

Coard & Ors v. The Attorney General (Grenada) [2007] UKPC 7 (7 February 2007)

Privy Council Appeal No 10 of 2006

**Bernard Coard
Callistus Bernard
Lester Redhead
Christopher Stroude
Hudson Austin
Liam James**

Leon Cornwall

Appellants

**John Anthony Ventour
Dave Bartholomew
Ewart Layne
Colville McBarnett
Selwyn Strachan
Cecil Prime**

v.

The Attorney General

Respondent

FROM

**THE COURT OF APPEAL OF
GRENADA**

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

Delivered the 7th February 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hoffmann
Lord Phillips of Worth Matravers
Lord Carswell
Lord Brown of Eaton-under-Heywood

[Delivered by Lord Hoffmann]

1. On 4 December 1986 the 13 appellants were convicted by Byron J and a jury of the murders of Maurice Bishop and 10 others and sentenced to death. Mr Bishop was at the time Prime Minister of Grenada, having come to power as a result of a revolution which ousted the previous constitutional government in 1979. In 1983 the revolutionary party split into two factions led by Mr Bishop and the appellant Mr Coard respectively. On 19 October 1983 there was a violent confrontation in which Mr Bishop and the others were executed by Mr Coard's supporters. A week later Grenada was occupied by the armed forces of the United States and other Caribbean islands and constitutional government under the Governor-General restored. Elections for a new Parliament were held in December 1984.

2. Until the 1979 revolution Grenada shared a Supreme Court with 5 other Associated States pursuant to the West Indies Associated States Supreme Court (Grenada) Act, which gave effect in Grenada to the West Indies Associated States Supreme Court Order SI 1967. The Act was repealed by People's Law No 4 of 25 March 1979, which established instead a Supreme Court of Grenada, consisting of a High Court and Court of Appeal.

3. The West Indies Associated States (Appeals to the Privy Council)(Grenada) Order 1967 SI 1967 No 224 contained machinery for an appeal to the Privy Council from the Court of Appeal established under the West Indies Associated States Supreme Court Order. Section 3 provides that—

“An appeal shall lie to Her Majesty in Council from decisions of the Court given in any proceedings originating in a State in such cases as may be prescribed by or in pursuance of the Constitution of that State.”

4. Section 104 of the 1973 Constitution of Grenada conferred a right of appeal to the Privy Council, as of right in some cases and with special leave in any case. But People's Law No 84 of 1979 abolished appeals to the Privy Council with effect from 13 March 1979. The first Act of the restored Parliament (Act 1 of 1985) confirmed the validity of all laws made by the revolutionary government. Thus at the time that the appellants were indicted on 28 September 1984 the Grenada judicial system consisted of a High Court and Court of Appeal established under

People's Law No 4 of 1979. The appellants brought a constitutional motion challenging the validity and jurisdiction of the High Court but this was dismissed. An appeal to the Court of Appeal was likewise dismissed. The appellants then petitioned the Privy Council for special leave to appeal but leave was refused in July 1985 on the ground that the right of appeal had been abolished by People's Law No 84 of 1979: see *Mitchell v Director of Public Prosecutions* [1986] AC 73.

5. At the trial, the appellants withdrew instructions from their counsel and took no part. In fact they behaved disruptively and from time to time had to be removed from the court room. Although they gave no evidence, they made what they called "indicative statements" from the dock, saying what they would have said in their defence if they had been minded to do so. The jury convicted them. Section 230 of the Criminal Code, which has remained in force at all material times, provides that the mandatory sentence for murder is death. The appellants were sentenced accordingly.

6. After conviction and sentence, the appellants appealed to the Grenada Court of Appeal. The appeal was heard over a lengthy period during 1990 and the appellants raised such matters as the unfavourable publicity at the time of the trial, the selection and attitude of the jury, the circumstances in which confessions were obtained, non-disclosure of material in the hands of the prosecution and alleged defects in the summing up. The Court of Appeal dismissed the appeals in July 1991. It appears that detailed oral judgments were given over a period of three days. No written judgment has been provided and it appears that no transcript or written note of the oral judgments was made.

7. Section 74(1) of the Constitution provides that where any person has been sentenced to death, the Minister designated for the purpose must refer the case to the Advisory Committee on the Prerogative of Mercy and, after obtaining its advice, "decide in his own deliberate judgment" whether to advise the Governor-General to exercise his powers under section 72(1), on behalf of Her Majesty, to (among other things) "grant a pardon, either free or subject to lawful conditions" or to "substitute a less severe form of punishment." By section 72(2), these powers must be exercised in accordance with the advice of the Minister.

8. On 15 August 1991 the Governor-General signed warrants in respect of each of the appellants which recited that the Minister had decided to advise the Governor-General to commute the sentence of death to one of life imprisonment. The warrant then said that the Governor-General, in accordance with that advice, granted the appellant a pardon "on condition that [he] shall be kept in custody to hard labour for the remainder of his natural life."

9. Since then, the appellants have remained in custody. During that period, there have been developments in the law. On 2 April 2001 the Eastern Caribbean Court of Appeal, presided over by Byron CJ (who had been the trial judge in this case), held in an appeal from St Lucia that the mandatory death penalty was an “inhuman or degrading punishment” and unconstitutional. This decision was affirmed by the Privy Council on 11 March 2002: see *Regina v Hughes* [2002] 2 AC 259. In consequence, the appellants filed a constitutional motion on 23 September 2002, claiming that the sentences imposed upon them had been unlawful. It followed that the warrants of commutation under which they were held in custody had no legal basis and were likewise unlawful.

10. To this central submission, Mr Fitzgerald QC on behalf of the appellants added further grounds of complaint. Their Lordships will briefly deal with these before returning to the substantial point in the appeal.

11. First, he submitted that, as much of the trial took place in the absence of the appellants (they having been removed because they were attempting to disrupt it), section 8(2) of the Constitution precluded the imposition of a sentence of death or imprisonment. The relevant part of this section reads:

“...except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence:

Provided that, in such circumstances as may be prescribed by law, the trial may take place in the absence of the person charged so long as no punishment of death or imprisonment (other than imprisonment in default of payment of a fine) is awarded in the event of his conviction.”

12. Their Lordships do not think that there is anything in this point. The structure of the provision is that the first part lays down a rule (no trial in the absence of the accused) subject to two exceptions (consent and disruption). The whole of the first part is then subject to a proviso allowing legislation under which people may be tried in their absence for minor offences. In this case, the trial did not infringe the rule because it fell within one of the exceptions. It follows that there was no need for it to come within the proviso. The appellants’ construction would produce

the absurd result that anyone charged with a serious offence could avoid imprisonment by disrupting the proceedings.

13. Secondly, Mr Fitzgerald said that whatever might be said about the legality of the sentence of death, the warrant of commutation was itself invalid. It recited that the Minister had advised commutation to a sentence of life imprisonment, but the warrant then purported to grant a conditional pardon, which was something different. Furthermore, the condition – that the appellants be imprisoned for the rest of their “natural lives” – was unknown to the law and would be an inhuman punishment because it would preclude any account being taken of individual circumstances or progress in prison.

14. Their Lordships consider that if the condition attached to the pardon is read literally, there is much in what Mr Fitzgerald says. But the document should be construed on the assumption that the Governor-General intended to do what he was constitutionally required to do, namely, to give effect to the advice of the Minister. The fact that he (or whoever drafted the instrument) may have had an imperfect understanding of what a sentence of life imprisonment would entail or did not realise that it took effect under section 72(1)(c) of the Constitution rather than section 72(1)(a) should not deflect the court from applying this principle of construction. Their Lordships therefore interpret the warrants as having been intended to do no more than substitute a sentence of life imprisonment.

15. Next, Mr Fitzgerald says that appellants’ constitutional rights have been infringed because they have not been supplied with a written copy of the judgments delivered by the Court of Appeal in July 1991. This is said to infringe section 8(3):

“When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.”

16. The appellants have several times asked for copies of the Court of Appeal judgments but they have never been the subject of a specific application to the Court. It appears that no transcript was made of the oral judgments, probably because the judges read from a text which they had prepared and which it was contemplated would be made available as

an authorised record of the judgments. But this has never happened. For one reason or another (there is a suggestion of a dispute between the judges and the Grenada government over payment of their fees) the judges have retained whatever text they used. So the question is whether these documents constitute a “record of the proceedings made by or on behalf of the court”.

17. Their Lordships consider that there is no evidence that these documents ever became a record of the proceedings. The papers that a judge uses for an oral judgment only become part of the record if he authorises them to be so used. Until then, whether they are rough notes or a polished text, they are only the material which he uses for his judgment and which may or may not coincide with what he actually says. In the present case the judges do not appear even to have parted with their text, let alone authorised its use as a record. It follows that there has been no breach of article 8(3).

18. It is possible to imagine circumstances in which failure to *create* a written record of some parts at least of the proceedings may infringe the general right to a fair trial (including an appeal) under section 8(1). A right of appeal may be incapable of practical exercise without one. In the case of an oral judgment, however, it is ordinarily the duty of counsel to make a note. No one seems to have taken a note of the judgments of the Court of Appeal in this case, possibly because they were expecting to be provided with an authorised version by the court. But whether the judges or anyone else said anything to encourage this expectation has not been investigated because the appellants have placed their reliance on section 8(3) and not section 8(1). Furthermore, if there was no further appeal from the judgment of the Court of Appeal, it is not easy to see how the appellants have been prejudiced by the absence of a written record of the judgments. It was said that they might have been needed for petitions to international human rights bodies, but there is no evidence that any such petition was criticised or rejected for lack of such records.

19. Mr Fitzgerald’s next point was that the appellants had been denied their constitutional right to appeal to the Privy Council. As their Lordships have noted, the Board in *Mitchell v Director of Public Prosecutions* [1986] AC 73 advised that the right had been effectively abolished by People’s Law No 84 of 1979. This law had been confirmed after the restoration of constitutional government by Act No 1 of 1985 and (since there was a doubt about whether that law had been certified as passed by the majorities needed for a constitutional amendment under section 39(2) of the Constitution) confirmed a second time by Act 16 of 1987. The Constitutional Judicature (Restoration) Act 1991, which restored the pre-revolutionary judicial system as from 15 August 1991,

also restored the appeal to Her Majesty in Council. By this time, the appeal against conviction and sentence had been dismissed by the former Court of Appeal. Section 7(4) of the 1991 Act made it clear that the restoration did not operate retrospectively:

“Notwithstanding anything contained in this Act or any other law, no appeal whatsoever shall at all lie to Her Majesty in Council, whether final, interlocutory or otherwise or from any thing or matter arising out of any such decision of the former Court of Appeal.”

20. Mr Fitzgerald submitted that *Mitchell v Director of Public Prosecutions* [1986] AC 73 was wrongly decided. The arguments which he advanced against the decision were in substance the same as those which the Board then rejected. In essence, he argued that section 3 of the West Indies Associated States (Appeals to the Privy Council)(Grenada) Order 1967 (SI 1967 No 224), which has been quoted above, did not merely provide machinery for such right of appeal as the Constitution might from time to time create but directly conferred a right of appeal which could be abolished only by the special voting procedure prescribed by section 39(5) of the Constitution for an amendment of section 3. It is common ground that the 1987 Act complied with section 39(2) but not with section 39(5).

21. Their Lordships reject this argument for the reasons given by Lord Diplock in *Mitchell*. The 1967 Order was made under powers conferred by the Judicial Committee Act 1844 and the language of section 3 shows clearly that it is concerned not with the constitutional question of whether a right of appeal should exist but with the procedural question of how such an appeal should be exercised. Once the Constitution was amended to abolish the right of appeal, there was nothing upon which the 1967 Order could operate.

22. The last of Mr Fitzgerald’s additional points was a bold application for leave to challenge the constitutionality of the convictions at the 1986 trial. For this purpose he applied also for leave to introduce a number of affidavits concerning the facts of the case, the pre-trial investigations and the conduct of the trial. Their Lordships refused the application. It is simply an attempt to use the procedure of a constitutional motion to obtain from the Privy Council a review of the 1991 decision of the Court of Appeal. As the law then stood, the decision of the Court of Appeal was final and section 7(4) of the 1991 Act made it clear that it was not to be any less final because an appeal to the Privy Council had been restored. All the points raised by Mr Fitzgerald in support of his

application and supported by the new affidavits were or could have been taken in the appeal. The use of a constitutional motion to avoid the finality of a decision dismissing a criminal appeal is ordinarily impermissible, for the reasons explained by Lord Diplock in *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106, 111-112:

"Acceptance of the applicant's argument would have the consequence that in every criminal case...there would be parallel remedies available to [the accused]: one by appeal to the Court of Appeal, the other by originating application under ... the Constitution...The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress...to a court of co-ordinate jurisdiction, the High Court. To give to...the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

23. In *Hinds v Attorney-General of Barbados* [2002] 1 AC 854 the Board applied this statement of principle. Lord Bingham of Cornhill said (at p. 870):

"Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The applicant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings [for constitutional relief]."

24. A similar point was considered by the Supreme Court of Canada in *R v Sarson* [1996] 2 SCR 223. The appellant had been charged with murder under the felony murder rule then applicable in Canada and pleaded guilty. Eleven months later the Supreme Court decided that the felony murder rule was unconstitutional. The accused applied for leave to appeal out of time but the application was refused. He then brought an application for habeas corpus on the ground that his detention on the basis of an unlawful conviction was an infringement of his rights under the Canadian Charter of Rights and Freedoms. But the Supreme Court held

that he could not use a collateral procedure to re-open the question of whether his conviction had been lawful. Even if a subsequent decision establishes that the law under which he had been convicted was constitutionally invalid, his guilt remains a matter of *res judicata* as between him and the Crown. Sopinka J said (at p 237) an accused could rely on subsequent judicial authorities only if he was “still in the judicial system”, that is to say, if an appeal was still possible. Otherwise the decision of the criminal court was final.

25. The finality of the appeal does not mean that the convicted person is entirely without remedy. As in many jurisdictions, the Governor-General has a power to refer the case back to the Court of Appeal, which must then hear and determine it as if it were a fresh appeal: see section 60 of the West Indies Associated States Supreme Court (Grenada) Act Cap 336.

26. Their Lordships therefore return to the main submission, namely that the mandatory sentence of death was unconstitutional. Mr Dingemans QC, appearing for the Attorney-General of Grenada, did not contest this point. It was so held in relation to the similar constitutions of other Caribbean states in *Reyes v The Queen* [2002] 2 AC 235 (Belize); *Regina v Hughes* [2002] 2 AC 259 (St Lucia); *Fox v The Queen* (2002) 2 AC 284 (Saint Christopher and Nevis) and *Bowe v The Queen* [2006] 1 WLR 1623 (The Bahamas). The last case decides that upon the true construction of the Grenadian Constitution, such a sentence was unconstitutional at the time it was passed in 1986. The result is that section 230 of the Criminal Code must be interpreted to mean, and has meant since the Constitution came into force in 1974, that the death penalty for murder is discretionary: a person convicted of murder may be sentenced to death but may instead be given a lesser sentence. The judge did not exercise this discretion and the sentence was therefore unlawful.

27. Mr Dingemans submitted, however, that the validity of the sentence of death was just as much *res judicata* as the validity of the conviction. If, as the Privy Council held in *Bowe's* case, the sentence was unconstitutional by 1986, the point could just as well have been taken before the Court of Appeal in 1991. The appellants are no longer “in the judicial system” and their only remedy is to petition the Governor-General under section 60 to grant them executive clemency or refer their cases back to the Court of Appeal.

28. In the ordinary way, there would be both logic and practical sense in Mr Dingemans's argument. But this is no ordinary case. First, the application to this case of the doctrine of *res judicata* is somewhat artificial. The legality of the mandatory death sentence imposed upon the

appellants has never been the subject of judicial decision. It is true that it could have been raised before the Court of Appeal in 1991 and the Board's decision in *Bowe's* case shows that if it had been raised, the correct answer would have been that it was unlawful. But that follows from the principle that judicial decisions on the meaning of the Constitution have retrospective effect. In practice, however, as was shown by the citation by Lord Bingham in *Bowe* of earlier cases before the Board, it is unrealistic to expect that the argument which succeeded in *Bowe* would have been entertained, let alone succeeded, before the Court of Appeal.

29. Secondly, the sentence in question was death. If the appellants were still at risk of execution, there can be little doubt that the Board would not allow the principle of *res judicata* to stand in the way of granting relief to prevent the carrying into effect of an unlawful sentence. But the validity of the life sentence substituted by the warrant of commutation is dependent upon the validity of the sentence of death. In the absence of such a sentence, the Governor-General has no power to order that the appellants be imprisoned for life and the appellants therefore remain held in detention without lawful authority.

30. Thirdly, there has never been any judicial contribution to determining the sentences which the appellants should serve. Byron J, correctly applying the law as it was understood at the time, exercised no discretion. And the appellants' present detention is solely by the authority of the executive.

31. Fourthly, there appears to be no adequate mechanism in Grenada for providing the appellants, even now, with the judicial sentencing procedure to which they were entitled. The only prospect of a review of the sentences is by means of the exercise of the royal prerogative of mercy, which depends entirely upon executive discretion. It is the Minister who advises the Governor-General on the exercise of the prerogative powers in section 72(1) of the Constitution. Before doing so, the Minister may, if he chooses, seek the advice of the Advisory Committee under section 74(2), but he is not bound by their advice. Alternatively, the Minister may receive advice from a Board of Review which he has appointed under section 2 of the Prison Rules Cap 254 to review the sentences of long term prisoners. In this latter case, however, it appears that the machinery has failed to function. Section 3(b) of the Prison Rules requires that the Board of Review should review the sentences of all life prisoners after the first 12 months have been served and thereafter after 4 years from the date of sentence and then at 4 yearly intervals. When these proceedings were before Benjamin J, he said (paragraph 49) that the Board had either never been appointed or had not

functioned: in either case the situation was “unsatisfactory and inexcusable”. It would appear from the affidavit in support of the constitutional motion that between October 1999 and April 2000, all but one of the appellants were interviewed by the Board but there is no evidence that any advice was tendered to the Minister. When the case was before the Court of Appeal, the Review Board had still not functioned and their Lordships were told that nothing further has happened. It may be that the reason for the failure to review the sentences is that the authorities took the view that the terms of the warrant of commutation precluded any possibility of release. If that was the case, then, as their Lordships have already indicated, they think that this was a misreading of the terms of the warrant.

32. Fifthly, and perhaps most important, is the highly unusual circumstance that, for obvious reasons, the question of the appellants’ fate is so politically charged that it is hardly reasonable to expect any Government of Grenada, even 23 years after the tragic events of October 1983, to take an objective view of the matter. In their Lordships opinion that makes it all the more important that the determination of the appropriate sentence for the appellants, taking into account such progress as they have made in prison, should be the subject of a judicial determination.

33. In *Hinds v Attorney-General of Barbados* [2002] 1 AC 854, 870 Lord Bingham qualified the principle stated by Lord Diplock in *Chokoling v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106 with this observation:

“It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument.”

34. Their Lordships do not think that in practice the relief sought by the appellants in relation to their sentences was ever available through the ordinary avenue of the appeal. They will therefore humbly advise Her Majesty that this appeal should be allowed and that it should be declared that the sentence of death imposed upon the appellants was invalid and that the case should be remitted to the Supreme Court of Grenada for the appellants to be sentenced in accordance with the construction of section 230 of the Criminal Code which their Lordships have indicated, taking into account the progress made by the appellants during their time in prison.

