thank you, Mr. Vice-President. The other area I was looking at with respect to this is clause 7 at 15S that deals with the accused making an attack on another person's character. Now, when you look at this particular piece of legislation, it can only be—in fact, Mr. Vice-President, you could correct me if I am wrong. Bringing bad character evidence into trial can rely on the defendant, because the prosecution cannot bring bad character evidence if the defendant does not use that bad character evidence to defend himself, to say he is of a good character. But the prosecution can use the bad character evidence if the defendant attacks another witness and attacks his credibility—right, so that particular issue.

So clause7 at 15S points to that particular area with respect to the attacking of people's character. But what is interesting in terms of the—because Sen. Mark

and I had some discrepancies with respect to the matter of section 15S(3), and the reference to section 7 at 15N(1)(g). If you go to 15N(1)(g), you will see 15N(1)(g) reads:

"the accused has made an attack on another person's character."

But we were arguing based on that particular clause, but we were questioning the other part, 15N(1)(b):

"the evidence is adduced by the accused himself or is given in answer to a question asked by him in cross-examination and intended to elicit it;"

This cross-examination, Mr. Vice-President, would only be possible if the defendant was attacking somebody else's character, and if in that particular issue with respect to the attack on the other person's character, the question we were asking is if that particular section was relevant.

Sen. Mark: Or whether it was a conflict of interest?

Sen. Dr. A. Nanan: If it was a conflict of interest. Because we were not sure with respect to the cross-examination, if the—[*Interruption*]

Sen. Seetahal SC: Can I ask a question?

Sen. Dr. A. Nanan: Sure.

Sen. Seetahal SC: Clause 7 at 15N(1)(b) deals with where the accused asked a witness questions, like he or his lawyers cross-examined a witness and they ask questions: Do you know if he had any previous convictions? Do you know this person? Did you know him before? And the police officer says, "Yes, I charged him", or it is an answer to a question asked by him in cross-examination which is the same thing. Right? So that is that. And then 15S is where you are talking about where he makes an attack. This is when he puts to a witness, "You fabricated this case to the police". Then when he goes into the box, the prosecution can now ask the questions about his cross-examination because he has lost his shield.

Sen. Dr. A. Nanan: Mr. Vice-President, the other issue when I look through this particular Bill is clause 7 at 15N(3) which reads:

"The Court shall not admit evidence under subsections (1)(d) or (1)(g) if, on an application by the accused..."

So the accused has to apply to exclude it. So if the accused does not apply to exclude it, it will be brought in.

"(4) On an application to exclude evidence under subsection (3) the Court shall have regard, in particular, to the length of time between the matters to which the evidence relates."

So this is another section that points to time with respect—So the court actually has to have that kind of benchmarking, I guess, with respect to time, and how they handle the matter with respect to that particular issue. But I wanted to ask generally with respect to the prejudice to the jury. [*Interruption*]

Sen. Seetahal SC: [*Inaudible*]

Sen. Dr. A. Nanan: Well, the evidence coming in, if it will be significantly prejudiced to the trial, so the judge could rule that it will not be accepted. So there are some very interesting sequences that can play out with respect to how this particular piece of legislation will operate, because you have to consider the propensity, the probative value and the other area with respect to the significant prejudice to the trail. I am not sure if the legislation carefully spells that out, or if there is still some vagueness with respect to that particular area, the matter with respect to that will lie in the court's domain, as well as time frames, and I am sure if there are some discrepancies, that will be sorted out in the joint select committee. As I go through the Bill, I find it a little confusing, Mr. Vice-President.

Sen. Dr. Saith: [*Inaudible*]

Sen. Dr. A. Nanan: But I need to make recommendations to the joint select committee, Minister in the Office of the Prime Minister. And the other part that I want to deal with is 15U. That deals with the age of 18, and no offence can be brought forward with respect to the particular trial if the person committed those was under the age of 18.

However, I did not understand with respect to the conviction in relation to an indictable offence or the summary trial of an indictable offence. I do not know if that was clear enough—[*Interruption*]

Sen. Seetahal SC: What clause is that?

Sen. Dr. A. Nanan: That is clause 7 at 15U(1)(a). These are exceptions to that particular clause:

"the conviction was in relation to an indictable offence or the summary trial of an indictable offence; and

the Court is satisfied that the interests of justice require the evidence to be admissible."

So in terms of the indictable offence, if it was committed under the age of 18, it is upon the court to decide if it should be brought in or not. Well, if that is the case, do we have a time frame under the age of 18, or is it anything under the age of 18?

Sen. Seetahal SC: Could I just ask? Once you are seven years and over, you could be convicted of an offence. But usually it is very rare, and what happens, the court will decide, the younger you are, whether or not to allow the conviction in. But summary trial of an indictable offence really means an indictable offence that is tried in the Magistrates' Court. That is all.

Sen. Dr. A. Nanan: Mr. Vice-President, section 15V—yes, 15V, I am coming down to the end of the alphabet. The other issue here, again, makes reference to relevance or probative value, but this one talks about the assumption that it is true. Now, how do you determine that? How do you determine this particular clause? That is why I find it a little vague there.

Sen. Seetahal SC: Read subsection (2).

Sen. Dr. A. Nanan: All right. I have subsection (2) underlined too, but I am a little confused because in section 15V(2) it reads:

> "In assessing the relevance or probative value of an item of evidence a Court need not assume that the evidence is true if it appears on the basis of any material before the Court, including any evidence it decides to hear on the matter, that no Court or jury could reasonably find the evidence to be true."

I find that a little confusing with respect to that particular—I think we need some clarification probably not the layman, but bush lawyer like myself. Clause 7 at 15V(2)—[*Interruption*]

Sen. Enill: [*Inaudible*]

Sen. Dr. A. Nanan: I am a sound engineer, but a bush lawyer probably in this particular thing.

7.30 p.m.

The other area, as I am coming to the end of the Bill, is 15W. It is another interesting area. [*Interruption*] That is my bush lawyer tendency. It is another little tricky clause being introduced:

"Where the Court makes a relevant ruling—

(a) it shall state in open Court, but in the absence of the jury, its reasons for the ruling;..."

In terms of clarification, I do not know if it could be made clearer.

"(b) if it is a Magistrates' Court, it shall cause the ruling and the reasons for it to be entered in the register of the Court's proceedings."

I think 15W(a) needs some clarification. The way I read it, I do not know if the relevant ruling means—who is stating in the open court?

Sen. Seetahal SC: The judge.

Sen. Dr. A. Nanan: If you read 15W(2), this drafting is really—Attorney General, as a bush lawyer I think the drafting is a little confusing. [*Crosstalk*] I am not a UK lawyer, but I think it needs to be redrafted. [*Crosstalk*]

Sen. Seetahal SC: I think what Sen. Dr. Nanan is saying makes a lot of sense in relation to 15W. If you read it:

"Where the Court makes a relevant ruling..."

It does not say whether it is the High Court or the Magistrates' Courts, but if you put it in (a) you would have to put:

"if it is in the High Court the judge shall state in open Court, but in the absence of the jury, its reasons...",—and then (b) would read—"if it is in the Magistrates' Court, the magistrate shall cause..."

You are separating the two, but in (a) there is no indication about a judge and jury, so there is an omission. So you are right, bush lawyer.

Hon. Senators: Bush lawyer! [*Desk thumping*]

Sen. Mark: Very good point! [*Crosstalk*] What a wonderful contribution so far.

Mr. Vice-President: Hon. Senators, the speaking time of the hon. Senator has expired.

Motion made, That the hon. Senator's speaking time be extended by 15 minutes. [*Sen. W. Mark*]

Question put and agreed to.

Mr. Vice-President: Senator, you may continue, but before you do I just want to inform Senators that dinner is available.

Sen. Enill: On a needs basis. [*Laughter*]

Mr. Vice-President: Please feel free to go ahead and have dinner, just make sure we do not fall under a quorum.

Sen. Dr. A. Nanan: Mr. Vice-President, I would not take much more time.

This particular legislation talks about veracity. I wanted to see if what they were saying here, with respect to the review, is captured in the legislation. They are dealing with the lack of veracity when you are under a legal obligation to tell the truth. We heard about perjury in this debate. It goes on to talk about conviction of one or more offences that indicate a propensity for dishonesty or lack of veracity. It means that this particular defendant tells untruths all the time. There is something called a propensity for veracity. Is a veracity question coming under the veracity rule? [*Crosstalk*] The veracity rules—that is from my research.

Sen. Seetahal SC: You mean credibility.

Sen. Dr. A. Nanan: I was just looking at that in terms of truthfulness. If I remember correctly, when I was reading the legislation it talked about the witness and the defendant and the matter of the particular statement that is being given or the question of truthfulness in this piece of legislation. It is not only with respect to a person telling untruths, because we can also have offences of dishonesty like theft. In terms of that particular situation, you could have that.

Do you know what is interesting too, Mr. Vice-President? They gave an example of somebody being convicted for drinking and driving, as not likely to be substantially helpful in assessing of truthfulness or denial of armed robbery. They are showing, with respect to this particular reference, that you could have perjury or false declaration, but you could also have dishonesty via theft. I do not know if it was captured in this legislation, with respect to that particular issue. I just wanted to bring that forward.

The judge has very extensive power in this piece of legislation in terms of discretion. When this situation is being looked at, a judge should be able to take into account evidence that the person concerned is a habitual liar or fantasizer outside the occasion when there is a legal obligation to tell the truth. That is the issue; I do not know if it is captured in this piece of legislation with respect to that particular institution developing.

When we are dealing with the defendant and he challenges the veracity of a prosecution witness, that could only happen if the judge permits it; if the judge agrees to allow the defendant to challenge the veracity of a prosecution witness. [*Interruption*] No, this is my bush lawyer thinking. [*Interruption*] Well, it still has to be the judge to approve the reputation coming into that institution. That is the situation regarding perjury.

Coming back to the Explanatory Note for one minute, it points to the section that this Bill would be inconsistent with sections 4 and 5 of the Constitution. In clause 3 it states:

> "...this Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution."

On the basis of what I described with respect to open court, in my opinion the defendant would not have a fair trial. I think you are bridging one of those sections of the Constitution.

I support all my colleagues on this side with respect to the three-fifths majority and I am also supporting a joint select committee for this legislation.

I thank you.

Sen. Dr. Rolph Balgobin: Mr. Vice-President, I had not intended to speak, being only a guest in this august House, but I thought I would rise just to say a few words, very quickly, in support of the Bill and several of the amendments proposed. I do not propose to rehash the arguments made here. I do, however, wish to make very few quick observations on some of the aspects covered by the Bill.

We need to observe that the criminals are winning. The criminals are winning; you have more daring robberies; more daring assassinations. The extent to which the law is flouted today by criminals, who are engaging in violent acts, is staggering; that takes no account of white-collar crime or any of the other negatively interesting things that are happening in our society.

I do not have the benefit of being a criminologist or a criminal lawyer, but it seems fairly clear to me that the criminals have worked out how to capsize the system. They have worked out the ins and outs of it; they have worked out how to get at witnesses and, therefore, witnesses and potential witnesses are afraid. People are afraid to speak. Long ago you used to hear about a fear of victimization, but now you actively fear for your life. So even for very petty things, you find that the answer, the retribution, is murder. I support the views of Sen. Dr. Kernahan when she talked about how these reprisals occur and their frequency. It is a kind of tit for tat happening in society that plays out in a very dangerous violent way.

The only way for us to repair and reverse that is to enhance and fix the system, because the system is all we have. We cannot allow the system to fail; we cannot allow it to further degenerate, so if witnesses are afraid, and rightly so,

then anything we could do which supports a better quality of evidence or gives the society a better chance to preserve the rule of law, is, to my mind, worthy of support.

That rule of law is clearly under threat, in many aspects of our lives. The question one would ask oneself is why that rule of law is under threat. We have heard some very interesting perspectives on that. I do not have to repeat them. What I would like to say, and I do not think it is often enough observed, is that our young people appear to be fed, almost constantly, on a diet of violence. We are, therefore, training killers every day, by the video games they play and by the television they watch. So you have a kind of broad desensitization of the society to acts of violence, even, as we all become more tolerant of criminal behaviour.

As I pointed out before, we tell people who are caught that they were foolish or unlucky, rather than saying, "Hey, you are not supposed to be doing that." That kind of self-regulation is being threatened. You have situations now where persons are being brought to court, brought to justice, and they are getting away because of technicalities. As my learned colleague, Sen. Prof. Deosaran, observed, lawyers are getting smarter and smarter. Universities are churning out a bunch of them every year and they are getting more and more intelligent, more and more competitive.

7.45 p.m.

They are no longer above battering witnesses to get what they want. So not only would a witness be afraid to, because of the violent encounter they can expect in terms of a reprisal, but you do not really want to go up there and face an intelligent lawyer that is intent on making mincemeat out of you or hammering, at least, your character and your reputation.

So you have a situation where the whole system appears to be leaning towards facilitating the criminal and the criminal knows this; the criminal has worked it out. I think the criminal mind is supported in many respects, perhaps, by other intelligent people, other educated people who are telling them what to do to get away. So they are getting more daring, more bold.

So what can we do other than try to modernize our approaches to dealing with this problem? We have to do that; we have to modernize our approach to receiving evidence in order to give prosecutions a better chance. I think that if technology is helping our young people learn to kill, then technology needs to help us to catch and prosecute them and if we cannot use technology to our advantage then I think that we are on a slippery slope and we are going to continue along this road where criminals continue to make fools of us all.

That is the funny thing about the criminal element. We talk the police bad; we talk the protective services bad. I do not think we tell any of these guys standing around us, keeping us safe, anything bad when we come here. We are glad for them. But we talk the services bad and we say all sorts of negative things about them and we say that the society has failed the killers in our midst. If it is we have to say that, I would gladly admit, I think we are failing a significant portion of our society as Minister Martin Joseph pointed out. I thought he was very candid and I agree that we are all to blame, perhaps. But do you know what? I think, though, that characterizing these people as victims, even as they brutalize the rest of the society, is the wrong thing to do because many of these people are brutal, heartless murderers; many of these people are corrupt; many of these people are dangerous; many of these people are dishonest.

So what is it that we do when we say that the society has failed them? Is it that these people are incapable of knowing what is right and what is wrong? You can go in to the worst place in the society and you can find somebody who goes on and betters himself and does very well. You can find people who progress, find ways to come out of where they are. And, yes, those are the lucky few, but I think that we let the criminal element off the hook when we blame everything else around them.

These people certainly have to carry a share of the burden, a big share, because, Mr. Vice-President, they are killing people; they are snatching people from their families; they are raping and torturing them; they are brutalizing them; killing them for nothing. The merest slight can result in your death.

So how is a society supposed to respond to that except to try to modernize the ways in which we capture and prosecute these people? I do not know that we are condemning the criminal element enough; I do not know that we are saying "thank you" to the people who try to keep us safe enough and I do not know that we are doing enough in terms of technology to really use the judicial system, the legal system, to our advantage, to protect the people it is supposed to protect, that is the innocent and law abiding among us.

So that really is the basis for my support and so I would say I hope that Bills like these allow people to give evidence without fear of reprisal. I think that biblical notion of a killer being allowed to face his accuser might be dated. There might be opportunities which I think this Bill seeks to explore, of doing things differently, because we have to catch up or continue headlong into the abyss.

So I support it. I know that there are some amendments that need to be made but, by and large, I support what this is trying to do. I would support any measure that would get this done quickly. Because, in my view, democracy works because it is democracy that allows us to come here and criticize what is best and worst about our society. And so, freedom works, but we are not free as long as the criminal element is allowed to do, or continue to do what they are doing.

Therefore the judicial system must work, the legal system must work and we have to give our guardians, people like the police and the justice system, the best chance possible to bring criminals and the criminal element to justice. So it is on that basis that I would extend my support in whatever way is most useful and with those few words, I thank you, Mr. Vice-President. [*Desk thumping*]

The Attorney General (Sen. The Hon. John Jeremie SC): Mr. Vice-President, I wish to thank all Senators who have participated in the debate over the past two days, because it has taken us two days to come to this point where we can deliberate on the Bill and decide whether or not it meets with our sanction.

Let me say at the outset that when Sen. Prof. Deosaran, my good friend, turned to his textbooks a little earlier, I, too, decided to go and get some of my textbooks and, in particular what I was able to get hold of was Sen. Prof. Deosaran's own book, that is, *Trial by Jury*. It is useful because I think it places in context a lot of the resistance which we have heard from the Opposition, principally. It places in context a lot of that opposition.

At page 3 of his book, Sen. Prof. Deosaran is quoting Sir Hugh Wooding.

Sen. Dr. Kernahan: What is the name of the book?

Sen. The Hon. J. Jeremie SC: I said *Trial by Jury, Social and Psychological Dynamics* by Prof. Ramesh Deosaran sitting behind you. He quotes from Sir Hugh Wooding who regrets the slow pace at which legal institutions in the Caribbean were being reassessed. By that I think he meant not simply institutions but also procedures and the way that we work. This is what Sir Hugh Wooding said:

> "The place of law as a continuing moral force in any community can only be secure if law possesses an element of growth such as will make it adaptable to new situations and to the constant shifting of social pressures which are inevitable in the modern democratic society. But the conservatism which is so characteristic of lawyers, has too often kept in check the improvement of the administration of justice."

Now, what we have had from the Front Bench, understandable as it is, really is what Sen. Prof. Deosaran was referring to as conservatism of lawyers. They are not lawyers by any stretch of the imagination, but I think that they are patriots and I think that the conservatism which lawyers feel generally when faced with changes to the administration of justice is what informs or has informed much of their contributions to the debate.

What the Bill before us is essentially about, it essentially deals with changing the rules with respect to evidence of bad character; changing the rules with respect to evidence of previous inconsistent statements and allowing in, that is changing, but allowing in the use of video recordings of the voluntary statements of prosecution and defence witnesses, including the accused, as evidence-in-chief in certain circumstances in a criminal trial. In all of those respects, we are going against established norms and principles.

So that I appreciate the concern and the conservatism of the Front Bench, but for us that is not an option and I take issue with the statements made by Sen. Rahman that we are really coming in at the end of a jigsaw puzzle. We are not. The legislation that we seek to introduce this afternoon is innovative legislation; it is tried legislation and it is legislation that fits the mischief which we in Trinidad and Tobago are seeking to address, that is to say, the problems that we are encountering with the collapse of so many of our criminal trials.

For years, and certainly since my first term as Attorney General, we have been engaged in a process of dialogue with the British Crown Prosecution Service and the present Attorney General of the United Kingdom. She was at the time, I think in the Home Office—the Secretary of State in the Home Office, that is Baroness Scott.

We have been engaged in a dialogue as to how best to improve our criminal justice system to make it more relevant to the challenges which we face. We recognize that one of the difficulties which we have is witness care and the protection of our witnesses. But my colleague, the Minister of National Security, was at pains and at lengths to debunk some of the criticism which has been levelled at the Witness Protection Programme. I know it; he knows it, but for some reason the public does not get it.

The Witness Protection Programme in Trinidad and Tobago is working. There are instances of which I am aware; the Minister is aware; Minister Enill who acts as Minister of National Security—he has had to be pressed into service on occasion—where we have done innovative things to secure our witnesses. So that

we are doing things in respect of executive action in relation to witness care and that was put on the record by my colleagues and I just wish to endorse and to compliment his hard-working staff and police officers [*Desk thumping*] who are ensuring that the criminal justice system, that integral part of the criminal justice system which depends on the safety of our witnesses, is kept going.

There was much criticism of the general nature of the Bill. I heard that from my colleagues on the Opposition Bench and criticism came as well from two, I think, Senators on the Independent Bench.

8.00 p.m.

Now, I want to make the point that we on this side are of the view and the firm view, that this Bill does not require a special majority. I want to take us back to some of the remarks that Sen. Mark made when he was in that very chair two years ago when we did the Evidence (Amdt.) Bill, 2007. That dealt with the hearsay rule. Hearsay in being a term of art and used in the sense that Sen. Rahman was using it to speak essentially in respect of written statements by persons who are deceased.

When we brought that Bill, it was because we saw that there was a deficiency in our criminal justice system. As I said, I take the point that there is a genuine conservatism which perhaps, obtains in the breast of my friends on the Opposition Bench. Here is what Sen. Mark said on February 06, 2007:

"This is one of the most dangerous pieces of legislation. [*Desk thumping*]"

That means all of them were in on this.

> "This is one of the most dangerous pieces of legislation I have ever heard during my 17 years as a parliamentarian."

He goes on to talk about hearsay. He asks this question:

> "Do you think Madam President",—at that time we had a lady in the Chair—"that as a parliamentarian of long-standing I can stand idly by and allow this usurpation of people's fundamental rights and freedoms?"

This is what he said two years ago. It sounds very much like what he said during the course of this debate. He went on to say—he has this style of asking questions, but he answers the questions that he asks:

> "Do you know what is more serious about this piece of legislation? We are told here today that it is all about fighting crime and it must not be business as usual and the rights of the citizens who are accused must not outweigh the rights of the citizens who are victims of crime."

We did not advance that argument this time around but that was the argument which we advanced on that occasion. We felt that the society was under siege and the rights of the many outweighed the rights of the few. Sen. Mark said:

> "We have a Constitution. The Constitution is the supreme law of the land and we must respect that document. The Government introduced a measure of serious consequence and far-reaching implications for our country and there is no consultation with stakeholders in our country. The Criminal Bar Association was not informed about it. They have not received a copy of the legislation. The Law Association was not aware of this legislation. We had to call both the Law Association and the Criminal Bar Association in order to make available to them copies of this legislation which they have never seen. That is an insult knowing full well that the Attorney General of our country is a lawyer."

Now this time around in piloting the Bill I said that we are consulting with the Law Association. I repeat that point because it is in my file that we have consulted with the Law Association. He went on to say:

> "I disagree fundamentally with the Attorney General of this country when he says that this Bill does not contradict, violate, contravene or aggravate the rights of the citizens under sections 4 and 5 of the Constitution. [*Desk thumping*] The Attorney General told this Parliament that it does not violate sections 4 and 5. Go to the Constitution. It says at (4):
>
> 'The right of the individual to life, liberty, security of the person."'

He must be reading this because he does not know all of this by heart.

> 'security of the person and enjoyment of property and the right not to be deprived thereof except by due process of the law.'
>
> What this Attorney General and this PNM Government is attempting to do is to violate the Constitution of our country! [*Desk thumping*] We cannot be party to that! [*Desk thumping*] Let me explain."

Now he makes a small concession here—

> "I am not a lawyer but I like law. Do you know what I understand by fundamental justice? It is the right of an accused to confront his accuser. I have a right as an accused to confront my accuser and most importantly, I have a right to cross-examine my accuser in the courts of Trinidad and Tobago. So how can you have legislation that does not give me the right to confront my accuser?"

The other thing that he did after he sought to say that the Bill was unconstitutional, was that he tried his best to say that you do not have the majority so you cannot pass the Bill. The other tactic that he has is to say, send it to a select committee or a joint select committee. On Tuesday February 06, 2007, when he realized that he was going nowhere with the constitutional argument, hear what he said in the closing line.

> "We cannot support this Bill. We call on the Government to do two things, either withdraw the Bill or have it referred to a Special Select Committee of the Senate so that we can go through it thoroughly so that we could ensure that the rights of citizens are balanced against those victims of crime."

I took us back in time to make the point that I respect the conservatism and patriotism of the Opposition on the front bench. That is the first point I want to make.

The second point is that at times you have to wonder whether it is patriotism that is driving these constant and repetitive demands to send this Bill to a joint select committee or select committee where we know what happens in those places. They take forever or alternatively, kill it because you do not have the constitutional majority. Sometimes you have to ask yourself: Are they being conservative? Are they really being patriotic or are they being destructive? I ask the question and leave it just like that.

The principle is, as it was then, and as I stated when I piloted the Bill with respect to the constitutionality of the Bill, changes in court procedure do not invite constitutional considerations. I think that I referred at length to the decision by Lord Hoffmann in which he said that prospective litigants—let me find the reference. In respect of the constitutional argument Lord Hoffmann rejects the proposition that procedural changes invite constitutional consideration.

In the case of *Humphrey v the Attorney General of Antigua and Barbuda* it is a case where, as I said in piloting the Bill, a more fundamental change in procedure was sought in Antigua:

> “That is the abolition of the preliminary enquiry in toto. The presumption will rarely if ever apply to changes in court procedure. Prospective litigants or defendants in criminal proceedings do not have a vested right to any particular procedure. Now, there will generally be nothing unfair in applying whatever procedure is in force when the case comes to court.”

He says that you are not depriving the litigant of a right to a fair trial if you change a procedure. In this case it was the preliminary enquiry procedure. He goes on to say:

> "In the Board's opinion it is a mistake to argue that because the old system"—and that is the old common law in relation to the Evidence Act which is before us—"provided a fair hearing, the change or abolition of some elements of that system results in the new system being unfair. Systems of criminal procedure may differ widely without being unfair. The question is not the extent to which the new committal proceedings differ from the old preliminary enquiries, but whether the new system of committal proceedings and trial taken as a whole satisfies the requirement of the Constitution."

The Humphrey case and Lord Hoffmann's statement answered the constitutional argument which my friends have put.

The other argument with respect to the special select committee or the joint select committee, we rejected that as a strategy. We think that the legislation before us with the appropriate amendments which have been made by the back bench would be more than satisfactory.

Sen. Rahman: Can I ask a question?

Sen. The Hon. J. Jeremie SC: Sure. I give way to my friend, Sen. Rahman, who refused to give way when I stood and asked him to give way earlier.

Sen. Rahman: Thank you so much. I gave way twice before. My question to you is this: What possessed the Government to include within this Bill the idea that you required a three-fifths majority? Were you misguided? Would you kindly explain why you put it there in the first place? The next thing I will like to know is, when the motion to amend comes, would it require a three-fifths majority to have that motion carried?

Sen. The Hon. J. Jeremie SC: I will answer the first question. I do not understand the second question about a motion to amend. On the first question, lawyers might take different views on this. I saw the Bill on the Order Paper. I studied it. The Bill was on the Order Paper when I was sworn in. In its draft form it requires a three-fifths majority. I had done the Evidence (Amdt.) Bill in 2007. I had the experience of that Bill. I looked at it and like Sen. Seetahal SC, I decided that it did not require a three-fifths majority. That is what "possessed", to use the word of Sen. Rahman, the Government to put in a three-fifths. That gives the explanation why a three-fifths clause was inserted in the first case. I am

authorized by the Leader of Government Business to say that the Government intends to revert to its position which is articulated in the Bill. That is to say that we will ask the Senate to pass this Bill with a three-fifths majority. That I think answers your question. I am saying that it is not necessary. We are saying that it is not necessary but we have heard your concern and our friends on the back bench and we say—

Sen. Seetahal SC: Back bench? We are not the back bench.

Sen. The Hon. J. Jeremie SC: I am sorry. On the higher bench because it is a higher bench. I have heard my colleagues on the higher bench, the Independent Bench. We have no difficulty because we know that this is legislation which patriots will support. Really it ought to be passed in principle, unanimously. We will carry it back to the status quo.

8.15 p.m.

The mischief which we seek to address in the legislation is the unjust outcome of a number of criminal prosecutions and we have addressed that by treating with evidence of previous inconsistent statements, evidence of bad character and the admissibility of video recordings of the voluntary statements of prosecution and defence witnesses, including the accused. We have done that in this legislation.

If I may just turn quickly to some of the specific contributions made by my colleagues on the higher bench, Sen. Drayton raised a couple of questions which were largely questions of commitment. We recognize that the Bill, once proclaimed, will require robust systems to be put in place to ensure that the evidence is gathered. First of all, you must have the technology in the police stations, and I expect that the Minister of National Security would move with some alacrity to ensure that the technology is put in place throughout the country to ensure that the objectives of the Bill are carried forward. I can give that undertaking to her. I can also give the undertaking, on behalf of the Minister of National Security, with respect to the management systems, which are required in the police service.

Mr. Vice-President, it would be remiss of me if I were not to point to the contributions of both Sen. Dr. Balgobin and Sen. Drayton who spoke of the commitment of our citizens under arms, our police service. Sen. Drayton said that in every profession—and I want to repeat that because it is something that is often lost on the citizens of this country—in every profession, there are bad eggs. In the medical profession, she said; in the accounting profession and, I dare say, that

Sen. Dr. Balgobin when he was making his comments about the criminals being properly advised and informed, was really pointing to bad eggs in the legal profession. Those are the people who can advise at what stage you take out a witness and so on. This is what he was saying without exactly identifying the point.

Yes, in every profession, there are bad eggs and yes, in the police service there are bad eggs, but the majority of police officers in this country, as Sen. Drayton said, and those I have had the occasion to work with over the years, are hard-working, dedicated, loyal citizens of this country. [*Desk thumping*] They are the ones who are keeping the Barbarians from us. They keep the Barbarians at the gate. They are the gatekeepers for us. We ought to place that on the record.

I intend to move, at committee stage, a series of amendments, which I will certainly have circulated. These would take into account the comments made almost universally from Sen. Dr. Nanan, whose contribution was quite thought-provoking in the sense that a lot of research must have gone into it. He quoted the civil code countries. That is unusual for the front bench of the Opposition. There is no back bench; there is a higher bench. He did do a lot of research and I commend him for it. [*Desk thumping*]

Mr. Vice-President, the hour is late and I think we have addressed most of the concerns either in the course of piloting the Bill or in the contribution made by my distinguished colleague, the Minister of National Security. I commend the Third World guidelines to Sen. Prof. Deosaran, who raised concerns about the reliability of eyewitness testimony. It is too late for me to go into that case and exactly what steps led up to the decision of the Court of Appeal in *R v Turnbull,* giving out those guidelines. Suffice it to say that there are safeguards built into law with respect to the use of eyewitness testimony.

With those few words, I beg to move.

Question put and agreed to.

Bill accordingly read a second time.

Bill committed to a committee of the whole Senate.

Senate in committee.

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

Clause 5.

Question proposed, That clause 5 stand part of the Bill.

Sen. Jeremie SC: Mr. Chairman, I beg to move that clause 5 be amended as follows:

A. In paragraph (b), delete the words "; and" and substitute a full stop; and

B. Delete paragraph (c) and put in a transitional clause at the end.

We have not compared it, but there is a new clause 8.

Sen. Seetahal SC: When you say delete paragraph (c), do you mean 3? Clause 5 has a (1), (2) and (3).

Sen. Jeremie SC: The copy I have has an (a), (b) and (c). There is a difference between the parliamentary copy and the yellow copy. The printed version is correct, I am told. The printed version is correct. Clause 5(c) is deleted.

Sen. Seetahal SC: So that has to do with the transitional provision, but there is already one toward the end of the Act, so there will be a double transitional provision, right?

Sen. Jeremie SC: We are repealing this one and inserting one at the end of the Act. We are taking off 15X and redrafting that. It is explained on page 2 of our amendments.

8.30 p.m.

Sen. Seetahal SC: The new clause 8 will take care of that; is that it?

Question put and agreed to.

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

Clause 6.

Question proposed, That clause 6 stand part of the Bill.

Sen. Mark: May I seek some clarification? With respect to this particular section that deals with clause 6(a)(iii) and also 6(c), first of all I would like to know, through you, Mr. Chairman, whether the inclusion of "fearful" is redundant when we take into account the parent Act of 2007, which deals with section 15C, which says if it is proven to the satisfaction of the court that such a person "is kept away from the proceedings by threats of bodily harm no reasonable steps can be taken to protect that person." I interpret that to be that this person is also experiencing fear. To include the new provision "is fearful" as (f), it seems a bit redundant. What is even more serious is when we go to the section that deals with clause 6(c)(5), which deals with the definition of "fearful", we find this thing is extremely frightening, in terms of the width of it. It is too wide and therefore I would like—

Sen. Jeremie SC: As a matter of policy, the Government has drafted the clause consistent with the English precedent and it is drafted in this way to be as wide as possible. It is wide, but it is not wide by error. This is something that we have settled on as a matter of policy. It is different from any of the governing terms in the parent Act. The intention is to expand on the terms of the parent Act.

Sen. Mark: Could we be consistent with the parent Act? I have the parent Act before me.

Sen. Jeremie SC: As I do.

Sen. Mark: I am talking about the British Criminal Justice Act. I have it before me. Let we read for you. It says:

> "through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

If the hon. Attorney General wishes to be consistent, then the English law is very clear in its language here. I do not understand why we are trying to create on the one hand an impression that you take it directly from the English law and on the other hand the English law has a different construct.

Sen. Jeremie SC: It does not have a different construct. The words themselves—you always accuse us of plagiarism. This is one instance where we took the concept of fear and we did not repeat verbatim what was present in the English provision.

Sen. Mark: But not because the British—we have cut our umbilical cord from the British decades now. Not because the British has a definition, because of their culture and their political experiences and maybe crime situation, they did a study. I did not see a study done here. There is a Law Reform Report that informed the Criminal Justice Act that came into being in 2003.

Sen. Jeremie SC: Can I just say that—

Sen. Mark: No, allow me to complete my statement. Let us be consistent. You are bringing into the construct of our civilization and our culture, a provision that talks about a wide interpretation. How can we just bring that interpretation into our culture, when we know the situation we have in this country with the police as an example?

The British police is a different police service. You cannot transplant from Britain, a provision and tell me I must go along with it, when I know that the

culture is different in Trinidad and Tobago. We have a problem with this. We have a serious problem with this.

Sen. Seetahal SC: Could I say something in that regard, if you do not mind? Under the 2007 amendment Act, not the parent Act as I keep hearing you refer to, at section 15C(2), there is a provision already and this will probably assuage Sen. Mark's concern, leave may be given by the court under so and so, only if the court considers that the statement ought to be admitted in the interest of justice. There is a provision already for the requirement of leave, before the statement is admitted. I think I alluded to that.

Sen. Jeremie SC: Mr. Chairman, I was about to point him just one line down to that requirement. Leave may be given by the court.

Sen. Mark: That is the one my good friend said?

Sen. Jeremie SC: Yes.

Sen. Seetahal SC: In practice the courts do. I think I pointed out that I had a case this year in which they refused.

Sen. Mark: My concern—

Sen. Jeremie SC: Also, Sen. Mark, that is the line down. If you go six lines up or so, it has to be proved to the satisfaction of the court that the person is fearful. You have the controls which you seek in there.

Sen. Mark: What I am arguing—my submission is that I find the definition of "fearful" a bit too wide. Given the culture that we have in this country, we may have a situation where anyone or the prosecution, can indicate that the witness is fearful for all kinds of reasons and I do not know what they have to prove to the court that this person's life is in danger or is it going to be used as a weapon in an effort to deny and maybe bring about an unfairness in the whole judicial process? That is what I am asking.

Sen. Jeremie SC: We stand on our position. We believe that the safeguards are adequate. The court is empowered to guard the rights of the individual.

Sen. Dr. Nanan: You made a statement that you had designed it in such a way for the legislation here, but we see it is being totally lifted out of the Act, word for word.

Sen. Jeremie SC: Sen. Dr. Nanan, you cannot have it both ways. You are accusing us on the one hand of following the English provisions slavishly. Sen. Mark is trying to say that we are not following the English provisions slavishly

and that we should. I am saying that we are not. In large measure, we are attempting to stick to what is tried and tested and consistent with our legal traditions, but we reserve the rights to make changes here and there, as the need arises.

The Bill is different; it provides for a special majority now. The English Bill, of course, cannot provide for a special majority, because they do not have a written Constitution.

Sen. Mark: May I advise you that if you go to my amendments on page 2, which reads as follows:

Delete clause 6(c)(5) and substitute the following:

For the purpose of subsection (1)(f) “fearful” includes fear of the death or injury of another person or of financial loss.

Rather than come back, you will see where we are proposing that section be deleted. We have reconstructed that section to just make "fearful" to include fear of death or injury of another person or of financial loss. We are not in support of this wide interpretation.

Question, on amendment, put and negatived.

Question put and agreed to.

Clause 6 ordered to stand part of the Bill.

Clause 7.

Question proposed, That clause 7 stand part of the Bill.

Sen. Jeremie SC: There are a number of amendments.

Mr. Chairman: There are two sets of amendments. We would deal with the—

Sen. Jeremie SC: We have deleted the word "audio" throughout. That is basically what we have done, consistent with the representations made by the higher bench.

7 A. In the proposed section 15I—

(i) in subsection (1)(e), (f) and (g), delete the words “or an audio”, “or audio” and “or audio” respectively;

(ii) in subsection (2)(a), after the word “may” insert the word “not” and delete the words “or an audio”;

(iii) in subsection (2)(b), delete the words “or audio” wherever they appear;

(iv) in subsection (3)(a), (b), (c) and (d), delete the words “or audio” wherever they appear;

(v) in the proposed subsection (4), delete the words “or audio”;

(vi) in the proposed subsection (5), delete the words “or an audio”;

(vii) in the proposed subsection (6), delete the words “or an audio” and “or audio”;

(viii) in the proposed subsection (7), delete the words “or an audio” and “or audio”;

(ix) in the proposed subsection (8), delete the words “or an audio”; and

(x) insert, after subsection (8), the following subsection:

“(9) Nothing in this section shall affect the admissibility of any video recording which would be admissible apart from this section.”;

B. In the proposed section 15J, delete the definition of the words “audio recording”; and

C. Delete the proposed section 15X.

Sen. Seetahal SC: I do not have a filed amendment, but I made the point during my contribution. In section 15I(1)(a), there is an inclusion of the words "including an accused". It says:

"a person, including an accused, is called as a witness…"

and there are other conditions. Then this section applies.

Then you go on to:

"A direction under subsection (1)(f)—

(a) may be made in relation to a video…given by the accused;”

In my view, the entire thing makes no sense when you look at 15I(1)(b), because the section applies where the witness claims or has at any time claimed to have witnessed, whether visually or in any other way, events alleged by the prosecution to include conduct constituting the offence. What you are talking about is video

evidence, you are talking about the admissibility of evidence in relation to the prosecution of an offence. I do not know how the accused comes in there and it is inconsistent with the English provisions. Therefore, we are getting ourselves in a whole bind. My suggestion is that, consistent with their provision which makes more sense, this really deals with a witness.

If you look at, it is contained in the Archbold at chapter 8, paragraph 67(a). You should delete in section 15I(1)(a) the words "including an accused" and in 15I(2)(a), you should include "may not be made in relation to video or audio recording given by the accused". It is no longer audio. This whole section has to do with witness for the prosecution, or even a witness for the defence, but not to do with the accused.

If you read the rest of everything, it is talking about it being evidence-in-chief; the accused recording being evidence-in-chief. When will that happen? An accused statement is not evidence-in-chief, it is statement by confession. You will be muddying the waters.

Sen. Jeremie SC: What I propose is that the technocrats look at this, perhaps, and we flag this as an area and we move on. I will take the point, but I am not going to agree to it until the technocrats have studied it.

Sen. Seetahal SC: Go to the Archbold, section 137.

Sen. Jeremie SC: We have the reference.

Sen. Seetahal SC: You will see that it is right there.

8.45 p.m.

Mr. Chairman: Clause 7 is amended as circulated—

Sen. Mark: No, clause 7 is deferred. I have several amendments.

Mr. Chairman: I am doing it part by part.

Sen. Merhair: Mr. Chairman, before we move on, the definition of a “video recording” as asked by Sen. Drayton and the definition for “moving computer visuals”, could the hon. Attorney General clarify in 15J where you have the definition for a “video recording”?

Sen. Jeremie SC: My understanding is that it would include computer video recording. That is what “'any medium” refers to. So, it does include the computer technology. If I could just say, this is in keeping with what modern courts outside of Trinidad and Tobago are doing in terms of the use of computer technology. I

believe, although I am not certain about it, that the Caribbean Court of Justice which has very technologically advanced systems has a computer recording system for their court proceedings.

Sen. Dr. Nanan: Mr. Chairman, with respect to that particular definition, I had raised concerns about the sound-track, because the definition talks about "…includes the accompanying sound-track". I think the reason was with respect to the altering of the sound-track.

Mr. Chairman: The way that I am going to deal with this is that the amendments to clause 7 that have been proposed by the Government, we will vote on them and then—

Sen. Mark: They are tied in.

Mr. Chairman: I just want to vote to approve the amendments.

Sen. Mark: Approve, what amendments?

Mr. Chairman: The amendments made by—

Sen. Mark: Most of his amendments were challenged by me.

Sen. Jeremie SC: Except for 15I(b). If you could just give us a minute or two—that is an alternative—while we check on the Archbold.

Sen. Mark: Because of the unique nature of this exercise, for us to cross the t's and dot the i's, it would have been best for us to send this Bill to a special select committee. We are going to spend a considerable amount of time going through this exercise. I guess if you want to do that, we are happy. [*Crosstalk*]

Sen. Jeremie SC: Mr. Chairman, we are drafting the clause.

Mr. Chairman: Let us deal with clause 7 section 15H. I think Sen. Mark has amendments.

Sen. Mark: Mr. Chairman, we are a bit concerned about the absence of safeguards as they concern the threshold level at 15H and, particularly, where statements have been admitted that have been inconsistent and unsworn. I think that we should take the threshold test for accepting these statements to a higher level and, therefore, we are advancing that the following safeguards be incorporated into the legislation as outlined in clause 2, where we are saying, first of all, that the statement be taken under oath or under some solemn affirmation or declaration. Even though a video statement is entertained in the dangerous kind of manner that we are being told that could be manipulated, that statement that is

being entertained by the court, we are saying that there must be a provision that says that it was given voluntarily, because you can have problems in video statements being given in an involuntary manner.

We are saying that one of the safeguards that we would want to ensure that takes place before these statements are admitted is that the court must prove that they were voluntary. We have no problem, given the videotape exercise that we are talking about. We are seeing dangers, but we are saying that it must be shown that it was voluntary.

At the same time, we are also saying that there must be a full opportunity to cross-examine witnesses during that period. Even though all these things are taking place, the judge must retain the right to determine if the videotape evidence is to be entertained. I am not seeing these safeguards in the legislation. I am saying that, for instance, our research has led us to different jurisdictions, particularly the Canadian jurisdiction, and there are safeguards in the legislation before matters like these are entertained, that is inconsistent statements. So, we would like these provisions to be incorporated. Maybe I have not captured them properly, but we want safeguards. We are not draftsmen, but we believe that these principles ought to be enshrined in the legislation.

Sen. Jeremie SC: Mr. Chairman, we agree, but we think the legislation as drafted—if you look at 15I(6) it says:

> "When considering whether or not any part of a video or an audio recording should be admitted under this section, the Court shall consider—
>
> (a) whether admitting that part of the recording would carry a risk of prejudice to the accused; and
>
> (b) whether the interests of justice nevertheless requires that part of the recording to be admitted in view of the desirability of showing the whole, or substantially the whole, of the video..."

So, there are two tests. If you look at 15I(8), it says:

> "A statement made by a witness in a video or an audio recording may be admitted under this section whether or not the statement was made on oath."

Sen. Mark: I am saying more than that. For instance, in the Canadian jurisdiction, the threshold test is much higher, even though they entertain the videotape with these provisions and safeguards.

Sen. Jeremie SC: What we are doing is that we have found that it is better not to mix and match. I intended to make the point in relation to the non-involvement of the Law Reform Commission. We do have the secretary of the Law Reform Commission here so, in a sense, they have adopted the work of the British Law Reform Commission. There is no paper done by—but the secretary is here. [*Interruption*] It says that the Law Reform Commission was involved in the exercise. In any event, the safeguards which you seek are in the legislation.

Sen. Mark: I am not in agreement with your undertaking here in terms of the safeguards.

Sen. Jeremie SC: Mr. Chairman, I do not want to argue with my friend. In his new clause, which is not numbered it says:

> "In considering whether any part of a recording should be not admitted under 15(j), the court must consider—
>
> (a) whether admitting that part would carry a risk or prejudice to the defendant, and
>
> (b) if so, whether the interest of justice nevertheless require it to be admitted in view of the desirability of showing; the whole, or substantially the whole, of the recorded interview."

It is the same thing. I am not sure that he understands his amendments. I am reading from your amendments. [*Laughter*] They are not numbered, but it is the new section 15J. The intent is the same. We have draftsmen on this side and you do not. So, that might account for the difference with respect to how it is spelled out. Can we move on?

Sen. Mark: No. we are not moving on yet. Mr. Chairman, I had made a statement earlier as it concerns safeguards. Now, I know that we are seeking under the provision outlined by the Attorney General, and my amendments as one aspect, which I have no problem with—[*Interruption*]—I am saying that I support what you are saying in terms of the provision, but what about clause 7 at 2(i) of my amendments. I am asking the Attorney General to comment on that for me.

9.00 p.m.

I forgot to include, "the statement must be voluntarily given". That is another safeguard, so there are five safeguards I have here. There are four recorded, but I am just adding a fifth "voluntarily given".

Sen. Jeremie SC: Mr. Chairman, we think that the Bill as articulated by the Government contains adequate safeguards.

Sen. Mark: No, you cannot dismiss my—

Sen. Jeremie SC: I am not dismissing it; I am just saying that—

Sen. Mark: Yes, but does that incorporate my concerns here or our concerns?

Sen. Jeremie SC: We think that our Bill has adequate safeguards.

Sen. Mark: So because you say so, that is so? Mr. Chairman, I insist with the amendments that we have put forward we would like them to be incorporated in the legislation to safeguard witnesses.

Mr. Chairman: The question is that clause 7, 15H, be amended as circulated by Sen. Mark.

Question, on amendment [Sen. W. Mark], put and negatived.

Sen. Jeremie SC: Yes, Mr. Chairman, we are ready now, where you have 7, 15I(1) in subsection (a) after the words "a person", delete the words "including an accused,".

Sen. Seetahal SC: So, we are just deleting the comma?

Sen. Jeremie SC: "…including an accused" that is what you are taking off.

Sen. Seetahal SC: You are deleting "including an accused"?

Sen. Jeremie SC: Yes.

Sen. Seetahal SC: "A person is called as a witness in proceedings for an indictable offence…"

Sen. Jeremie SC: Right.

Sen. Seetahal SC: Okay.

Sen. Jeremie SC: And then (2), which takes Sen. Seetahal's SC point about the "not". After the word "may" insert the word "not". That is what was (2)(b)(iv), it would now become (iii).

Sen. Mark: [*Inaudible*]

Sen. Seetahal SC: Well, he said it is now (iii), but it was (ii).

Sen. Jeremie SC: It was (ii), it is now (iii).

Sen. Seetahal SC: You include "not" instead of—

Sen. Jeremie SC: After the word "may" insert the word "not".

Sen. Seetahal SC: It is on page 9 there under which was (2) now it is (3):

"A direction under subsection (1)(f)—

(a) may not be made in relation to video…"

So we include the word "not".

Mr. Chairman: Subsection (2)(a)—

Sen. Seetahal SC: The Attorney General said this is now 15I(3), so I am asking what is 15(2)?

Sen. Jeremie SC: No, I am sorry. I was looking at the roman numerals.

Sen. Seetahal SC: So, it is really 15I(2)(a)?

Sen. Jeremie SC: Precisely.

Sen. Seetahal SC: So, 15I(2)(a) we include "may not". Include the "not". [*Crosstalk*]

Sen. Mark: Because it is a bit confusing, just advise me when you are ready.

Sen. Seetahal SC: It is confusing.

Mr. Chairman: So, let us do these proposed amendments first. The amendments as proposed in what was circulated and also under 15I(1)(a), delete after "person", delete the coma and the words "including an accused". And in section 15I(2)(a), include the word "not" in-between "may" and "be".

Question, on amendment, put and greed to.

Sen. Mark: Mr. Chairman, I just want you to go back to, if you may with your leave, clause 15H(1), it says:

"Where in criminal proceedings a person"—

Mr. Chairman, are you with me? If you look at the law—[*Crosstalk*]

Mr. Chairman: Yes.

Sen. Mark: I am saying to be consistent with what we have just agreed to, where we just talked about a person is called as a witness in proceedings—the amendments you just put. I am saying that in this particular section of the Act we have "Where in criminal proceedings a person…" which is very broad, and I am saying to be consistent, "a person who is called as a witness"—so where in criminal proceedings a person who is called as a witness gives oral evidence, because as Sen. Seetahal SC said, this is dealing with witnesses and not accused, but the language in terms of a person is so broad it could include both witness and accused.

So I am saying just to be clear in terms of the legislation, I am suggesting that where in criminal proceedings a person is called as a witness, so you have it clear in the legislation rather than just leave "a person" which is rather broad. So, I would like the hon. Attorney General to be consistent in this particular aspect of the legislation, having regard to the amendment that we just made.

Sen. Seetahal SC: But you have "is called as a witness".

Sen. Mark: No, I am talking about 15H(1), I am dealing with "a person"—this is open—[*Inaudible*] So, I am saying to be consistent—the amendment that he just made could be anybody. That is the point I am making. [*Inaudible*]

Sen. Jeremie SC: Mr. Chairman, we have no difficulty with the clause as it is drafted.

Mr. Chairman: As is?

Sen. Jeremie SC: Yes. [*Crosstalk*]

Sen. Dr. Nanan: No, there is a change in clause 15W—

Mr. Chairman: We have not reached there yet. Okay, we are on 15I with Sen. Mark's amendments.

Sen. Mark: Mr. Chairman, we have many amendments in terms of—if you go to clause 15I and we go to (a) I am suggesting—well, that first amendment has been addressed because we said that including an accused and we just have our witness, so that is okay.

Now, what I could not understand is when we go to 15I(1)(b), we said "the witness claims or has at any time claimed to have witnessed whether visually or in any other way—". Again, I found this to be so broad and ambiguous. What do you mean by "in any other way"? I just could not follow that at all, and I am saying that for instance we delete that or we clearly define what we are talking about here. We have to be more specific. This is criminal law, this is impacting on people's lives, liberty, security and freedom and you just cannot make a statement and say "in any other way", what does that mean?

Try to tell us what that means. The court has to interpret that. This is just too loose. I am asking, Mr. Chairman, is either we delete that section or we become more specific, because it is law that we are dealing with here and we are lawmakers. I do not want to be responsible for this piece of legislation going out so loosely. When somebody asks me what we meant by that, what am I to tell

them, that we agreed to that? On what basis? I cannot agree to that. I am asking the Attorney General, either delete that section or be specific with what you are saying? This is too wide. Innocent people can get trapped here.

Sen. Jeremie SC: We are checking the legislative precedence, Mr. Chairman.

Sen. Mark: You want to flag it and let us come back, because the legislative precedence might take a little time.

Sen. Jeremie SC: No, we found it already.

Sen. Mark: Oh, you found it already, very official. [*Laughter*]

Sen. Jeremie SC: We try to be. The English Act has at sub paragraph (b), the person claims to have witnessed "whether visually or in any other way" and they go on:

"(i) events alleged by the prosecution to include conduct constituting the offence or part of the offence; or

(ii) events closely connected with the offence;"

We borrowed it from the British precedence.

Sen. Mark: Is that a temporary loan?

Sen. Jeremie SC: Say again.

Sen. Mark: Is it a temporary loan?

Sen. Jeremie SC: No.

Sen. Mark: You said you borrowed it, temporarily or permanently? [*Laughter*]

Mr. Chairman, you see the problem I have is that we are dealing with two different cultures, two different environments and we are importing and transplanting expressions that could have dangerous implications for innocent people in our country. The British jurisprudence is different from ours. When we leave language so loose and ambiguous—

Sen. Jeremie SC: The problems are the same, the mischief is the same and the jurisprudence is essentially the same. We have the same final court—

Sen. Mark: Mr. Chairman, we have some reservations about these illusive languages.

Sen. Jeremie SC: If you wish, we would double-check it against—

Sen. Mark: I do not care if it comes from Britain, we are Trinidad and Tobago.

Sen. Jeremie SC: We would double-check it against the Archbold.

Sen. Rahman: Mr. Chairman, if you are saying either visually or any other way, we might as well remove visually and say “in any other way—”Why do you want to say “visually or in any other way”, it is a bit redundant there, “visually in any way”.

Sen. Jeremie SC: No, “visually” is specific and under the ejusdem generis rule it is normal to put a general clause after a specific one to make sure that you catch every possibility.

Mr. Chairman: We will move forward, you will second No. 3 clause 15I(1)(b)(i).

Sen. Mark: Mr. Chairman, you want to continue with me?

Mr. Chairman: Yes, we are continuing.

Sen. Mark: Yes, so that is one of the areas I have concern about and then also this thing about conduct “to include conduct constituting the offence or part of the offence”. Again, we are talking about conduct, again loose, not specific, does not tell us anything. The British, we just borrowed it wholesale and transplanted it.

9.15 p.m.

Sen. Mark: I just find it incomprehensible, quite frankly. But the Government and so on, has the majority and they are not listening to us. They just want to pass—[*Interruption*]

Sen. Jeremie SC: —"conduct constituting the offence", what is the objection to that form of words?

Sen. Mark: I am trying to find myself in the position of a court under a judge, lawyer, understanding the law I am a layman, I am asking this question. When you say to include, and then you say "conduct constituting the offence", or part of the offence, I am asking myself—could you explain that to me?

Sen. Jeremie SC: It is part of the *actus reus*. *Actus reus* is usually an act, an omission or it could be conduct. It is part of how you define crime. You define crime in terms of the act and a state of mind. The mental ingredient is called the *mens reao,* and the physical surrounding circumstances would be called the *actus reus*, and conduct is a part of the *actus reus*. Conduct constituting the offence.

Sen. Mark: I find it a bit, you know—Mr. Chairman, may I also ask as we are going along: "the witness has previously given a statement of the events in question, whether in response to questions asked or otherwise;" what is this? This is wide, this is wild, this is dangerous. Who is asking these questions? We do not know. We do not have a clue. This thing again, is very dangerous legislation. I understand what the Government is trying to achieve, but we borrow things wholesale and we—Who are asking these questions, Mr. Attorney General, through you, Mr. Chairman?

Sen. Jeremie SC: Mr. Chairman, we are not borrowing things wholesale without borrowing the checks and balances. Okay? So that—[*Interruption*]

Sen. Mark: Who are asking these questions, Sir?

Mr. Chairman: I want to try and do this because this is very complicated here and I want to follow you. So No. 3, you want to change 15I(1)(b)(i)? You want the words "include conduct constituting the offence or part of the offence;" deleted?

Sen. Mark: Yes. And then also "or in any other ways".

Mr. Chairman: Okay. Well they said, no. And then No. 4, you have, “delete 15I(i) and (ii)”, so I want to try and follow that because you are correcting the clause and then you want the clause deleted.

Sen. Mark: No, no, no, I am asking for clarification. Mr. Chairman, we need a little patience, like a Job here tonight.

Mr. Chairman: Okay.

Sen. Mark: Because we cannot rush it.

Mr. Chairman: The hour is late, so—

Sen. Mark: So that is why we should adjourn.

Mr. Chairman: But we just want to understand. No sense trying to confuse us.

Sen. Mark: No, I am not confusing you, Sir. I am representing the interest of the majority.

Mr. Chairman: I am asking, in No. 4, when you say delete section 15— Sen. Mark! Sen. Mark, what do you mean in No. 4, delete section 15I(i) and (ii)?

Sen. Mark: Section 15, let me just go back to my—

Mr. Chairman: You all do not look like you know what you mean.

Sen. Mark: No, no, I am just trying to— Oh! Mr. Chairman, I think that for instance, if you go to 15I(b)(ii), that is the "audio recording", that is what the Attorney General has already deleted. So wherever there was "audio recording", I deleted it and the Attorney General has supported me. [*Interruption*]

Mr. Chairman: We do not have to deal with (4), (5), (6), and (7)?

Sen. Mark: No, because we are on all fours on that one.

Mr. Chairman: Okay.

Sen. Mark: We have deleted together on that one.

Mr. Chairman: Okay.

Sen. Mark: But where we differ, Mr. Chairman, is the earlier part that you already—

Sen. Joseph: So that takes care of (4), (5), (6) and (7)?

Mr. Chairman: And then we move now—[*Interruption*] No, he still has some amendments here on 15I.

Sen. Jeremie SC: But they are all the same, his deleting of "audio recording". So it goes all the way down.

Sen. Mark: So the only—[*Inaudible*] Mr. Chairman, is (b) under 15I, as well as (b)(i) and (ii). So we have some little challenges here.

Mr. Chairman: The question is that section 15I be amended as proposed by Sen. Mark.

Question, on amendment, put and negatived.

Sen. Jeremie SC: I am sorry, Mr. Chairman, there is a typo in (x). That "form" should really be "from this section". Our proposed amendments have been circulated. On page 2 under (x):

Insert, after subsection (8), the following subsection:

"(9) Nothing in this section shall affect the admissibility of having any video recording which would be admissible apart"—it should be—"from this section".

Instead of "form", it should be "from".

Sen. Enill: It is a form of words you read from.

Mr. Chairman: So we go on to 15J.

Sen. Mark: Before you go on to 15J, Mr. Chairman, I had asked with your leave, if the Attorney General could have explained to us 15I(1)(c). Because we would like to know when we said, "whether in response to questions asked or otherwise", "statements made", I want to know statements by whom, and questions are being asked by whom? Is it the—[*Interruption*]

Sen. Jeremie SC: Is that not stated?

Sen. Mark: But is that stated here?

Sen. Jeremie SC: That is how it is worded, and we wanted to be broad as possible.

Sen. Mark: Yes, but who is going to ask these questions?

Sen. Jeremie SC: Normally it would be the police investigators, Sen. Mark.

Sen. Mark: Yes, you say normally, but why do we not state that here?

Sen. Jeremie SC: Because that is not necessary in legislation. This is legislation.

Sen. Mark: So you are saying that anybody could ask questions here.

Sen. Jeremie SC: We are saying that we have followed the precedents which are available to us, and wish to leave it like this.

Sen. Mark: All I am saying, Mr. Chairman, is that I find it a bit broad. I believe if the authority is the police, we should identify them. People are asking questions here.

Sen. Jeremie SC: The words "or otherwise" at the end—

Sen. Mark: What does that mean?

Sen. Jeremie SC: Voluntary statements, in case nobody asks questions.

Sen. Mark: "Or otherwise". Why not say "voluntary statement", rather than saying, "or otherwise" if that is what it means?

Sen. Jeremie SC: What are you asking me to do, why I did not say something using different words which—[*Interruption*]

Sen. Mark: No, you said, "or otherwise" means, voluntary statement.

Sen. Jeremie SC: It could mean a voluntary statement.

Sen. Mark: So we are making law and we are saying, it could mean.

Sen. Jeremie SC: No it includes. That is what law is all about.

Sen. Mark: Well, say so. Say so.

Sen. Jeremie SC: But this is what the British precedent says.

Sen. Mark: What that has to do with Britain? We are not in Britain. We are in Trinidad and Tobago.

Mr. Chairman: Okay. We move now to section 15J. The proposal is to delete the definition of the words "audio recording".

Sen. Jeremie SC: I think even Sen. Mark might agree with that one.

Sen. Mark: Which one is that?

Mr. Chairman: I think Sen. Mark also had that in his—

Sen. Jeremie SC: The audio recording in 15J. Might.

Mr. Chairman: The question is that section15J, be amended, as proposed, by the Attorney General.

Question, on amendment, put and agreed to.

Mr. Chairman: Section 15X.

Sen. Mark: I thought you were doing it in order. Section 15K now.

Mr. Chairman: Yes, but we have nothing on K.

Sen. Dr. Nanan: I have something on W.

Sen. Baptiste-Mc Knight: Mr. Chairman, you did not ask—[*Inaudible*]

Mr. Chairman: We have accepted all of them already.

Sen. Baptiste-Mc Knight: No! You have not asked them about it.

Mr. Chairman: About what? Oh, you mean to say, you want me to go through clause by clause? Okay.

Sen. Mark: That is what I said.

Mr. Chairman: No, no. This is one clause, clause 7 with all these different parts. I am just going through the proposed amendments, and then we will do the whole clause. So all the other parts have no amendments. We go now to 15X, and it is to delete 15X. That is the amendment.

Mr. Chairman: The question is that section 15X be deleted as proposed by the Attorney General.

Question, on amendment, put and agreed to.

Mr. Chairman: And now—

Sen. Mark: New clause 8.

Mr. Chairman: Sen. Dr. Nanan, you have an amendment for 15W?

Sen. Dr. Nanan: I wanted to ask with respect to 15L(2). Remember I made—"of proving his good character" instead of "bad character", I think that was an error? Section 15L(2).

Mr. Chairman: Sen. Mark has some new clauses that we have to look at.

Sen. Dr. Nanan: Well, then, I have 15W then.

Mr. Chairman: Okay, 15W?

Sen. Jeremie SC: I do not know where we are.

Mr. Chairman: What happened is that he did not want to do 15L because Sen. Mark proposed a new clause.

Sen. Jeremie SC: Okay.

Mr. Chairman: We will deal with that under a new subclause. Sen. Dr. Nanan, do you have an amendment?

Sen. Dr. Nanan: Yes, 15W. I made a suggestion and I have an amendment actually, "Where the Court makes a relevant ruling", delete "it" in (a) and replace it with the words "if it is in the High Court, the judge…"

Sen. Jeremie SC: Okay. This is one instance in which we cannot agree with Sen. Seetahal SC. If you look at 15W(1):

"Where the Court makes a relevant ruling—

(a) it shall state in open Court, but in the absence of the jury, its reasons for the ruling;"

There is no jury in the Magistrates' Court. It has to be the High Court that we are referring to.

"(b) if it is a Magistrates' Court, it shall cause the ruling and the reasons for it to be entered into the register of the Court's proceedings."

So the drafting is clear that (a) refers to the High Court, and (b) refers to the Magistrates' Court. There can be no possible reason on which you could disagree with that.

Sen. Rahman: In the first one, in the absence of a jury could mean it is in the Magistrates' Court because there is no jury there.

Sen. Jeremie SC: There is no jury in the Magistrates' Court.

Sen. Rahman: Right. So in the absence of a jury, you could probably—[*Interruption*]

Sen. Jeremie SC: "It shall state in open court, but in the absence of the jury, its reasons for the ruling". The court "shall". It is an obligation on the court.

Mr. Chairman: The question is that section 15W, be amended, as proposed by Sen. Dr. Nanan.

Question, on amendment, put and negatived.

9.30 p.m.

Sen. Ali: Mr. Chairman, before we leave that, I have a comment on 15P. There is a statement which does not make sense. I am doing what Sen. Seetahal SC asked me to do—so 15P(4)(b); (b) does not seem to make sense.

Mr. Chairman: You just want clarification?

Sen. Ali: It does not seem to make sense. Sen. Seetahal SC asked me to raise it. [*Interruption*] [*AG confers with drafters*]

Sen. Jeremie SC: There is a drafting error here. It should be:

"two offences are of the same category as each other if they belong to the same category of offences."

Mr. Chairman: That is what is there now.

Sen. Jeremie SC: Is that what it says?

Mr. Chairman: Yes.

Sen. Jeremie SC: Well, it is in the context of bad character evidence. So you might have different offences which fall within, for example, sexual offences or dangerous drug offences dealing, so there might be one or two categories within a subhead, a class of offence. The section is identical to the British section 103, matter in issue between the defendant and the prosecution; that is the legislative precedent. It was borrowed faithfully; I thought there was an error.

Question put and agreed to.

Clause 7, as amended, ordered to stand part of the Bill. [*Crosstalk*]

Sen. Mark: [*Inaudible*]

Mr. Chairman: Clause 7 is all those 15; the whole clause is clause 7. [*Crosstalk*] There is section 15L. [*Interruption*]

Sen. Dr. Nanan: Section 15L(2). [*Crosstalk*]

Sen. Mark: On page 12. AG, if you go to the parent Criminal Justice Act, you would see they talk about good character here and not bad character, and it went on to talk about:

> "only so far as it allows the Court to treat such evidence as proving the matter..."—that is the qualifier. I think if we are copying, we must copy properly.

Sen. Jeremie SC: Sen. Mark, first of all, we were not copying.

Sen. Mark: Well, you were just borrowing then.

Sen. Jeremie SC: If we were borrowing—let me just refer you to subsection (b) of the British Act which says:

> "Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character."

Sen. Mark: You have “bad”?

Sen. Jeremie SC: Yes.

Hon. Senator: So the British one is wrong too. [*Laughter*]

Sen. Jeremie SC: This is this Criminal Justice Act, section 44. [*Crosstalk*] I am quite certain that mine is right; this is the actual Act.

Sen. Dr. Nanan: We want to add to that clause.

Sen. Jeremie SC: You want to add a piece to it?

Sen. Dr. Nanan: Yes:

> "but only so far as it allows the Court to treat such evidence as proving the matter concerned."

Sen. Jeremie SC: That would run contrary to what we want to do; we want to prove his bad character.

Sen. Dr. Nanan: Okay.

New clause 8.

The Clerk: Mr. Chairman, the amendment reads as follows:

Insert after clause 7 the following:

“Transitional 8: "This Act shall not apply to a—

(a) preliminary enquiry; and

(b) criminal trial,

which is in progress before the commencement of the Act.”

New clause 8 read the first time.

Question proposed, That the new clause be read a second time.

Sen. Jeremie SC: Mr. Chairman, we have an amendment to that clause. After "preliminary enquiry:" instead of "and" we want to use the word "or". [*Interruption*]

Question put and agreed to.

Question proposed, That the new clause be added to the Bill.

Question put and agreed to.

New clause 8 added to the Bill.

Preamble approved.

Sen. Mark: Mr. Chairman, I have new clauses, so I do not know if you could come back to them after the Preamble.

Hon. Senators: No! [*Crosstalk*]

Mr. Chairman: That is what we asked.

Sen. Mark: I asked you that; you have my thing before you.

Mr. Chairman: That is why we asked you if these new clauses—

Sen. Mark: Look, I circulated. Mr. Chairman, if you look at my amendments, I felt that there ought to be a definition for "criminal proceedings", nobody discussed that, nobody argued that. There is another section. I thought the important explanatory evidence ought to have been explained, for example, reprehensible behaviour; all these things have not been explained. I would like the Attorney General to comment on it.

Hon. Senators: Put it to a vote! [*Crosstalk*]

Sen. Mark: It is not just putting it to a vote. We are rushing legislation here and we will come back to regret it.

Sen. Jeremie SC: We are not rushing legislation.

Sen. Mark: And these "fellas" saying just put it to a vote?

Hon. Senator: Yes.

Sen. Jeremie SC: Sen. Mark, if you are talking to me then why are you—

Sen. Mark: Well, let me ignore these people and talk to the AG.

Sen. Jeremie SC: We do not agree.

Sen. Mark: You do not think that there should be a definition?

Sen. Jeremie SC: As a matter of fact, you do not have any—I am sorry, I was about to say that you do not have any clauses; you have a series of statements.

> "...that the evidence contained in the prior statement is such that it will be admissible if given in Court….This is a new clause for admitting inconsistent statement principals..."

I think you mean principles; it cannot be "principals". Principal is what you have in a school.

Sen. Mark: No, principles. Where do you see principals?

Sen. Jeremie SC: Your pages do not have any numbers.

9.45 p.m.

Sen. Mark: You are correct; it is just a typo. That is a typo.

Sen. Jeremie SC: —"new clause for admitting inconsistent statement, principals, to safeguard inconsistent statement."

Sen. Mark: Okay, it is a typo.

Sen. Jeremie SC: Okay, well, we agree that there should be principles to safeguard inconsistent statements but we think that it is captured in the Bill which is before the Senate this afternoon so we do not agree with your new clause 15J. Well, they have no numbers but if you look at it, this is identical to what we have in the Bill. You do not have a number. You just say, "In considering whether any part of a recording should be not admitted", and I feel that that is not proper drafting.

Sen. Mark: I have some definitions. Are you on definitions?

Sen. Jeremie SC: Where are you with your definitions?

Sen. Mark: "Criminal proceedings".

Sen. Jeremie SC: "Criminal proceedings" is a term of art; it is defined in the case law, so there is a judicial definition.

Sen. Mark: What about "reprehensible behaviour"?

Sen. Jeremie SC: Again, Bradley defines what is "criminal proceedings".

Sen. Mark: [*Inaudible*] "reprehensible behaviour?"

Sen. Jeremie SC: Again, these are ordinary English terms which the court would develop meanings—

Sen. Mark: [*Inaudible*]

Sen. Jeremie SC: No, I do not. I do not think so. It is not in the British legislative precedent and we would be doing ourselves a disservice. Can I just say that the reason I keep referring to the legislative precedent and you say, well, yes, there is this in Canada, and so on and so forth, history has shown that when we use legislative precedents, we are best advised to stick closely to the terms of the legislation that we seek to import. There is a grandfather clause in the Supreme Court of Judicature Act which says that as of a particular date all the legislation, statutes enforced in England are enforced in Trinidad and Tobago. I am just saying that when you—especially in this area—take new concepts, you had better be careful about what you are doing. You cannot mix and match. You cannot take something on which there is Canadian jurisprudence and impose it on our procedure. It might not fit and it might not fly with the courts.

Sen. Mark: Mr. Chairman, I just want to advise the Attorney General that the concept of "reprehensible behavior" is clearly defined in the Criminal Justice Act of 2003 in the interpretation section. If you are saying it is not there—I saw it and I just thought, you know, to be consistent, I was just helping you. But, Mr. Chairman, if he does not want—

Sen. Dr. Gopaul-McNicol: I just wanted to comment on what the Attorney General just said. Irrespective of what we choose to adopt from the British law, it is in our responsibility and our right to extrapolate from the law and make it relevant to fit our culture. I am very concerned about this debate, recognizing, of course, that the Government has the majority and will vote. But this will come back to haunt us at some point in time down the road.

Question put and agreed to, That the Bill, as amended, be reported to the Senate.

Senate resumed.

Bill reported, with amendment.

Question put, That the Bill be now read the third time.

The Senate divided: Ayes 22 Noes 0

AYES

Enill, Hon. C.

Saith, Hon. Dr. L.

Jeremie SC, Hon. J.

Browne, Hon. M.

Joseph, Hon. M.

Manning, Hon. H.

Narace, Hon. J.

Dick-Forde, Hon. Dr. E.

Gronlund-Nunez, Hon. T.

George, W.

Rogers, L.

Lezama, Miss L.

Melville, Miss J.

Gayle, N.

Primus, J.

Deosaran, Prof. R.

Ali, B.

Ramkhelawan, S.

Baptiste-Mc Knight, Mrs. C.

Nicholson-Alfred, Mrs. A.

Merhair, Miss G.

Balgobin, Dr. R.

The following Senators abstained: W. Mark, Dr. A. Nanan, Dr. J. Kernahan, M. F. Rahman, Dr. S. Gopaul-Mc Nicol.

Question agreed to.

Bill accordingly read the third time and passed.

COMMISSION OF ENQUIRY (VALIDATION AND IMMUNITY FROM PROCEEDINGS) BILL

House of Representatives Amendment

The Attorney General (Sen. The Hon. John Jeremie SC): Mr. Vice-President, I beg to move,

That the House of Representatives amendments to the Commission of Enquiry (Validation and Immunity from Proceedings) Bill, 2009 listed in Appendix II be now considered.

Question proposed.

Sen. Mark: No, no, we do not do things like that, Mr. Vice-President. You have to put the question to the House—

Sen. Jeremie SC: He did.

Sen. Mark: No, no, no. He has not put it to the House. He just asked as if there is no debate. I have some points I want to raise.

Sen. Jeremie SC: He is now going to say that.

Mr. Vice-President: Sen. Mark, could you wait until I am finished?

Sen. Mark: I humbly apologize, Sir. If I am wrong, Sir, I am wrong.

Question put and agreed to.

Clause 7.

House of Representatives amendment read as follows:

Delete and substitute the following:

"7 Subject to section 9, the evidence validated by section 6 may be:

(a) relied on by the commissioners in the conduct of the Commission and in their report to the President; and

(b) used in any civil or criminal proceedings in any Court."

Sen. Jeremie SC: Mr. Vice-President, in the other place this amendment was moved to clause 7. What it does—it was felt in the other place that the fact that the evidence is validated by clause 6 and in clause 7 it is expressly stated that the validated evidence may be relied on by the commissioners in the conduct of the commission and in their report to the President, it was felt that those express words meant that the evidence as validated could not be used in civil or criminal proceedings in any court and an amendment was moved by the Opposition, your colleagues in the other place, and accepted by the Government and that amendment found favour with the entire House. So that the Bill was passed unanimously in the other place with the support of the Government front and back bench in the other place. So that I beg to move the Senate doth agree with the House of Representatives in the said amendment.

Question proposed.

Sen. Mark: Mr. Vice-President, may I again humbly apologize? I think I rushed you and I really want to apologize.

I believe that the Attorney General has, in fact, stated that this was a measure that had unanimous support in the other place, which I am aware of and I am just seeking clarification on a few matters that I would like to have elucidated, elaborated—

Sen. Jeremie SC: Ask your colleagues.

Sen. Mark: No, I am asking you; you are the Attorney General; you are moving the amendment. My colleagues are not here so I have to ask my honourable colleague.

I want to ask the hon. Attorney General whether, when we talk about the evidence being relied upon by the commissioners in the conduct of the commission and in their final report to the President will now be used in any civil or criminal proceedings in any court, our concern here, hon. Attorney General, through you, Mr. Vice-President, is whether the evidence here— [*Interruption*] I did not hear you. You said something?

Sen. Joseph: Is there a Senate UNC and a House UNC?

Sen. Mark: Let me address the Chair. I think if I go to take on this chap— [*Laughter*] I am seeking to get some clarification. Could this evidence be used by John Public, any member of the public, if they wish to file a complaint to the Integrity Commission? It is a point that was raised, as you would recall, in the other place. I am just trying to elicit from you, clarification on the matter.

Before you rise to respond to me, it is an area that we would like to have some clarification on, because we want to know whether evidence considered by the commission can be taken by any member of the public via a complaint and submitted to the Integrity Commission, and if this is so, whether there is any place in your amendment for the inclusion of the Integrity Commission. That is an area we are trying to get some clarification on so that we can, in fact, determine whether evidence emerging out of the commission of enquiry can be submitted, can be cited, can be adduced by a member of the public and submitted to the Integrity Commission for its enquiry and investigation. We know that the Integrity Commission is not a prosecutorial agency.

10.00 p.m.

At the same time we will like to find out from the hon. Attorney General to what extent that point has currency or weight because we want some clarification.

There is also another area. We had proposed an omnibus provision that would have captured the areas that we are now seeking to clarify. The Attorney General did indicate at that time that it would not have been necessary but we still insist that that is an area that ought to be considered by the Attorney General, in ensuring that no loopholes are left, so when this Bill becomes an Act we would have no challenges to this legislation whatsoever. These are two points to which I will like the Attorney General to respond in his winding up.

Sen. Jeremie SC: Mr. Vice-President, as I said in the other place when this question was asked of me by the front bench Opposition, evidence can be taken to the Integrity Commission. The Integrity Commission is not a court so that it is not similar to the civil or criminal proceedings amendment to clause 7. Of course, the evidence if it can stand on its own and it is of a type which the Integrity Commission will accept, subject to their rules and procedures, we can carry it to the Integrity Commission.

The Integrity Commission as you know and anticipated by your argument can do nothing. They cannot prosecute because they are not a court or a prosecutorial agency. They cannot make a finding in law. They can make a recommendation and pass the material on to the police or the Director of Public Prosecutions. The amendment as is drafted is sufficient to meet the concerns expressed in the other place by all the Members opposite. That is why it was passed unanimously.

I beg to move.

Question put and agreed to.

ADJOURNMENT

The Minister of Energy and Energy Industries (Sen. The Hon. Conrad Enill): Mr. Vice-President, I beg to move that the Senate do now adjourn to Tuesday, November 03, 2009, at 1.30 p.m. when we would do the Private Members' Motion on the EITI. We hope to conclude that particular Motion. Tomorrow is Private Members' Day as we agreed on the last occasion.

Question put and agreed to.

Senate adjourned accordingly.

Adjourned at 10.04 p.m.

WRITTEN ANSWER TO QUESTION

The following question was asked by Sen. Wade Mark:

Trinitrain Consortuim Contract (Details of)

177. With respect to the Rapid Rail Project, could the Minister of Works and Transport provide the Senate with:

(i) Details of the US $67 million Phase I contract with Trinitrain Consortium; and
(ii) A copy of the contract?

The following reply was circulated to Members of the Senate:

The Minister of Works and Transport (Hon. Colm Imbert):

Details of the US $67 Million Phase I contract with Trinitrain Consortium are as follows:

- The 'Phase 1 Contract' with Trinitrain is, in fact, only one part of a contract containing three phases with Trinitrain for the overall Rapid Rail Project. Phase 1 is the only Phase that has been commenced under the Contract.
- The three phases of the Rapid Rail Contract are:
  - Phase 1: the "Planning" phase;
  - Phase 2: the "Design-Build" phase; and
  - Phase 3: the "Operation/Maintenance" phase.

- NIDCO/GORTT may elect to proceed, or not to proceed, with each of Phase 2 and Phase 3 of the Rapid Rail Project:
  - in its absolute discretion;
  - without additional payment to the DBOM contractor, beyond amounts paid for work properly performed in Phases previously directed.
- Phase 1 (Planning) is broken down into various stages, each commenced by NIDCO's discretionary issue of a Notice to Proceed. The Stages are:

Stage	NTP	Stage of Phase 1 Work
1	NTP 1	Planning
2		Early Work Activities
	NTP 2A	Data Gathering
	NTP 2B	Early Procurement
	NTP 2C	Early Projects
3	NTP 3	Preliminary Engineering

- Stage 1 Planning: The objective of the planning stage is to determine the basic characteristics and design criteria of the Rapid Rail including: alignment and profile, number and location of stations, location and design of the Operations, Maintenance and Storage Facility, type and configuration of rolling stock, fleet size, mode of operation and maintenance facilities (commenced by NTP 1).
- Stage 2 Early Work Activities: includes data gathering and basis of design (commenced by NTP 2A), and may include:
  - NTP 2B: Early Equipment Procurement, (if required, but none is anticipated); and
  - NTP 2C: Early Action Projects (e.g. Utility relocation and other facilitating work, if required.); and
- Stage 3 Preliminary Engineering: Comprises further development of the design to a 30% complete stage of the work, submitting the EIA, obtaining the CEC, and development of the pricing for Phases 2 and 3 (commenced by NTP 3).

(ii) In accordance with the Design-Build-Operate-Maintain contract executed between the National Infrastructure Development Company Limited (NIDCO) and the Trinitrain Consortium, the Ministry of Works and Transport and Trinitrain Consortium, clause 34 provides in part, that the DBOM contractor (Trinitrain) shall not, and shall ensure that its officers, employees and agents do not disclose or otherwise make public, any documentation, other information or material (whether in written or computer-readable form), which is in any way connected with the project or contract.

The Ministry of Works and Transport is a party to this contract and although clause 34 does not expressly apply to the Ministry of Works and Transport, the Ministry has been advised that to disclose in whole or in part any aspect of the contract may place the other party to the contract in a disadvantageous position.