

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS  
SAINT CHRISTOPHER CIRCUIT**

**CLAIM NO. SKBHCV2015/0137-0138**

**BETWEEN:**

- 1. JEFFREY MARTIN**
- 2. BERNARD RICHARDS**

Claimants

**and**

- 1. THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS**
- 2. THE SUPERINTENDENT OF PRISONS**

Defendants

**Appearances:-**

Mr. John Cato for the Claimants

Mrs. Tashna Powell Williams for the Defendants

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2018: October 29  
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**JUDGMENT**

- [1] **VENTOSE, J.:** The Claimants have been spared the sentence of death by hanging because of the exercise by the Governor General of the prerogative of mercy to commute their respective sentences to 50 years imprisonment. This was done pursuant to section 66(2)(c) of the Constitution of Saint Christopher and Nevis that provides that the Governor General may substitute a less severe form of punishment for any punishment imposed on any person for any such offence. The Claimants filed originating motions on 15 June 2015 alleging that the sentences are unconstitutional because the Governor General had no power to exercise the function of the court in sentencing them in breach of, among other things, the

separation of powers doctrine. Each Claimant therefore claimed, among other things:

1. A declaration of this Honourable Court that his right to liberty guaranteed under section 5(1)(b) of the Constitution has been, is being or is likely to be contravened in relation to him.
2. That he be forthwith released upon the finding and determination of this Honourable Court that such rights as the Claimant is entitled under the Fundamental Rights provisions of the Constitution have been infringed.

[2] The Claimants state that they have been serving sentences of 50 years imprisonment without remission of time that were not handed down by a court of competent jurisdiction as stipulated by the Constitution, but by way of warrants of commutation issued under the authority of the Governor General. The Claimants also state that they are: (1) constitutionally entitled to have their sentences reviewed every four years at the level of the Mercy Committee; (2) entitled to know the facts and circumstances surrounding the review; and (3) entitled to make representations to the Committee whenever this occurs. In addition, the Claimants state that since their incarceration they have never been informed of any such review or any arrangement or plans for hearing of any review of their sentences.

[3] The Defendants in response state that: (1) the court sentenced the First Claimant to death on 20 June 1985 and the Second Claimant to death on 22 May 1991; and (2) in commuting their sentences, the Governor General acted in accordance with the authority vested in him by section 66(2)(c) of the Constitution. The Defendants continue that the First Claimant and Second Claimant are detained pursuant to warrants of commutation dated 10 December 1985 and 12 December 1996 respectively but that the warrants of commutation do not make any mention of detention without the hope of remission. In addition, they state that the Governor General is specifically empowered by the Constitution to commute the Claimants' sentences to 50 years imprisonment and that the sentences do not have to be ones handed down by a court of competent jurisdiction. The Defendants deny that the actions of the Governor General infringed any of the constitutional rights of the Claimants.

[4] The question for determination is whether the Governor General acted unlawfully in issuing the warrants of commutation.

[5] A similar question was answered as recently as 2007 by the Privy Council in **Coard et al v Attorney General of Grenada** (2007) 69 WIR 295. In that decision, the appellants were convicted of murder and sentenced to death on 4 December 1986. On 15 August 1991, the Governor General signed warrants of commutation for each of the appellants that granted them a pardon “on condition that [he] shall be kept in custody to hard labour for the remainder of his natural life”. The Privy Council explained at [9]) that:

[S]ince 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 Sir Dennis 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 *R v Hughes* [2002] UKPC 12, 60 WIR 156. 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.

[6] The Privy Council then stated that:

[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 R* [2002] UKPC 11, 60 WIR 42 (Belize), *R v Hughes* (2002) 60 WIR 156 (St Lucia), *Fox v R (No 2)* [2002] UKPC 13, 61 WIR 169 (St Christopher and Nevis) and *Bowe and Davis v R* [2006] UKPC 10, 68 WIR 10 (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 s 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.

[7] Indeed one of the cases mentioned in that paragraph emanated from this jurisdiction: **Fox v R (No 2)** [2002] UKPC 13, 61 WIR 169, [2002] 2 AC 284. The

effect of the decision in **R v Hughes** [2002] UKPC 12, 60 WIR 1, **Fox** and their progeny is that the mandatory death sentence imposed on any person in Saint Christopher and Nevis is unconstitutional.

- [8] The Privy Council in **Coard** rejected arguments that the validity of the sentence of death was just as much *res judicata* as the validity of the conviction, stating that:

[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.

- [9] A summary of the reasoning of the Privy Council is as follows: first, the legality of the mandatory death sentence imposed upon the appellants had never been the subject of judicial decision. Second, without the sentence of death the Governor

General had no power to commute to life imprisonment. Third, there was no judicial determination of the appellants' sentences of death. Fourth, there was a lack of an appropriate mechanism for providing persons like the appellants with the judicial sentencing exercise to which they were entitled. Fifth, the only available mechanism for any review of the sentences was the exercise of the prerogative of mercy, which depended solely on executive discretion. As a result the Privy Council (at [34]) concluded that:

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 s 230 of the Criminal Code which their lordships have indicated, taking into account the progress made by the appellants during their time in prison.

- [10] I disagree with the Defendants that the case at bar can be distinguished from **Coard**. The facts are almost indistinguishable – the appellants in **Coard** and the case at bar: (1) were convicted of murder; (2) sentenced to death by hanging (the mandatory sentence); (3) had their sentences commuted by warrant of commutation issued by the Governor General (**Coard**: life imprisonment, and the Claimants: 50 years imprisonment); and (4) challenged the basis on which they remained in detention. The principles enunciated in **Coard** (summarized above at [9] above) are of general application and are directly applicable here.
- [11] The Claimants were convicted for murder and sentenced to suffer the mandatory penalty of death by hanging. The Governor General then commuted their sentences of death to ones of imprisonment for 50 years. The validity of the sentences substituted by the warrants of commutation is dependent on the constitutionality of the sentences of death. Since the decision of the Privy Council in **Hughes** the mandatory death penalty is unconstitutional and is treated as unconstitutional at the time when the death sentence was passed. There is no doubt that the mandatory death sentence is unconstitutional in Saint Christopher and Nevis: **Fox**. Consequently, the Governor General had no power to commute a sentence which was unlawful when it was passed: **Bowe and Davis v R** [2006]

UKPC 10, 68 WIR 10. Therefore, when the Governor General in 1985 commuted the sentence of death of the First Claimant and in 1996 commuted the sentence of death of the Second Claimant to ones of 50 years imprisonment he was exercising a power he did not have. The Claimants therefore remained in detention without lawful authority: **Coard**.

[12] The Claimants rested their case not only on the exercise by the Governor General of his power under section 66 of the Constitution but also on the section itself, arguing that section 66(2) cannot “sit at the table” with the separation of powers doctrine. The Defendants submit that the Claimants’ argument is premised on a fundamental misconception of the character of the prerogative of mercy. I agree with the Defendants’ characterization of that argument. It is not necessary for me to examine the cases cited by Counsel for the Defendants because it is clear that the ordinary exercise by the Governor General of the prerogative of mercy under section 66 of the Constitution does not offend the separation of powers doctrine. The exercise of the prerogative of mercy is an act of reprieve from an otherwise lawful sentence determined by a judicial officer.

[13] However, when, as here, the warrant of commutation becomes the only basis on which a person is detained (because the sentence is declared unconstitutional) the separation of powers doctrine is implicated because there is no judicial determination of sentence to justify the continued detention. In such a case, the situation becomes no different in principle to the cases exemplified by **DPP v Mollison (No 2)** [2003] 2 LRC 756 where the Privy Council held unconstitutional section 29(1) of the Juveniles Act 1951 under which the respondent was sentenced to be detained during the Governor General’s pleasure. I also agree with Counsel for the Defendants that many decisions of the Privy Council and Caribbean courts have accepted the lawfulness of the prerogative of mercy, although its exercise by the Governor General is subject to judicial review: **Lewis v Attorney General of Jamaica** [2001] 2 AC 50. The Claimants’ argument relating to the constitutionality of section 66 of the Constitution has no merit.

[14] I do not agree with Counsel for the Defendant that the Claimants are attempting to raise an issue not raised in their pleadings, namely, a challenge to the sentence imposed by the court. The Claimants specifically stated in the fixed date claim that:

[T]he sentence was unconstitutional in that there was no power in (sic) the Governor General to exercise the function of the Court in sentencing him to a term of imprisonment and that the exercise of the judicial function of sentencing constituted a breach of the Separation of Powers Doctrine which the Constitution espouses and therefore offends against section 5 of the Constitution in that it is not authorized under the Constitution and deprives him of his liberty.

[15] This is an explicit challenge to the lawfulness of the sentences imposed on the Claimants by the Governor General. The lawfulness of the sentences of 50 years imprisonment engages directly the constitutionality of the sentences of death for which they were substituted. Moreover, the Claimants claimed a declaration that their right to liberty guaranteed by section 5(1)(b) of the Constitution has been, is being and is likely to be contravened. The only basis for the alleged infringement is the continued detention of the Claimants under the warrants of commutation issued by the Governor General. As stated above, the continued detention of the Claimants is unconstitutional because it is not based on a judicial determination of sentence after conviction. The Defendants state that in both Claimants' cases the judicial "function of sentencing was therefore conducted by the court". I disagree. The original detention of the Claimants was based solely on the mandatorily imposed sentence of death. The court had no role in the determination of their original sentences.

[16] There is nothing in the decisions of **Chokoling v Attorney General of Trinidad and Tobago** [1981] 1 All ER 244, [1981] 1 WLR 106 and **Hinds v Attorney General of Barbados** [2002] 4 LRC 287 that is of any relevance to this case. **Chokoling** is the authority for the principle that where an alternative remedy exists, for example, by pursuing an ordinary appeal, it will be an abuse of process for an applicant to seek constitutional relief by way of collateral challenge. In 1985 and 1991 the Claimants could not seek to challenge the mandatory death

sentence (**Hughes** was decided in 2001) or the decision of the Governor General in 1985 or 1996 to commute their sentences (**Coard** was decided in 2007).

- [17] The originating motion was the only way for the Claimants to challenge the lawfulness of their continued detention. Their constitutional challenges do not therefore offend the principle enunciated in **Chokolingo**. The discussion of **Chokolingo** by the Privy Council in **Coard** related to its rejection of an attempt by the appellants to challenge their *convictions*, not their continued detention. Lord Hoffman (at [22]) in **Coard** stated that:

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 [the Board in *Chokolingo*].

- [18] The Claimants also sought a declaration that they be released from prison forthwith if the court finds that their constitutional rights have been infringed. It bears repeating that the Claimants have not had a judicial determination of their sentences to which they are entitled. Their situation is not different in this regard than that faced by the appellants in **Coard** where the Privy Council, after declaring their sentences of death to be invalid, remitted the matter to a trial judge for them to be sentenced, taking into account the progress they made during their time in prison. The Claimants have not provided any authority or reasons in principle or policy to justify their immediate release from prison. I agree with the Defendants' suggestion that the cases should be remitted to a trial judge for sentence hearings with time served being taken into account. The Claimants must now have the benefit of a judicial determination of their sentences taking into account any progress they have made during their time in prison. The orders made below are sufficient to vindicate the constitutional rights of the Claimants. It follows therefore that the remedy of damages under section 18(1) of the Constitution is not an appropriate remedy for the constitutional infringements.

### **Disposition**

- [19] For the reasons explained above, I declare that:

1. That the mandatory sentences of death imposed on the Claimants are unconstitutional.
2. The Governor General acted unlawfully in substituting by warrant of commutation the sentences of 50 years for the sentences of death.
3. The Claimants' right to personal liberty guaranteed by section 5(1)(c) of the Constitution has been and is being infringed because their continued detention is without lawful authority.
4. The appropriate sentences to be imposed on the Claimants be determined by a High Court Judge, after hearing or receiving such evidence and submissions as may be presented and made, taking into account time already served and the progress, if any, made by the Claimants during their time in prison.
5. No order as to costs.

[20] I wish to thank counsel for the parties for their helpful submissions.

**Eddy D. Ventose**  
High Court Judge

**By the Court**

**Registrar**