

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS.11 AND 11A OF 2005

BETWEEN:

EUGENE HAMILTON

Petitioner

and

[1] CEDRIC LIBURD
[2] LEROY BENJAMIN
[3] WAYLAND VAUGHN

Respondents

CIVIL APPEAL NOS.12 AND 12A OF 2005

BETWEEN:

GLENROY MARTIN BLANCHETTE

Petitioner

and

[1] EARL ASIM MARTIN
[2] LEROY BENJAMIN
[3] ARTHURLYN BELLE

Respondents

CIVIL APPEAL NOS.13 AND 13A OF 2005

BETWEEN:

LINDSAY FITZ PATRICK GRANT

Petitioner

and

[1] RUPERT HERBERT
[2] LEROY BENJAMIN
[3] WENTFORD ROGERS

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Ariel Misick QC with him Ms. Constance Mitcham and Ms. Marguerite Foreman for the Appellants.

Mr. Anthony Astaphan, SC with him Mr. Glenford Hamilton for the 1st Respondent

Mr. Maurice King, QC with him Mr. Delano Bart ,Attorney-General, Ms. Nicole Sylvester , and Mr.Adrian King for the 2nd and 3rd Respondents.

2006: March 22;
April 3.

JUDGMENT

- [1] **ALLEYNE, C.J. [AG.]:** These appeals and counter-appeals arise in consequence of an interlocutory order made by Justice Davidson Baptiste in a series of election petitions filed by the respondents following the general election held in the Federation on the 25th day of October 2004, in a consolidated hearing, the order being dated the 28th day of July 2005. This court had given the appellants leave to appeal, and the appeals and counter-appeals were also being heard together. At the conclusion of the appeal we dismissed the appeal, and promised to give reasons in writing, which we now do.
- [2] At the commencement of the hearing of the appeals learned counsel for the respondents took an objection in limine to the jurisdiction of the court to hear and entertain an interlocutory appeal in election petitions. The skeleton arguments on this issue were filed only on March 18th, before which neither the court nor the appellants had notice of the intention to make this objection in limine.
- [3] Learned counsel for the respondents argued, in limine, that the right to appeal requires legislative authority, and that in the absence of statutory authority therefor the Court of Appeal cannot properly entertain an appeal.

- [4] In consequence, learned Queen's Counsel for the respondents submitted that the court has no jurisdiction to entertain an appeal against an interlocutory order on an election petition. Counsel submitted that the appellate jurisdiction of the court is conferred by statute and in the absence of statutory authority neither the High Court nor the Court of Appeal can create such a right.
- [5] The jurisdiction of the court to hear and determine any question whether any person has been validly elected as a Representative to the National Assembly of the Federation is conferred by section 36(1) of the **Constitution of the Federation of Saint Christopher and Nevis**¹, and the right of appeal is addressed by subsections (6) and (7) of the same section. These subsections are reproduced in full.
- [6] Section 36 (6) and (7) read:
- (6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining any such question as is referred to in subsection (1).
- (7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) and no appeal shall lie from any decision of the High Court in proceedings under this section *other than a final decision determining any such question as is referred to in subsection (1) of this section.*²
- [7] Learned Queen's Counsel for the respondent submitted that the jurisdiction conferred on the court by section 36(1) of the constitution is a special jurisdiction separate and distinct from the ordinary jurisdiction of the High Court in civil matters conferred by section 7(1) of the **Eastern Caribbean Supreme Court (St. Christopher & Nevis) Act**³ (hereinafter the Supreme Court Act), and of the Court of Appeal under section 31 of that Act. Counsel asserted that section 82 of the **Constitution and Elections Act** (renamed the National Assembly Elections Act and hereinafter referred to as the Elections Act)⁴ makes provision as to who may present an election petition, and section 83 contains procedural provisions. Neither section

¹ Statutory Instrument 1983 N0. 881

² Italics mine.

³ No. 17 of 1975

⁴ Cap. 162, as amended by Act 7 of 1976 and 16 of 1983.

confers jurisdiction. Sections 86A and 87 make provision with respect to how the jurisdiction may be exercised. None of these sections purports to confer jurisdiction on the court.

- [8] In support of this proposition counsel relied on the case of **Patterson v Solomon**⁵, which emphasized the special nature of the jurisdiction, and that the principles there adumbrated do not depend on whether or not the jurisdiction was formerly exercised by the legislature.
- [9] Learned Queen's Counsel submitted that sections 7 and 31 of the **Supreme Court Act** confer jurisdiction in civil matters on the Supreme Court (the High Court and the Court of Appeal). Counsel submitted that this jurisdiction clearly does not include the jurisdiction in matters concerning 'any question whether any person has been validly elected as a Representative'⁶, a jurisdiction which falls squarely within the provisions of section 36 of the Constitution, and which the legislature cannot, and has not purported to, usurp under the ordinary civil jurisdiction of the court.
- [10] Counsel for the respondent contended that the limitation on appeals provided by section 36(7) of the Constitution cannot be overridden by legislation other than legislation which effectively and explicitly amends the Constitution. Section 96(7) of the Constitution clearly places the jurisdiction conferred by section 36 outside the pale of the regular civil jurisdiction of the High Court, and section 98 of the Constitution is explicitly made '*subject to section 36*', thus limiting the appellate jurisdiction of the Supreme Court within the boundaries established by section 36.
- [11] Learned Queen's Counsel submitted that there is good reason for the Constitutional provisions making it imperative that election petitions be disposed of speedily, by limiting the right to appeal and thus eliminating opportunities for delays caused by legal maneuvers. As was said in **Da Silva v A.G. of Ceylon**⁷, *the subject matter is*

⁵ [1960] 2 All E.R. 20 at p. 24.

⁶ Section 36 (1)(a) of the Constitution.

⁷ (1949) 50 NLR 481

such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal. Counsel asserted that this case before us illustrates the point, being a case where the question of membership of the legislature remains in question some 18 months after the election, by reason of procedural appeals, a clearly highly undesirable situation.⁸

[12] In response, Mr. Anthony Astaphan, S.C., lead counsel for the first appellants in the appeals, submitted that the jurisdiction of the High Court under section 36 of the Constitution is a parallel jurisdiction with that under the Supreme Court Act. Counsel referred in particular to subsections (1), (5), (6) and (7) of section 36. Counsel submitted that under the parallel jurisdiction all the rights and remedies of the High Court available under its ordinary civil jurisdiction are available in addition to the rights and remedies provided for under the section 36 (Constitutional) jurisdiction.

[13] Learned senior counsel submitted that, unlike the Constitutions of Trinidad and Tobago and some others, the Constitution of the Federation does not provide explicitly that questions arising under section 36(1) shall be determined under a law prescribed by Parliament. Counsel submitted that section 36(1) provides for the enforcement of the provisions of section 28 and other questions connected with membership of the National Assembly or the Nevis Island Assembly. He contended that in relation to the Elections Act, matters relating to the constitution fall under the Constitutional jurisdiction, while matters not addressed in the Constitution are not affected by the constitutional provisions as to jurisdiction, but fall to be decided under the parallel, ordinary jurisdiction of the court.

[14] In support of this proposition learned Senior Counsel relied on **Russell and Others v Attorney-General of St. Vincent and the Grenadines (Court of Appeal)**⁹. In the paragraph cited by learned Senior Counsel, in the judgment of Sir Vincent Floissac, C.J., and with which Byron and Liverpool JJA concurred, it was held:

⁸ *Albert Joseph Arzu v Allan Edmund Arthurs and another*. [1965] 1 W.L.R. 675 at p. 679 E.

⁹ [1995] 50 WIR 127 at p. 137.

"The jurisdiction to determine questions as to the validity or otherwise of elections to the House of Assembly and other questions referred to in section 36 of the Constitution has been excluded from the jurisdiction conferred by section 96 because the former jurisdiction is a peculiar and special jurisdiction. It is essentially a parliamentary jurisdiction conveniently assigned to the judiciary by the Constitution and by legislation."

[15] As in the case of the Federation of Saint Christopher and Nevis, sections 36 and 96 of **The Constitution of Saint Vincent**¹⁰ respectively confer on the High Court jurisdiction to hear and determine, among other things, any question whether any person has been validly elected as a representative, and whether any provision of the Constitution other than a provision of Chapter 1 has been or is being contravened. These are indeed separate and distinct jurisdictions, although they both fall within the Constitution and relate to questions of significant constitutional importance.

[16] **Russell v Attorney-General**¹¹ determined that a question such as is referred to in section 36 cannot be determined under section 96, because the jurisdiction under section 36 is a 'peculiar and special jurisdiction'. I agree, and for the same reason hold that such a question cannot be determined under the ordinary jurisdiction of the High Court in civil matters. The jurisdiction under section 36 is 'essentially a parliamentary jurisdiction conveniently assigned to the judiciary by the Constitution'. What is more,

'...the same principle applies whether or not the jurisdiction vested in the particular court had previously been exercised by the legislative body. As was said in [*De Silva v A.-G. for Ceylon*¹²] the dispute is one which *"concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council."*¹³

¹⁰ Cap 2, Laws of Saint Vincent & The Grenadines Revised Edition 1990.

¹¹ *Supra*, footnote 8.

¹² *Supra* footnote 7.

¹³ *Patterson v Solomon* [1960] 2 All E.R. 20 at p. 24.

[17] This case went on appeal to the Privy Council. However, as events unfolded, it became unnecessary for that court to decide the issue. Nevertheless, their Lordships' *obiter* references to the issue are helpful. Lord Mustill, delivering the opinion of the Board, had this to say;

“...this caused their lordships some concern lest a declaration obtained under section 96 might be used as a stepping stone towards the unseating of elected members, or of the elected House as a whole, which is the exclusive preserve of section 36.

.... the court will be alert to make sure that such a procedure will not be allowed to outflank the comprehensive jurisdiction over election disputes which the Court of Appeal has held to reside exclusively in section 36.”¹⁴

[18] Learned senior counsel referred further to section 86A of the **Elections Act**, but the court pointed out to him that this section makes procedural provisions, and does not relate in any way to jurisdictional issues. Counsel referred further to the Privy Council case of **Devan Nair v Yong Kuan Teik**¹⁵. That section of their Lordships' decision, however, does not assist the appellant. It is in relation to the question of a right to appeal to The Federal Court or to the Privy Council on an interlocutory order on an election petition. The decision is to the effect only that section 36 of the Elections Offences Ordinance of Malaysia applies to all cases where there has been a final determination of the matter, whether it be on procedural grounds or upon the merits. Such a question does not arise in these cases, as it is common ground and indeed indisputable that there has not been a final determination of this matter.

[19] The case of **Harmon v Park and another**¹⁶ relied upon by learned Senior Counsel for the appellant does no more than confirm that the jurisdiction of the courts under statutes of the nature of the **Elections Act** is a special jurisdiction, apart from which the case turns on its own particular facts and applicable statutory provisions. The case of **Lord Monkswell and others v Thompson**¹⁷ follows **Harmon v Parks** and affords no further assistance.

¹⁴ **Russell v Attorney-General** [1997] 51 WIR 110 at p. 125.

¹⁵ (1967) 2 AC 31, at p. 39 E.

¹⁶ [1880] Vol. VI Q.B 323 at p. 326.

¹⁷ [1898] 1 Q.B. 353.

- [20] Learned senior counsel sought to argue that the order test, rather than the application test, should apply in determining whether the appeal was an appeal against an interlocutory order. He relied on the cases of **Nair *supra*, Arzu v Arthurs**¹⁸, **Duporte v Freeman**¹⁹ and **Allen v Wright (No. 1)**²⁰. With the deepest respect to learned Senior Counsel, whether it is or is not makes not the slightest difference in this case. In any case, as I indicated earlier, it is common ground that whichever test is applied, the order appealed is an interlocutory order.
- [21] To his credit, learned Queen's Counsel for the second and third appellants, Mr. Maurice King Q.C. did not seek to extend the argument beyond expressing support for the submissions of Mr. Astaphan on the issue of the parallel jurisdiction.
- [22] It seems clear to me that section 36(7) of the Constitution of the Federation of Saint Christopher and Nevis unequivocally excludes the possibility of an appeal from any decision of the High Court in any proceedings which seeks to determine whether any person has been validly elected as a Representative to the National Assembly other than a final decision determining that question. The proceedings in which this appeal arises is clearly such a proceeding, the decision is not a final decision, and I have no hesitation in holding that this court has no jurisdiction to entertain an appeal, notwithstanding that leave to appeal was granted.
- [23] The appeal is dismissed, with no order as to costs.
- [24] Since this costs order departs from the general rule that the successful party should normally be awarded costs, we considered that we should explain our reason for the departure. The respondents had not raised this issue prior in earlier proceedings leading up to this appeal. They did not oppose the applications for leave to appeal, and indeed themselves applied for and obtained leave to cross-appeal. They only served the appellants with notice of their intention to take the point at the last

¹⁸ *Supra* footnote 8

¹⁹ [1968] 11 W.I.R. 497.

²⁰ [1960] 2 W.I.R.100.

moment, and filed their skeleton arguments on the issue only on March 18th, the Saturday prior to the scheduled date of 20th March when this matter was expected to come before the court, thus depriving the appellants of the opportunity to fully consider the point and perhaps to take steps to minimize the costs consequential on a full hearing.

[25] It was directed further that the substantive matter be brought on for trial expeditiously.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal