GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 10 OF 2004

IN THE MATTER OF THE CONSTITUTION OF GRENADA

and

IN THE MATTER OF AN APPLICATION BY BERNARD COARD AND OTHERS FOR REDRESS PURSUANT TO SECTION 16 OF THE SAID CONSTITUTION OF GRENADA FOR CONTRAVENTIONS OF SECTIONS 3, 5 AND 8 THEREOF IN RELATION TO THEM

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

[1] BERNARD COARD
[2] CALLISTUS BERNARD
[3] LESTER REDHEAD
[4] CHRISTOPHER STROUDE
[5] HUDSON AUSTIN
[6] LIAM JAMES
[7] LEON CORNWALL
[8] JOHN ANTHONY VENTOUR
[9] DAVE BARTHOLOMEW
[10] EWART LAYNE
[11] COLVILLE MC BARNETTE
[12] SELWYN STACHAN
[13] CECIL PRIME

Respondents

Before: Hon. Brian Alleyne S.C. — Justice of Appeal
Hon. Michael Gordon Q.C. — Justice of Appeal
Hon. Suzie d'Auvergne — Justice of Appeal [Ag.]

Appearances:

Mr. Karl Hudson-Phillips Q.C., Mr. Rohan Phillip, instructed by Henry Hudson-Phillips & Co. for the Appellant

Mr. Keith Scotland and Mr. Cajeton Hood for the Respondents other than Bernard Coard and Ewart Layne

Mr. Ruggles Ferguson and Mr. Derrick Sylvester for Respondents Bernard Coard and Ewart Layne

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2004: November 22, 23, 24;
2005: February, 14.

JUDGMENT

[1] ALLEYNE, J.A.: The respondents are all inmates at Her Majesty's Prison at Richmond Hill in Grenada, and have been since they were convicted in the High Court of Grenada (hereinafter the former High Court) on December 4th 1986 on 11 counts of murder and sentenced to death as a result, in keeping with the then lawful mandatory sentence of death for the crime of murder as prescribed by the Criminal Code of Grenada[1].

[2] The respondents' trial took place largely in their absence. Before the actual trial commenced, on 18th April 1986, after the learned trial judge had advised the respondents of their right to challenge jurors, the record shows that 'all the accused start clapping and stamping and chanting "This court is a Yankee Court", "This court is unconstitutional", and other similar expressions of disdain. This went on for about 10 minutes, after which the learned judge ordered the police to remove the respondents from the court, which they did. Counsel for the Crown made submissions regarding continuing the proceedings in the absence of the respondents, and referred, according to the record, among other things, to the provisions of section 8(2)(f) of the Constitution of Grenada[2]. I think it would be useful at this point to reproduce the provisions of section 8(2) in its entirety:

> "(2) Every person who is charged with a criminal offence-
> (a) shall be presumed to be innocent until he is proved or had pleaded guilty;

[1] Now CAP. 1, Laws of Grenada Continuous Revised Edition 1994.
[2] Statutory Instrument No. 2157 of 1973 U.K.

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
(c) shall be given adequate time and facilities for the preparation of his defence;
(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;
(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,

and 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."

[3] The court ordered that all accused be brought back in to court. The learned trial judge recorded that they started going to the bathroom one by one. He advised them of their right of challenge, after which they all started chanting and stamping and making disparaging remarks about the judge and the court, and "make a great disorder again." The judge once again ordered their removal from the court, took and recorded evidence of the conduct of the respondents, called the respondents one by one and after citing each and asking each whether he has anything to say, to which they each make no response, he committed each to seven days for contempt, except Hudson Austin and Selwyn Strachan whom he discharged after hearing them. The court rose and on the resumption, in the presence of Mr. Strachan and Mr. Austin, began the process of empanelling a jury for the trial of the respondents. Strachan and Austin once again commence disruptive conduct, the judge cited each for contempt, allowed them the opportunity to be heard, and after hearing them, committed each for 10 days for their contempt.

[4] The learned trial judge then recorded that the trial proceeded in the absence of the accused, "they having conducted themselves in such a manner as to render continuance of the proceedings in their presence impracticable in consequence of which I have ordered them removed and the trial to proceeds." A jury was thereupon empanelled in the absence of the respondents. Twenty-nine potential jurors were stood aside, one was challenged by the prosecution, and 2 were excused, before a panel of 12 jurors to try the accused was empanelled and sworn. The judge directed that 6 alternate jurors be sworn. Once again in the process the prosecution stood aside 14 persons called to be empanelled before 6 alternates could be sworn. The trial then commenced and proceeded to a conclusion in the absence of the respondents. They were all convicted on all counts and all sentenced to the mandatory death penalty.

[5] On December 10th 1986 the respondents lodged appeals against their convictions and sentences. On July 12th 1991 the then Court of Appeal (hereinafter the former Court of Appeal) dismissed the appeals and affirmed their convictions and sentences. The judgments of the learned judges of the former Court of Appeal were read in court, we are told over a period of two days. Nevertheless, despite the best efforts of the respondents, a written record of the judgment of the former court has not been made available to them.

[6] On July 19th 1991 the Governor-General of Grenada assented to the Constitutional Judicature (Restoration) Act of 1991[3], and on the same date issued a Proclamation[4] appointing August 1st 1991 as the date for the coming into effect of the said Act (hereinafter the Restoration Act).

[7] On July 29th 1991 the respondents filed a Motion in the former Court of Appeal, which heard the matter expeditiously, dismissed the Motion, and refused to re-

[3] Act No. 19 of 1991.
[4] SR&O 14 of 1991.

hear the appeals or to grant a stay of execution of the death sentences. As a result of the filing of that Motion and the decision of the Authority of the Organisation of Eastern Caribbean States (OECS) to which reference will be made in due course, the Proclamation of July 19th was revoked on July 30th, and the Restoration Act was subsequently brought into force with effect from August 15th 1991, after the Motion before the former Court of Appeal had been disposed of.

[8] On August 15th 1991 the Governor-General issued a series of documents under the Public Seal of Grenada headed COMMUTATION OF DEATH SENTENCE AND WARRANT FOR IMPRISONMENT. By these instruments the Governor-General, purporting to be acting in the exercise of his powers under section 72(1) of the Constitution of Grenada[5], granted to each of the respondents:

> 'a pardon in respect of the said conviction, on condition that (he) shall be kept in custody to hard labour for the remainder of his natural life and be confined in the Richmond Hill Prisons as Her Majesty's Governor-General shall from time to time direct'.

[9] The respondents have since been kept in confinement at the prison and remain so to the present. There has been a multiplicity of litigation on the part of the respondents concerning their trial, convictions and sentences, the present appeal being the latest.

[10] On September 23rd 2002 the respondents issued a Fixed Date Claim by which they claimed-

(a) A declaration that the sentence of death imposed upon them at their trial was unconstitutional and illegal.

(b) A declaration that the imposition of the term of imprisonment for the remainder of their natural lives by the Governor-General pursuant to the advice of the Chairman of the Advisory Committee on the Prerogative of Mercy is unconstitutional, illegal, null and void.

[5] Statutory Instrument No. 2155 of 1973 (UK).

(c) A declaration that the failure by the respondents to provide the applicants with the record of the proceedings including the written reasons used to justify the dismissal of the applicants' appeal against conviction is unconstitutional and illegal.

(d) An order that the sentence of imprisonment for the remainder of the applicants' natural lives be quashed.

(e) An order that the applicants be released forthwith.

(f) An order that monetary compensation including aggravated and/or exemplary damages be assessed by a Judge in Chambers and paid by the respondents to the applicants as a result of the above mentioned unconstitutional actions.

(g) Costs.

(h) Such further or other relief as the nature of the case may require.

[11] On 16th March 2004 the learned trial judge made the following declarations and orders:

Declared: 1. The sentence of death imposed upon the applicants at their trial was unconstitutional and illegal.

2. The imposition of the term of life imprisonment for the remainder of the applicants' natural lives by the Governor-General pursuant to the advice of the Chairman of the Advisory Committee on the Prerogative of Mercy is unconstitutional, illegal, null and void.
3. The failure of the respondent to provide the applicants with the written reasons used to justify the dismissal of the applicants' appeal against conviction is unconstitutional and illegal.

Ordered 1. The sentence of imprisonment for the remainder of the applicants' natural lives be quashed.

2. The applicants be remanded to custody and brought before a judge of the High Court within 42 days to be sentenced pursuant to the convictions dated December 4, 1986.
3. The applicants be paid monetary compensation to be assessed by a judge in Chambers and the said monetary compensation to be paid to the applicants by the respondent as a result of the failure to provide the applicants with the said written reasons.
4. The respondent shall pay to the applicants costs fixed in the sum of $15,000.00.

[12] The appellants, by their amended Notice of Appeal, appealed against the learned trial judge's order that

(a) The sentence of imprisonment for the remainder of the respondents' natural lives be quashed.
(b) The respondents be remanded to custody and brought before a Judge of the High Court within 42 days to be sentenced pursuant to the convictions dated December 4, 1986.
(c) The respondents be paid monetary compensation to be assessed by a Judge in Chambers and the said monetary compensation be paid to the respondents by the appellant as a result of the failure to provide the respondents with the said written reasons.
(d) The appellant shall pay the respondents costs fixed in the sum of $15,000.00.

[13] The respondents filed a Notice of Appeal (the counter-notice of appeal) against the learned trial judge's findings:

(i) That the pardons granted to the appellants by the Governor General on 15th August 1991 pursuant to the advice of the Chairman of the Advisory Committee on the Prerogative of Mercy are void.

(ii) That the appellants are procedurally barred from obtaining remedies for breach of their rights under section 8(2) of the Constitution.

(iii) That the appellants lacked the further right of appeal against the decision of the defunct Court of Appeal and that this weighed heavily against the remedy of release forthwith for the breach of their rights under section 8(3) of the Constitution.

The sentence of imprisonment for the remainder of the respondents' natural lives.

[14] The learned trial judge held, at paragraph 58 of his judgment, that 'the clear distinction demonstrated by the Governor-General in imposing as a condition of the pardon between imprisonment for life and imprisonment for the remainder of natural life …. is a plain encroachment on the sentencing power of the court and renders the sentence unlawful and not authorized by law.'

[15] Learned Queen's Counsel Mr. Hudson-Phillips submitted that in law there is no distinction between imprisonment for life and imprisonment for the rest of natural

life. Counsel referred to the case of R. v Secretary of State for the Home Department, ex parte Hindley[6], a decision of the House of Lords. In the judgment of Lord Steyn, with which all other members of the Court concurred, it was stated that the issue of the unlawfulness of 'whole life tariffs' is a point of statutory interpretation. His Lordship quoted section 27 of the Prison Act 1952 (U.K.) which empowers the Secretary of State, if he thinks fit, at any time to release conditionally on licence a person serving a term of imprisonment for life, and at any time by order recall to prison a person released on licence. His Lordship declared that that section showed that 'as a matter of law a sentence of life imprisonment was understood to authorize the detention of a person sentenced to life imprisonment for an indeterminate period which is brought to an end by the death of the prisoner'. He was of the view that section 1 of the Murder (Abolition of Death Penalty) Act 1965 (U.K.)[7], read with section 27 of the 1952 Act, 'did not exclude the possibility that life might sometimes mean life.' His Lordship continued 'It is therefore impossible to conclude that life imprisonment in the statute *meant* a finite period short of the natural life of the prisoner.'

[16] Lord Steyn quoted with approval Lord Bingham of Cornhill, CJ's observation in the Divisional Court[8] that he could 'see no reason, *in principle*, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment.' While the House of Lord's judgment is focused explicitly on the interpretation of a specific statutory provision, the endorsement, in principle, of the acceptability, in law, of 'lifelong incarceration', lends support to the view proposed by counsel for the appellant that there is nothing unlawful in a sentence of imprisonment for the rest of the prisoner's natural life.

[6] [2000] 2 All ER 385.
[7] The section provides that 'a person convicted of murder shall be sentenced to imprisonment for life', and further, in subsection (2), that in passing such sentence 'the Court may at the same time declare the period which it recommends to the Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person.'
[8] [1998] QB 751 at 769.

[17] The learned trial judge, at paragraph 49 of the judgment, appears to have come to the same view, on the authority of The State v Tcoeib[9], and pointed to the Prison Rules made under section 51 of the Prison Act[10] as the instrument which is intended, among other things, to mitigate the harshness of that sentence and 'the element of hopelessness' inherent therein. A sentence for the rest of one's natural life is indeed a 'punishment of distressing severity'[11], but the Prison Rules provide for the appointment by the Minister of a Board of Review with the duty to review the sentences of all long term prisoners and tender appropriate advice to the Minister on the exercise of the prerogative of mercy. I feel constrained to make some observations on the matter of the function of the Board of Review and the exercise of the prerogative of mercy.

[18] It is worthy of note that the prerogative of mercy is exercised by the Governor-General on the advice of the Minister designated by him under section 72(2) of the Constitution, whose discretion must not be so fettered, either by his own policy or by the views of others, that he fails to exercise his own constitutional discretion upon consideration of the relevant reports and *other material considerations*[12]. In Lavender & Son v. Minister of Housing Willis J. said "It is, of course, clear that if the Minister has prejudged any genuine consideration of the matter before him, or has failed to give genuine consideration to, inter alia, the inspector's report, he has failed to carry out his statutory duties properly."[13] The learned judge said further "It is also clear …. That where a Minister is entrusted by Parliament (*a fortiori by the Constitution)* with a decision of any particular case he must keep that actual decision in the last resort in his own hands."[14]

[9] [1997] 1 LRC 90.
[10] CAP. 254, Revised Laws of Grenada 1991.
[11] State v Tcoeid *supra* at page 100.
[12] Lavender & Son v. Minister of Housing [1970] 1 W.L.R. 1231, at 1236 H to 1237 A, 1239 A – B, 1240 B.
[13] Franklin v. Minister of Town an Country Planning [1948] A.C. 87.
[14] Lavender v. Minister of Housing *supra* citing R. v. Minister of Transport ex parte Grey Coaches, The Times, March 19th, 1933. See also page 1241 B.

[19] For obvious reasons, indicated in paragraph [17] of this judgment, the appointment of the Board is a non-discretionary duty of the Minister. Under Rule 3(b), the Board is under a duty to review the sentences of all prisoners serving a life sentence after 12 months of the sentence, again after four years from the date of sentence, and thereafter at four-yearly intervals except where a review has indicated that the case should come up again after less than the usual period. Rule 4 of the Rules provides:

> 4. The Superintendent *shall* bring to the notice of the Board all long term convicts (both men and women) at the end of the fourth year of imprisonment and every fourth year thereafter, describing the prisoner's mental and bodily conditions with particular reference to the effect of imprisonment upon his health, his demeanour and his attitude towards the offence and towards crime generally and upon his conduct and industry and on any other points which might be of assistance to the Board in considering his case.

[20] No specific provision is made as to the composition of the Board. It seems to me to be as plain as it was to the Privy Council in the case of Neville Lewis and others v. The Attorney General of Jamaica[15] in relation to the Privy Council of Jamaica that in advising the Minister, the Board must have regard to the material which the Superintendent is required to bring to its notice (page 11 of the judgment). Equally plain is the right of the prisoners to be informed of the contents of that material, their right to make representations on their own behalf to the Board, and their right to procedures which are fair and proper and are subject to judicial review. I am of the view that the principles laid down in Neville Lewis, though considered in the context of a Constitutional institution, namely the Privy Council of Jamaica, are equally applicable to the statutory institution under consideration here, namely the Board required to be established by the Prison Rules for the protection of the rights of long term prisoners in Grenada.

[21] In delivering the majority opinion of the Privy Council, Lord Slynn of Hadley reviewed a number of earlier cases decided by the Privy Council (pages 12 to 23) and concluded:

[15] Privy Council Appeals Nos. 60, 65, 69 of 1999 and 10 of 2000.

> "The procedures followed in the process of considering a man's petition are thus in their Lordships' view open to judicial review. In their Lordships' opinion it is necessary that the condemned man should be given notice of the date when the Jamaican Privy Council will consider his case. That notice should be adequate for him or his advisers to prepare representations before a decision is taken. It is not sufficient …. for him to be asked to submit a petition after they had met and when either a decision had been taken, subject to revision, or a clear opinion or consensus formed. The fact that the Jamaican Privy Council is required to look at the representations of the condemned man does not mean that they are bound to accept them. They are bound to consider them. There is every reason to have a confident expectation that the Jamaican Privy Council will behave fairly but if they do not the court can say so. The fact that the man has the right to make representations as a matter of fairness does not, contrary to what has been said, necessarily open the floodgates to challenges before the court or to further delay."

Their Lordships went on to declare that if the Jamaican Privy Council does not accept the report of the international human rights bodies, they should explain why. They further held that it is not sufficient that the prisoner be given a summary of the gist of the material available to the Jamaican Privy Council, "(H)e should normally be given …. the documents.'

[22] Their Lordships of Her Majesty's Judicial Committee quoted at length from the judgment in Reg. v. Secretary of State for the Home Department, ex parte Doody[16]:

> 'It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. …. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depends so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject. Rather, I would simply ask whether a life prisoner whose future depends vitally on the decision of the Home Secretary as to the penal element and who has a right to make representations upon it should know what factors the Home Secretary will take into account. In my view he does possess this right, for without it there is a risk that some supposed fact which he could controvert, some

[16] [1994] AC 531 at page 563.

opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered."

[23] I have dealt with this matter at length because I agree with the learned trial judge that 'the non-functioning or non-appointment or non-existence' of the Review Board which is required by the law of Grenada to be appointed and to function is 'entirely unsatisfactory and inexcusable.' The court made its views in this respect known to learned junior counsel for the appellant, in the absence of learned Queen's Counsel who had been forced to leave early, at the hearing, and accepted his undertaking to bring our view to the attention of the relevant authorities in Grenada.

[24] That the sentence of imprisonment for life, which clearly in principle cannot be distinguished from imprisonment for the remainder of natural life, is not an unlawful sentence in principle, is affirmed by a number of decisions of the courts, including Greene Browne v The Queen[17], Hinds and Others v. The Queen[18]. It is contended on behalf of the respondents, however, that life imprisonment as a common law punishment was abolished by the operation of sections 10 and 11 of the Criminal Code of Grenada[19]. Even if that is so, section 11(e) explicitly preserves, if that were necessary, the power of Her Majesty, or of the Governor-General as the representative of Her Majesty, to grant a pardon or to remit or commute in whole or in part, or to respite, the execution of any sentence passed or to be passed. Learned counsel for the respondents submitted that the sentence of life imprisonment in Grenada as a statutory sentence is provided for in only a very few cases, not including murder. However, the Constitution, at section 72, empowers the Governor-General, among other things, to grant a pardon subject to lawful conditions, or to substitute a less severe form of punishment for any punishment imposed on any person for any offence. It cannot I think be questioned that life imprisonment, even 'for the rest of natural life', is a less severe form of punishment than the death penalty.

[17] Privy Council Appeal No. 3 of 1998 (St. Christopher ands Nevis).
[18] [1976] 1 All ER 353 at page 370 e – f.
[19] CAP. 1 of the Laws of Grenada, Continuous Revised Edition 1994.

[25] Learned counsel for the respondents argued that the power to substitute a less severe form of punishment is limited to the power to determine the *nature* of the punishment, but does not extend to the power to decide the *extent* of the punishment. To paraphrase counsel's words, the Governor-General could properly determine that the respondents should serve a term of imprisonment, but could not properly determine the extent of the term of imprisonment, a matter which could only be determined by a court. The Governor-General would therefore have to refer the matter of the extent of the sentence, whatever its nature, to the appropriate court for determination.

[26] Learned counsel for the respondents further submitted that, section 72 of the Constitution being a section which derogates from the protective provisions of section 8, should be interpreted narrowly and restrictively, in contrast to the liberal approach to the fundamental rights provisions contained in sections 2 to 15; The Queen v. Peter Hughes[20]. In written submissions and in oral argument counsel urged that to read a section 72(1) sentencing power exception into section 3(1), one would have to construe "Court" to include the Governor-General. I would be the first to agree that that would be an improper and unacceptable construction of section 3(1)(a). However, I do not agree that that is the necessary or even a possible approach to section 72. Section 72 is not an exception to section 3, but stands on its own as a separate and independent power of the Governor-General, conferred on him by the Constitution, and thus immune from any possibility of unconstitutionality. The section is clear in its terms and can be interpreted according to its ordinary meaning.

[27] The proposition that the section should be narrowly construed is based on a distinction which counsel seeks to make between the word punishment, used in section 72 of the Constitution, and the word sentence. In my view such a distinction is entirely artificial. I have looked at Stroude's Judicial Dictionary,

[20] Privy Council Appeal No. 19 of 2001, at paragraph 35.

and at Words and Phrases Judicially Defined, and without going into the details of the definitions, I have to say that it is my view that while the word punishment is broader in scope than the word sentence, the former certainly embraces the latter.

[28] Learned counsel for the respondents makes much of the terms of section 72(1)© and in particular of the word '*form'.* The section reads:

> 'The Governor-General may, in Her Majesty's name and on Her Majesty's behalf –
> © substitute a less severe *form* of punishment for any punishment imposed on any person for any offence.'

Learned counsel argued that the Governor-General is thereby granted two powers, first, to set aside the sentence of the court, and second, to substitute a lesser *form* of punishment. Counsel contends that the Governor General could not, under that power, reduce the term of a sentence of imprisonment to a lesser term. The power, counsel contends, would be limited in that context to a power, for example, to substitute for the sentence of imprisonment a sentence of a fine or probation, referring the matter thereafter to a court to determine the quantum of the fine or the terms of the probation order. Attractive as this may seem at first glance, I find this proposition entirely inconsistent with the legislative intent evident in sections 72, 73 and 74.

[29] The Constitution, by these sections, establishes a Advisory Committee on the Prerogative of Mercy, which Committee must, in every case where a person has been sentenced to death other than by a court-martial, and may in any other case referred to it by the appropriate Minister, consider the sentence imposed on any person and advise the Minister with regard to that sentence. The Minister, after obtaining the advice of the Committee, is empowered to decide, in his own deliberate judgment, whether to advise the Governor-General to exercise any of his powers under section 72(1), those powers being to grant a pardon, either free or subject to lawful conditions, to grant a respite, indefinite or for a specified period, of the execution of the sentence (the word used in the Constitution is 'punishment'), to substitute a less severe form of punishment for the punishment

imposed by the court, or to remit the whole or part of any punishment, penalty or forfeiture imposed by the court. The Governor-General must act in accordance with the advice of the Minister.

[30] The discretion is vested in the Minister. The matter has been dealt with by the courts, and the issue of mercy is now an executive prerogative. The exercise of that executive prerogative is not, of course, entirely outside of the supervisory jurisdiction of the courts to ensure procedural regularity, fairness and the application of the rules of natural justice[21]. Once these prerequisites are observed, the Minister has a wide discretion to advise the Governor-General. The punishment may not be increased, but it may be affirmed, or abated to the extent determined by the Minister.

[31] I entirely agree that the function of the Advisory Committee, of the Minister and of the Governor-General is not the function of a court, it is not a sentencing function, but an executive prerogative of mercy.

The grant of a pardon on condition that the respondents serve a sentence for the remainder of their natural lives.

[32] By instrument under the Public Seal dated 15th August 1991 the Governor-General, in purported exercise of the powers vested in him by section 72(1) of the Constitution, granted to each of the respondents respectively, a pardon in respect of their convictions, on condition that they be kept in custody to hard labour for the remainder of their natural lives.

[33] Learned counsel for the respondents contended that the imposition of that condition amounts to a breach of section 3(1) of the Constitution, which provides that no person shall be deprived of his personal liberty save as may be authorized by law in any of 10 circumstances, in which list a condition for the grant of a

[21] Regina v. Secretary of State for the Home Department, ex parte Doody, *supra*.

pardon is not included. Counsel therefore submitted that such a condition is in breach of section 3 of the Constitution and of the principle of the separation of powers expressed therein; Hinds v. R[22], DPP v. Mollison (No. 2)[23]. In response, learned Queen's Counsel for the appellants submitted that the powers of the Governor-General under section 72 are original powers not subject to limitation by section 3. The learned trial judge did not rule on that question, but rested his decision on his view that the sentence of imprisonment for the rest of the respondents' natural lives was unlawful, a view which, as I have earlier indicated, I do not share.

[34] It seems to me that the Governor-General's powers under section 72 are independent of and not limited by section 3 of the Constitution. In particular, the power to impose a less severe form of punishment for any other, more severe punishment, is not limited by section 3. The Governor-General clearly has no power to sentence a convicted person. Nevertheless the Constitution itself confers on him the power to substitute a less severe punishment than that imposed by the court. It would be irrational to hold that a power conferred by the Constitution itself is in breach of the very Constitution.

[35] Learned counsel for the appellant, in his written reply to the respondents' submissions on this issue, argued that the sentence of death imposed on the respondents by the court at trial had the effect of depriving the respondents of their personal liberty, and that the order of the Governor-General is therefore not a contravention of section 3(1) of the Constitution, either by depriving the respondents of their liberty, which they had already lost by the sentence of the court, or by the exercise of a sentencing power. I agree.

The Governor-General's exercise of the prerogative of mercy.

[22] [1975] 24 WIR 326.
[23] Privy Council Appeal No. 88 of 2001.

[36] The instruments under the hand of the Governor-General and the Public Seal of Grenada by which the Governor-General commuted the death sentences and substituted the sentence of life imprisonment recites the advice of the Minister 'to commute the death sentence to one of life imprisonment. The Governor-General is bound, under section 72(2) of the Constitution of Grenada, to exercise his power in accordance with the advice of the Minister.

[37] Learned counsel for the respondents in support of their cross appeal contended that the imposition of the condition that they be kept in custody to hard labour for the remainder of their respective natural lives as a condition of the grant of a pardon was not a lawful exercise of the power, in that, first, it was not in strict compliance with the advice of the Minister, and second it was not in conformity with the powers of the Governor-General under section 72(1) of the Constitution. I shall deal with the second objection first.

[38] It was contended by counsel for the respondents that each of the sub-paragraphs of section 72(1) vests a distinct power, or authority, in the Governor-General. In particular, counsel submitted that the grant of a pardon could only be subject to *lawful* conditions, and that a condition of imprisonment could not be *lawfully* imposed other than by a court. In this respect, learned counsel argued, the pardon available under the Constitution differs from that available at common law. Learned counsel conceded that at common law, the sovereign could impose such a condition, but that under the Constitution a sentence of imprisonment could only be imposed by a court, subject only to the exceptions contained in section 3 of the Constitution.

[39] Learned counsel contends that the powers of the Governor-General under section 72(1)(a) are limited by the fundamental rights and freedoms provisions contained in Chapter 1 of the Constitution, and that the order of the Governor-General was in breach of the said provisions.

[40] Counsel submitted that to so hold would not in any way interfere with or frustrate the purpose and intent of section 72. It was argued that the Governor-General could have complied with the advice of the Minster by acting under section 72(1)(c), which empowers him explicitly to substitute a less severe form of punishment for the punishment imposed. Counsel submitted, nevertheless, that while the Governor-General could order the *form* of punishment, he could not properly order the *extent* of punishment, which, counsel contends, only a court could lawfully do.

[41] 'Pardon' is defined by Stroud's Judicial Dictionary as 'the remitting or forgiving of a crime'. 'Remit' is defined by the Concise Oxford Dictionary as 'cancel or refrain from exacting or inflicting a debt or punishment; abate or slacken; cease or cease from, partly or entirely.' A strict interpretation of section 72 may well lead to the conclusion that the Minister intended the Governor-General to act under section 72(1)(c) rather than under section 72(1)(a). Without expressing any opinion at this stage as to whether the Governor-General could, under the former subsection, impose a term of imprisonment, finite or indefinite, on the respondents, I am of the view that the Governor-General clearly intended to act in compliance with the advice of the Minister, and to substitute a less severe form of punishment for the punishment imposed on the respondents by the trial court.

[42] In reply to the contentions of the respondents, learned counsel for the appellant submitted that the basic rule of construction *res magis valeat quam pereat* should be applied to the Governor-General's exercise of his powers under the Constitution, and that the instrument must be construed in such a way as to implement, rather than defeat, the purpose and clear intent of the document. Further, learned counsel submitted in his written reply that section 108 of the Constitution precludes this or any court from inquiring into whether the Governor-General has acted in accordance with the advice of the Minister. I agree.

[43] The language of the instrument is not contrary to the intention to substitute the sentence of life for the sentence of death, and indeed does convey that intention. The contentions of the respondents, if correct, would clearly lead to injustice or absurdity[24]. In effect, to uphold their contentions would mean that, upon the issue of the instruments on 15th August 1991, the respondents should have been immediately released from prison, and their continued detention thereafter would be illegal. That clearly was not the intention of the Minister or of the Governor-General, and is not the intention conveyed by the words of the instrument. I would therefore dismiss this ground of appeal.

Whether the failure to supply the respondents with the written judgment of the former Court of Appeal is a breach of the Constitution entitling the respondents to damages.

[44] The learned trial judge found that some 12 years after the judgments were delivered on 12th July 1991 in Criminal Appeals No. 4 to 20 in the former Court of Appeal, the State continues to be in breach of section 8(3) of the Constitution by failure to provide them with written reasons for the decision of that court dismissing their appeals. It is common ground that the decision of the court was delivered orally in the presence of the respondents and their legal representatives, over two days. It is also common ground that no written record of the reasons has been provided. The respondents argue that written reasons are necessary to enable them to access the processes of international Human Rights tribunals and other bodies in pursuit of their legitimate interests.

[45] An examination of the Rules governing access to the international organs for the protection of Human Rights will demonstrate that the respondents are not correct in their assertion that the written judgment is an essential prerequisite to initiating process in the various systems. Indeed if they are right in their basic assertions the very failure of the appellants to provide written reasons may itself be a ground

[24] Erven Warnink BV v. Townsend & Sons (No. 2) [1982] 3 All ER 312 at 320.

for a petition. In any event, an example may be found in the conditions for presenting a petition in the Inter-American system. The three preconditions to accessing that system are, first, that the accused State must have violated one of the rights established in either the American Convention or the American Declaration, second, the claimant must have exhausted the possibilities of legal redress in the State in which the violation occurred and his or her petition to the IACHR must be presented within six months of the final judgment by the tribunal concerned, and, third, the claim should not be the subject of some other international procedure. These conditions are not rigid, and may be avoided in certain circumstances. The petition, which must be in writing, should contain all the *available* information and should describe the violation of human rights that took place, the date and place where it occurred, and identify the government involved. There are various other rules, which are not overly restrictive, and which certainly do not require, as is argued on behalf of the respondents, the written judgment of the former Court of appeal.

[46] Section 8(3) of the Constitution reads:

> 'When a person is tried for any criminal offence, the accused person or any person authorized by him in that behalf shall if he so requires and subject to the 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."

[47] Learned Queen's Counsel for the appellants submitted that the provisions of section 8(3) apply to trial proceedings or, at any rate, to proceedings which are not final and from which there is a right, or a possibility of appeal. Learned counsel offered no authority for this restrictive application of this provision of the chapter of the Constitution for the protection of the fundamental rights and freedoms. It is firmly established that these provisions must be given a broad, generous and purposive interpretation[25]. I am firmly of the view that the section confers on the

[25] Savarin v. Williams, Civil Appeal No. 3 of 1995, Dominica, (unreported) per Sir Vincent Floissac, C.J.

accused person, even if he has not been convicted and therefore has no occasion to appeal, a right to the record of the proceedings, for whatever purpose.

[48] No doubt this is a right which could be enforced in various ways, for example by way of an order for disclosure under the Civil Procedure Rules 2000, by an order of mandamus, and certainly by way of any other appropriate remedy in an action under section 16 of the Constitution[26]. The case raises two questions; whether indeed there has been a breach of the right, and secondly whether, if there has been, damages is an appropriate or effective remedy.

[49] The right declared by the Constitution is the right to 'any record of the proceedings made by or on behalf of the court.' It should not be difficult to establish that a record of the judgment delivered by the former Court of Appeal was made by or on behalf of the court. Such a record could take a number of forms; electronic text, audio, video, manuscript or typescript, which list is not exhaustive. The record could be full, summary or anything in between. It may be that the only record made by or on behalf of the court in respect of the reasoned judgment was a summary of the result, which, it is not doubted, has been made available to the respondents. The respondents have not established that there is any other record to which they have the right within the intendment of section 8(3) of the Constitution. I am not satisfied that there has indeed been a breach of the constitutional rights of the respondents in this regard.

[50] Even if there had been such a breach of that section of the Constitution in relation to the appellants, I am doubtful that damages would be an appropriate, adequate or effective remedy in respect of that breach. I would allow the Attorney-General's appeal against the order for monetary compensation.

Breach of section 8(2) of the Constitution.

[26] Jennifer Gairy v. The Attorney-General of Grenada, Privy Council Appeal No. 29 of 2000, para. 19.

[51] The respondents cross appealed against the finding of the learned trial judge that they are precluded by the provisions of Act 19 of 1991 from seeking to have the courts examine afresh issues of the breach of their rights under section 8(2) of the Constitution. In this regard the grounds of appeal relate to the selection of the jury and the conduct of the trial in their absence.

[52] The substance of the respondents' complaint concerns the following provisions of section 8(2):

> "except with his own consent the (criminal) 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."

[53] The factual matrix concerning this ground of appeal has been set out in paragraphs 2 to 4 of this judgment.

[54] It seems to me that there is no ambiguity in the quoted parts of section 8(2) of the Constitution. The proviso to the section, to my mind, can only mean what it says, that is, that a law may make provision for the holding of a criminal trial in the absence of the accused person in prescribed circumstances, but in such cases no punishment of death or imprisonment may be imposed on the accused in whose absence the trial took place. This provision undoubtedly creates grave inconvenience, and may even frustrate the effective operation of the criminal justice system where an accused person is determined to so disrupt the court's proceedings, as these accused persons clearly were. Nevertheless there do exist methods whereby their efforts may be frustrated and the business of the court may be enabled to proceed.

[55] Learned Queen's Counsel for the appellant submitted, however, that this issue was fully argued and decided in an appeal by the respondents against their conviction and sentence; alternatively, the issue should logically have been raised on the said appeal to the former Court of Appeal of Grenada. The history of the several trials and appeals relating to this matter is recited in the headnote to the case Mitchell and Others v. Attorney General of Grenada and Another[27] and in the judgment of Liverpool J.A. at pages 215 and 216 of that report. In that case, which was an appeal to this court by these respondents and others, it was held that this court has no jurisdiction to hear, re-hear, determine or redetermine matters which were heard and determined by the former Court of Appeal before its abolition[28].

[56] For the reasons stated above, I hold that this court has no jurisdiction to hear, re-hear, determine or redetermine the matters which were raised in the High Court and on appeal in this court, and in any event that the respondents are estopped from relitigating the matters which are the subject matter of this appeal. I agree with learned counsel for the appellant that to entertain these matters would be to entertain an appeal from the decisions of the former Court of Appeal.

[57] For the above reasons I would allow the appeal of the appellant and dismiss the cross appeal. I would make no order as to costs.

Brian Alleyne, SC
Justice of Appeal

[58] GORDON, J.A.: I shall rely on the statement of facts as set forth in the judgment of Justice of Appeal Alleyne and only repeat them to the extent necessary for the more ready understanding of this judgment.

[27] [1993] 3 LRC 199.
[28] Sir Vincent Floissac, C.J. at pages 214 and 215, Liverpool J.A. at page 224.

[59] It might be useful to repeat at this juncture, the declarations and orders of the learned trial Judge which were to the following effect:

> "1. It is declared that the sentence of death imposed on the Applicants at their trial was unconstitutional and illegal.
> 2. It is further declared that the imposition of the term of imprisonment for the remainder of the applicants' natural lives by the Governor General pursuant to the advice of the Chairman of the Advisory Committee on the Prerogative of Mercy is unconstitutional, illegal, null and void.
> 3. It is further declared that the failure by the Respondent (the Appellant herein) to provide the Applicants with the written reasons, used to justify the dismissal of the Applicants' appeal against conviction is unconstitutional and illegal.
> 4. It is ordered that: -
>   a. The sentence of imprisonment for the remainder of the Applicants' natural lives be quashed
>   b. The Applicants be remanded to custody and brought before a Judge of the High Court within 42 days to be sentenced under the convictions dated December 4, 1986.
>   c. The Applicants be paid monetary compensation to be assessed by a Judge in Chambers and paid to the Applicants by the Respondent as a result of the failure to provide the Applicants with the said written reasons.
> 5. The Respondents shall pay the costs of the Applicants in the sum of $15,000.00

[60] The Appellant has raised three issues for determination by this Court and the Respondents, in their Counter-Notice, have raised a further four. The Appellant raises the following issues:

- Whether the attaching of a condition to the commutation of the sentences of the Applicants/Respondents (hereafter "the Respondents") that they serve a sentence "for the remainder of their natural lives as opposed to a life sentence *simpliciter* is an encroachment on the sentencing powers of the Court so as to render "the sentences unlawful and not authorized by law".
- Whether, notwithstanding the conclusive nature of the proceedings against the Respondents and the dismissal of their Appeal against conviction and sentence, the Respondents may rely on subsequent

judicial decisions (Reyes v R.; Hughes v R) to determine whether the imposition of the mandatory sentence of death was unconstitutional and illegal.

- Whether the failure to provide the Respondents with a record of the proceedings of Appeal against their convictions and sentences is a breach of Section 8 (3) of the Constitution for which they were entitled to damages.

The Respondents raise the following issues for determination:

- That the learned trial Judge erred in law in holding that in the circumstances of this case the pardons granted by the Governor General were void on account of the attachment of the unlawful condition of imprisonment for the remainder of the Respondents' natural lives.
- That the learned trial Judge erred in law in holding that the Respondents could not obtain remedies for the breach or their rights under Section 8 (2) of the Constitution of Grenada (right to be present at the selection of a jury and at all other times during their trial)
- That the learned trial Judge erred in law in holding that the Appellants were not entitled to be released forthwith for breach of their rights under section 8 (3) of the Constitution (the right of an accused person to be given a copy, for his use, of any record of the proceedings made by or on behalf of the court)

[61] I will attempt to deal with each of these issues seriatim, though, inevitably, there will be some overlap.

Imprisonment for the rest of the Respondents' natural lives

[62] The first issue, as expressed by learned Queen's Counsel for the Appellant in his skeleton argument, was whether the attaching of the condition to the Pardon that the Respondents be imprisoned for the rest of their natural lives as opposed to a life sentence *simpliciter* was an encroachment on the sentencing powers of the

Court. Expressed thus, the issue is a fairly narrow one. However, learned Counsel for the Respondents sought to widen this into a questioning of whether the Governor-General, as part of the Executive, has power to impose any sentence of imprisonment as a condition of a Pardon without breaching Section 3 (1) (a) of the Constitution of Grenada.

[63] I am of the view that there are two separate questions to be answered. Logically, if the second question, as raised by learned Counsel for the Respondents, is answered in the negative, then there will be no need for the other question to be addressed and so it is to that issue that I first direct my mind.

[64] Two sections of the Grenada Constitution need to be reproduced for an easy understanding of the arguments, namely sections 3 (1)(a) and 72. Section 3 (1) (a) of the Grenada Constitution reads as follows:

> "3. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say: -
>
> (a) in execution of the sentence or order of a court, whether established for Grenada or some other country, in respect of a criminal offence of which he has been convicted;
>
> (b) ……."

There are some nine other circumstances in which imprisonment is sanctioned but they do not concern this case. Section 72 reads as follows;

> "72. (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf –
>
> (a) grant a pardon, either free or subject to lawful conditions, to any person convicted of an offence;
>
> (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
>
> (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or
>
> (d) remit the whole or any part of any punishment imposed on any person for any offence or any penalty of forfeiture otherwise due to the Crown on account of any offence.
>
> (2) The powers of the Governor General under sub-section (1) of this section shall be exercised by him in accordance with the advice of such

> Minister as may for the time being be designated by the Governor-General, acting in accordance with the advice of the Prime Minister."

[65] As I understood the argument of learned Counsel for the Respondents Section 72 of the Constitution gives the Governor-General the power to grant a pardon with or without conditions to a convicted person and, also, to substitute a less severe form of punishment to that imposed on such convicted person by the court. Learned Counsel argued that "less severe form of punishment" referred to type of punishment rather than to quantum of sentence. In other words, a fine could be substituted for imprisonment, but the amount of the fine could not be determined by the executive. Similarly, the sentence of death could be substituted for by a sentence of imprisonment, but the term of imprisonment could not be determined by the Executive. Learned Counsel urged, with considerable vigour, that the determination of the extent of the sentence is an exclusively judicial function in the context of Section 3 (1).

[66] Learned Counsel prayed in aid of his argument a statement by Lord Bingham of Cornhill in Reyes v The Queen[29] to the following effect:

> "In reaching this decision the Board is mindful of the constitutional provisions….governing the exercise of mercy by the governor-general. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6 (2) of the constitution. [in pari materia with section 3 (1) of the Grenada Constitution.]"

[67] Whilst at first blush this appears to be helpful to the Respondents' argument, an examination of the context within which the statement was made and the language succeeding the quoted passage make it less so. Lord Bingham made the statement in the context that a mandatory death sentence was cruel and inhuman, notwithstanding the existence of the Advisory Council's ability, or power to exercise mercy. The passage continued:

[29] Privy Council Appeal No. 64 of 2001

> "Mercy, in its first meaning given by the *Oxford English Dictionary*, means forbearance and compassion shown by one person to another who is in his power and has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore the provisions governing the Advisory Council appear in Part V of the Constitution dealing with the executive. It has been repeatedly held that not only the determination of guilt but also the determination of the appropriate measure of punishment are judicial not executive functions" (emphasis added)

[68] On the authority of a passage from The Queen v Hughes [30], a judgment of the Privy Council delivered by Lord Rodger of Earlsferry, learned Counsel for the Respondents argued that Section 72 of the Grenada Constitution should be narrowly construed. The passage, to be found at paragraph 35, reads as follows:

> "Since paragraph 10 introduces these exceptions to the rights and protection which people would otherwise have under the Constitution, it must be construed like any other derogation from constitutional guarantees. In *State v Petrus [1985] LRC (Const) 699, 720D-F* in the Court of Appeal of Botswana, Aguda JA referred to *Corey v Knight (1957) 150 Cal App 2d 671* and observed that
>
> > 'it is another well known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions'
>
> In case of doubt paragraph 10 should therefore be given a strict and narrow, rather than a broad, construction."

It is to be noted that the paragraph 10 therein referred to was paragraph 10 of Schedule 2 to the Saint Lucia Constitution which preserved the efficacy of any law, notwithstanding its inconsistency with the St. Lucia Constitution, authorizing the infliction of any description of punishment that was lawful in St. Lucia prior to the date on which the St. Lucia Constitution came into effect.

[30] Privy Council Appeal No. 91 of 2001

[69] The same thought is expressed in Watson v The Queen[31] where Lord Hope of Craigshead endorsed the narrow interpretation of any provision derogating from the rights and freedoms guaranteed by the Constitution and found no harm if such narrow interpretation amounted to "tabulated legalism". I endorse completely the jurisprudence that rights and freedoms must receive generous interpretation whilst derogations therefrom must be interpreted in a strict and narrow way.

[70] What therefore raises itself for decision is whether Section 72 of the Grenada Constitution (the power of the Executive to grant mercy) is a derogation of the rights enshrined in Section 3 (the circumstances in which a person may be imprisoned). If a person accused of a crime is tried, found guilty and sentenced to suffer a penalty sanctioned by law, then, after all available appeal procedures permitted by law have been exhausted, the Court is functus. There is no more that the court may do. The accused, if sentenced to imprisonment, will lawfully be imprisoned pursuant to that sentence. That is the burden of Section 3. However, the Constitution, the supreme law of the land, provides that the executive may exercise mercy, not justice. This is a prerogative power granted to the executive. To interpret Section 72 of the Grenada Constitution as creating a distinction between "punishment" and "sentence" is to me to create a sterile semantic distinction unsupported by the language and stultifying of the intent of section 72. Indeed, one would have considerable difficulty in giving meaning to Section 72 (1) (d) of the Grenada Constitution, which gives the Governor-General power to remit the whole or any part of any punishment imposed on any person for any offence, if this approach were adopted. To do so in the way suggested by learned Counsel for the Respondents would be to do violence to the language, intent and purpose of that sub-section. It is clear to me that in that context the word "punishment" must include sentence if the section is to have any meaning. To extend the logic of learned Counsel for the Respondents, he would have it that there is no executive power to reduce a convicted person's sentence from, for example, five

[31] Privy Council Appeal No. 36 of 2003

years to two years because this would be a reduction of sentence rather than substituting a less severe form of punishment. I hold that Section 72 of the Grenada Constitution does not seek to, nor does it, derogate from the rights and freedoms granted to individuals under law. Rather, it gives to the executive the power to act mercifully after lawful sentence has been passed by a duly constituted court. [See quotation from Lord Bingham at paragraph [66] above] The issue of separation of powers simply does not arise.

[71] Having answered the second question raised positively, namely whether the Governor-General was empowered to impose a condition of a sentence of imprisonment as a condition to a commutation of a sentence of death/pardon, it becomes necessary to determine whether the express sentence imposed as a condition of the pardon granted to the Respondents was lawful.

[72] As I understand the question for the determination of the Court, the issue is whether "imprisonment for life" is different in law to "imprisonment for the remainder of natural life". Learned Counsel for the respondents invited the Court to make a pronouncement on whether a sentence of life imprisonment is different from a sentence to imprisonment for the remainder of natural life.

[73] Learned Queen's Counsel for the Appellant urged that there is no distinction between a sentence of life imprisonment and imprisonment for the remainder of natural life. In support of his argument learned Queen's Counsel referred to R v Secretary of State, ex p Hindley[32]. In that case the Head note reads in part as follows:

> "The Applicant, H, was serving mandatory sentences of life imprisonment for murder. In February 1997 the then Secretary of State informed H that detention for the whole of her natural life was the tariff necessary to satisfy the requirements of retribution and deterrence in her case. In November 1997 the next Secretary of State outlined his policy on the imposition of whole life tariffs, stating his openness to the possibility that, in exceptional circumstances – including exceptional progress by the prisoner whilst in

[32] [2000] 2 All ER 385

custody – a review and reduction of the tariff might be appropriate. Subsequently, he informed H that, subject to consideration of whether it might be appropriate to reduce the tariff because of exceptional progress, her tariff would remain a whole life tariff. In the mean-time H had commenced judicial review proceedings, seeking an order quashing the decision to impose a whole life tariff…..H appealed to the House of Lords, contending that the Secretary of State's policy was unlawful. In particular, she contended that the mandatory sentence of life imprisonment for murder under s. 1 of the Murder (Abolition of Death Penalty) Act 1965 did not mean a lifelong period of imprisonment, that the Secretary of State's policy had fettered his discretion, that it excluded consideration of such cases by the Parole Board and that it was inconsistent with a system that required the tariff to be expressed in a term of years."

[74] In the course of his judgment Steyn LJ had this to say, and I apologise for the length of the quotation but am of the view that both the jurisprudence and the strict law therein contained are of assistance:

"*Unlawfulness of whole life tariffs*

The first ground put forward raises a point of statutory interpretation. Counsel for Hindley submitted that when in 1965 Parliament enacted s 1 (1) of the Murder (Abolition of Death Penalty) Act 1965, which in the case of murder replaced the sentence of death by a mandatory sentence of life imprisonment, the substitute sentence did not mean a lifelong period of imprisonment. It contemplated that, if the prisoner was not a risk to others, he or she would be released after a finite period of imprisonment. Counsel for Hindley pointed to the statement in the *Report of the Royal Commission on Capital Punishment 1949 – 1953* (Cmd 8392) p. 226 para 644 that there is no recorded case in which it has been decided that a life sentence prisoner shall be kept in penal servitude until he dies. On the other hand before 1965, persons convicted of heinous murders were sentenced to death and executed. The correctness of the legal submissions of counsel must be tested against the language of the statutory provisions. In 1965 Parliament was legislating against a tolerably clear meaning of 'life imprisonment'. One does not need to go further back than s.27 of the Prison Act 1952. It provided as follows:

> '(1) The Secretary of State may at any time he thinks fit release on licence a person serving a term of imprisonment for life subject to compliance with such conditions, if any, as the Secretary of State may from time to time determine
>
> (2) The Secretary of State may at any time by order recall to prison a person released on license under this section…'

Section 27 shows that as a matter of law a sentence of life imprisonment was understood to authorize the detention of a person sentenced to life imprisonment for an indeterminate period which is only brought to an end

> by the death of the prisoner or if and when the Secretary of State in the exercise of his discretion decides to release him or her. Section 1 of the 1965 Act, read with s 27 of the 1952 Act, did not exclude the possibility that life sometimes might mean life……
> In the Divisional Court Lord Bingham of Cornhill CJ observed that he could 'see no reason *in principle* why a crime, or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment' (Lord Bingham CJ's emphasis). I respectfully agree. Looking at the matter more broadly there is therefore no reason to give the concept of life imprisonment anything but the contextual meaning of the legislation"

[75] Learned Counsel for the Respondents pressed upon the Court that there must be a difference between imprisonment for life and imprisonment for the remainder of natural life by pointing out the undenied fact that in a period of six weeks 23 pardons were granted by the Governor-General of which number fifteen had attached to them imprisonment for the remainder of natural life and the other eight the condition attached was life imprisonment. In the light of the learning to be derived from the foregoing extract of Steyn LJ's judgment I am of the view that the two sentences, though differently expressed, perhaps for emotional reasons, amount to the same in law.

[76] I am fortified in this view by reference to the Prisons Act[33] and the Prison Rules[34] made pursuant to Section 51 thereof. Rule 2 of the Prison Rules states that a Board of Review shall be appointed. Rule 3 reads in part:

> "3. The Board shall, at the prescribed intervals, or after such lesser intervals as circumstances require, review the sentences of all long term prisoners including prisoners detained at Her Majesty's pleasure in the under mentioned manner and in each case tender appropriate advice to the Minister on the exercise of the prerogative of mercy -
>
> (a) ….
>
> (b) Review of Intermediate Sentences: [*There can be little doubt that this should read "Review of Indeterminate Sentences]* In the case of a life sentence or detention during Her Majesty's pleasure, the first review shall take place after the initial 12 months have been served. Thereafter a further review shall

[33] Cap 254 Laws of Grenada
[34] S.R.O. 14/1980

take place after 4 years from the date of sentence, and then in four-yearly intervals except where a review has indicated that the case should come up again after less than the usual period;

(c) ....."

[77] As I understand the pattern to be followed, the Minister must appoint a Board of Review and that Board, whether a prisoner is in prison for a determinate period of more than 4 years or for an indeterminate period, must review such prisoner who has served, in the case of a life sentence one year and thereafter every four years for the purpose of advising the Minister on the exercise of the prerogative of mercy. Learned Queen's Counsel for the Appellant conceded, quite properly in my view, that the prerogative of mercy continued to exist in the cases of the Respondents

[78] In the circumstances, I hold that the condition attached to the pardons of the Respondents were valid and that the pardons themselves legally effective. This disposes of both the Ground of Appeal by the Appellant and the Ground of Appeal in the Counter-Notice by the Respondents

[79] In his judgment, at paragraph 49 the learned trial Judge said the following:

> "The said Prison Rules provide for the appointment by the minister of a Board of Review with power to review the sentencing of all long term prisoners and tender appropriate advice to the minister on the exercise of the prerogative of mercy. While such review is open to all long-term prisoners, there has been no demur to the allegation of the non-functioning or non-appointment or non-existence of such a body. This state of affairs is entirely unsatisfactory and inexcusable."

I cannot find words to express too strongly my disapprobation of such a state of affairs. A convicted person in prison, though bereft of liberty nevertheless remains a human being and a citizen of the country. He is entitled to have his case reviewed. He has no entitlement to any particular outcome of such review, nor may he have any entitlement in regards to how the Minister may view the advice of the Board, but the law says he is entitled to a review and if the opportunity for such

review is absent, then in my view there is a breach of the law. One hopes that the attention of relevant authorities will be drawn to this lapse and that urgent action will be taken to resume reviews of long-term prisoners at the intervals legally stipulated.

[80] The second issue raised by the Appellant was whether, notwithstanding the conclusive nature of the proceedings against the Respondents and the dismissal of their appeal against conviction and sentence, the Respondents may rely on subsequent judicial decisions (Reyes v R and Hughes v R) to support the proposition that in their case the imposition of the mandatory sentence of death was illegal and unconstitutional. Learned Counsel for the Respondents acknowledged that in their Fixed Date Claim their Prayer for a Declaration that the sentence of Death imposed on the respondents was unconstitutional and illegal was the mounting of a "collateral attack" on the decision of the former Court. By that language I understand them to be acknowledging that they have had the benefit of, and exhausted, all of the opportunities of appeal available to them in a criminal trial and that they are seeking to tread that very narrow path around issue estoppel amongst other things.

[81] I believe that a good starting point, establishing the jurisprudential base, on this issue is a statement by Diplock LJ in Maharaj V Attorney General of Trinidad and Tobago (No. 2)[35] to the following effect:

> "The fundamental human right is not to a legal system that is infallible, but to one that is fair. It is only errors in procedure that are capable of constituting infringements on the rights protected by s 1 (a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

[82] I am of the view that if the Respondents were to come before a court for sentencing in the legal environment of to-day, then Hughes v R[36] would

[35] [1978] 2 All ER 669 @ p678

undoubtedly apply, notwithstanding the date of commission of the offence, and they would be entitled to a sentencing hearing prior to any sentence being passed. At such a sentencing hearing the Respondents might be sentenced to death, to life imprisonment or even some other sentence of imprisonment. What has happened in the case of all of the Respondents is that they were sentenced to death and then later the Governor-General exercised the prerogative of mercy in their favour granting them a pardon on condition that they serve a sentence of life imprisonment.

[83] The Respondents' conviction is not in issue (at this point). In Pratt and Morgan v. The Attorney General for Jamaica[37] their Lordships exercised the power vested in the Supreme Court of Jamaica by the Constitution to make "such orders…as it may consider appropriate for the enforcing…. any provisions (relating to human rights and fundamental freedoms)" by allowing the appeals and commuting the death sentence to life imprisonment. [Section 16 of the Constitution of Grenada is similar] In this case, as I have observed above, the Respondents have already had their sentences of death commuted. Thus, even if the sentence of death was a live issue, which it is not, by analogy with the ruling in Pratt and Morgan this Court would be minded to do the same. In other words, the issue is academic and as such, does not justify the 'collateral attack' as a means of circumventing the doctrine of issue estoppel.

Absence of Respondents at time of selection of jury

[84] The next issue I will deal with is the ground of Appeal as expressed in the Respondents' Counter-Notice as follows: "In the circumstances of this case the Learned Trial Judge erred in law in holding (despite favouring the Appellants [sic Respondents'] submissions as to the effect of (a) the selection of the jury in their enforced absence and (b) the trial in their absence) that the Appellants [sic

[36] Privy Council Appeal No. 91 of 2001
[37] [1994] 2 AC 1

Respondents] could not obtain remedies for the breach of their rights under Section 8 (2) of the Constitution". The learned trial Judge at paragraph 68 of his judgment quoted extensively from the judgment of Floissac CJ in Mitchell and others v Attorney General of Grenada and Another[38] and I can do no better than to adopt the learning therein expressed. In short, in a previous binding decision of this Court, it was decided that this Court has no jurisdiction to enquire into matters adjudicated upon by the former Court. I am in full agreement with the learned trial Judge that as these matters were canvassed before the former Court of Appeal, "this precludes the Applicants (the Respondents herein) from seeking to have Courts examine the issues afresh".

[85] Learned Counsel for the Respondents argued that notwithstanding the above, Section 16 of the Constitution gives to this Court the power to further enquire as to whether the Constitutional rights of the Respondents were breached – another collateral attack. They urge in favour of "special circumstances" justifying this Court enquiring into the matter a number of issues, including: that the issue was determined by a 'temporary court'; that the judges of that temporary court enjoyed no security of tenure; that the lack of security of tenure and the manner in which the judges were appointed was of particular significance given the highly charged political atmosphere arising from all the circumstances surrounding the Respondents' trial; that the courts which heard and determined the issue owed its existence to a policy decision by the Organization of Eastern Caribbean States governments to prevent the Respondents from accessing the court established by the Courts' Order. Notwithstanding the sublime cynicism of the arguments in the context of the Respondents and their place in the history of the existence of what they now refer to as the 'temporary court', I feel bound to deal with this issue, not least because there is a finding, albeit obiter, by the learned trial Judge in relation to the proviso to Section 8 (2).

[86] Section 8 (2), to the extent relevant here, reads as follows:

[38] [1993] 3 LRC199

"8. (2) Every person who is charged with a criminal offence –

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

(b) ....

(c) ....

(d) ....

(e) ....

(f) ....

And 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 a 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."

The learned trial Judge found in favour of the interpretation proffered by Counsel for the Applicants (Respondents) of the proviso to Section 8 (2), namely that it was all embracing and precluded the award of the punishment by death or imprisonment when a person charged with a criminal offence has had his trial, or a part thereof, conducted in his absence.

[87] I disagree with the learned trial Judge, both semantically, and from the point of view of purposive construction. Semantically, if the proviso were to read "Provided that in such circumstances the trial may take place……." rather than as it does "Provided that, in such circumstances as may be prescribed by law, the trial may take place….." then I could have no quarrel with the learned trial Judge's interpretation. However, written as it is, the proviso is clearly intended to apply to circumstances where an accused person, notwithstanding an absence of conduct so as to render trial in his presence impracticable, may in certain circumstances prescribed by law, be tried in his absence. In practical terms this happens most frequently in our magistrates' courts where an accused person is summoned before the Court on a complaint, and, having been served with the summons fails to turn up. In those circumstances the court may find him guilty of the crime

charged, but may not sentence him to imprisonment, but may fine him with a term of imprisonment in default of payment of the fine.

[88] From a purposive construction point of view to come to a conclusion different from the above would put in the hands of an accused person the power to frustrate his trial in circumstances where, as in this case for example, if found guilty, he might face a sentence of death. This cannot have been the intent and purpose of the framers of the Grenada Constitution.

[89] In the circumstances I agree with the conclusion of the learned trial Judge that this Court has no jurisdiction for the reason he has given. For the further reasons expressed at paragraphs [86] and [88] above, I am of the view that even if this Court had jurisdiction, the conclusion would be that where deliberate behaviour by an accused person designed to inhibit the orderly progress of his trial results in his being excluded for a greater or lesser period from the court room in which his trial is continuing no breach of the Constitution or of his constitutional rights occurs in the continuing of his trial in his absence; and that further there is no inhibition or bar to the court imposing such sentence as is appropriate, even a sentence of imprisonment or a sentence of death.

[90] The final issue is one raised by both the Appellant and the Respondents, and it surrounds the failure of the former Court of Appeal to provide the Respondents with a written copy of its judgment dismissing their appeal against conviction and sentence. The learned trial Judge found that, indeed, written reasons for the dismissal of the appeals of the Respondents against conviction and sentence had not been given to the Respondents in breach of Section 8 (3) of the Grenada Constitution and that, hence, this was a fit case for compensation to be assessed by a judge of the High Court and paid by the State. Section 8 (3) reads as follows:

> "8. (3) When a person is tried for any criminal offence, the accused person or any person authorized 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."

[91] The Appellant challenges the entitlement to damages whilst the Respondents' challenge goes to the quality of the remedy, the latter arguing that the proper remedy should be their immediate release. The real difference between the parties on this issue is whether as a result of the failure to deliver to the Respondents a written record of the judgment they were deprived of the possibility of an appeal to the Privy Council.

[92] In Mitchell and others v The Director of Public Prosecutions for Grenada and anor[39] these same Respondents petitioned the Judicial Committee of the Privy Council for special leave to appeal against the decision of the former Court of Appeal dismissing their motion for declarations challenging the constitutionality of that court and the court below. The Board, whose judgment was delivered by Diplock LJ found that People's Law No 84, passed by the restored Grenada parliament had properly been passed (in the context of the Grenada Constitution). Lord Diplock in concluding the Board's reasons stated the following:

> "The words of People's law 84 which purport to abolish appeals to the Privy Council are in absolute and unambiguous terms. In effect the first thirteen words purported to repeal the whole of section 104 of the Independence Constitution. Those words have since been confirmed and thereby validated by an Act of the legitimate Parliament of Grenada passed by a procedure by which section 104 (which may be described as a semi-entrenched, rather than a fully entrenched provision) may validly be repealed or amended. The repeal has therefore altered the Constitution of Grenada since 21st February 1985……. In their Lordships' view it deprives them clearly and unambiguously of any jurisdiction to entertain this petition under section 3 of the Privy Council Appeals Order, which is, as they have already pointed out, their only source of jurisdiction to hear appeals in proceedings originating in Grenada" (emphasis added)

[39] (1985) 32 WIR 241

[93] Appeals to the Privy Council were restored by the Constitutional Judicature (Restoration) Act[40] (the Restoration Act). It is the argument of learned Counsel for the Respondents that the provisions of the Restoration Act were intended to operate retrospectively. Learned Counsel for the Respondents referred the Court to Blyth v Blyth[41] as authority for the proposition that as appeals to the Privy Council were a procedural matter then the Restoration Act was retrospective in effect. Blyth v Blyth dealt with the admissibility of evidence of the circumstances of condonation as a defence to a petition for divorce on the grounds of adultery. The Matrimonial Causes Act 1963 permitted evidence to be given to rebut the presumption of condonation raised by the resumption of marital intercourse. The adultery, the resumption of marital intercourse and the filing of the petition for divorce all took place before the Matrimonial Causes Act came into force, but the trial took place after. The Commissioner who heard the petition refused to receive the evidence of the husband petitioner of the circumstances of the resumption of marital intercourse on the grounds that to do so would be to give s.1 of the matrimonial Causes Act retrospective effect. On that issue the House of Lords upheld the Court of Appeal. Lord Morris of Borth-y-Gest stated the following:

> "Having analysed the effect in law of the resumption of marital intercourse between the spouses after the commission of a matrimonial offence both Lord justices held that s. 1 dealt with a purely procedural matter, i.e. the admissibility of evidence to rebut what would previously have been regarded as conclusive evidence against a husband. The distinction that existed before the Act of 1963 between the respective cases of husband and wife in regard to evidence which they might give was swept away. I agree with Wilmer LJ when he said:
>
> > '….I think the section is to be construed as governing the procedure to be followed in all cases brought to trial after the Act of 1963 came into force, irrespective of the date of the events to which the evidence may be directed. To say that this involves the section being given retrospective effect is, I think, perhaps misleading. The true view is rather that the section looks forward to the conduct of trials that take place after the coming into force of the Act of 1963'"

[40] Act No. 19 of 1983
[41] [1966] 1 All ER 524

[94] I take the view that for a proper interpretation of the Restoration Act it must be read contextually. Sections 5, 6 and 7 of the Restoration Act are here relevant .

> "5. Subject as hereinafter provided:
>
> (1) The Privy Council Appeals Order shall, in its entirety, as from the appointed day, be restored and shall have full force and effect in so far as it is applicable to Grenada so that appeals shall again lie to Her Majesty in Council as provided for in the Constitution and the Privy Council Appeals Order.
>
> (2) The Privy Council (Abolition of Appeals) Act 1979 abolishing Appeals to Her majesty in Council shall no longer be of any force and effect as from the appointed day, and as from that day all decisions of Her majesty in Council, whether given before or after that day, shall have full legal force and effect in Grenada.
>
> (3) There is hereby restored all jurisdiction in Her Majesty in Council in and over Grenada, additional to the jurisdiction to hear appeals restored by sub-section (1), provided for in the Constitution, the Courts Order and the Privy Council Appeals Order.
>
> 6. All references in the Constitution to the High Court, the Court of Appeal, the Supreme Court and Her Majesty in Council shall, as from the appointed day, be construed as and deemed to be references to the High Court, the Court of Appeal, the Supreme Court and Her Majesty in Council respectively as those terms are used in the Courts Order and the Privy Council Appeals Order.
>
> 7. (1) All matters and proceedings commenced and pending in the Former High Court, including matters ordered by the Former Court of Appeal to be reheard, retried or determined howsoever by the Former High Court, shall be deemed to have been commenced and may be continued in the High Court and, for such purpose only, nothing contained in this Act shall invalidate any proceedings done in the Former High Court prior to the appointed day.
>
> (2).....
>
> (4) All matters and proceedings pending in and not determined by the Former Court of Appeal shall be determined and concludqed as if pending in the Court of Appeal.
>
> (4) Notwithstanding anything contained in this Act or any other law, no appeal whatsoever at all shall lie to Her Majesty in Council from

> any decision whether final, interlocutory or otherwise or from anything or matter arising out of any such decision of the Former Court of Appeal.
>
> (5) ……

[95] In my view the sole purpose for having the judgment of the Former Court of Appeal in writing would have been to permit them to appeal to the Privy Council. I take the view that the clear, unambiguous and vigorous language of the Restoration Act and the decision in Mitchell et al v D.P.P (supra) precluded that possibility.

[96] Having said the above, however, it is necessary to accept the fact that the Former Court of Appeal or the State did fail in its constitutional duty to provide written reasons for its decision, notwithstanding that reasons were given orally in open court.

[97] The remedy being sought here is a Constitutional remedy. If available, it would have been available in 1991. The right of appeal to the Privy Council against conviction and sentence, if available, would have been available in 1991. In the circumstances, I am of the view that it is apposite to quote from the judgment of Lord Nicholls of Birkenhead in Durity v The Attorney General of Trinidad and Tobago[42] at paragraph 35:

> "….the Board consider it may be helpful if they make certain general observations. When a court is exercising its jurisdiction under section 14 [equivalent of section 16] of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established."

[42] Privy Council Appeal No. 52 of 2000

[98] I am of the view that this further collateral attack represents a misuse of the court's Constitutional jurisdiction. In the circumstances, I would allow the Appellant's appeal and dismiss the Respondent's Counter appeal.

Michael Gordon, Q.C.
Justice of Appeal

[99] d'AVERGNE, J.A. [AG.]: I have read the preceding judgments of Alleyne, J.A. and Gordon, J.A. and agree that the Appellant's appeal should be allowed and the Respondent's Counter appeal should be dismissed.

Suzie d'Auvergne
Justice of Appeal