

EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
SAINT CHRISTOPHER AND NEVIS

SKBHCV2012/0399

IN THE MATTER OF THE CONSTITUTION OF SAINT CHRISTOPHER AND
NEVIS

and

IN THE MATTER OF THE APPLICATION BY WAY OF FIXED DATE CLAIM
FOR CONSTITUTION REDRESS FOR BREACH OF THE CONSTITUTION

BETWEEN:

[1] THE ATTORNEY GENERAL OF ST. CHRISTOPHER
AND NEVIS

[2] FRANKLYN DORSET
(Superintendent of Prisons)

Applicants/Defendants

And

BERNARD RICHARDS

Respondent/ Claimant

SKBHCV2010/0388

IN THE MATTER OF THE CONSTITUTION OF SAINT CHRISTOPHER AND
NEVIS

AND

IN THE MATTER OF THE APPLICATION BY WAY OF FIXED DATE CLAIM
FORM FOR CONSTITUTIONAL REDRESS FOR BREACH OF
CONSTITUTION

BETWEEN:

[1] FRANKLYN DORSET
(Superintendent of Prisons)

[2] THE ATTORNEY GENERAL OF ST. CHRISTOPHER
AND NEVIS

Applicants/Defendants

And

JEFFREY MARTIN

Respondent/Claimant

Appearances:

Mrs. Tasha Powell Williams and Mr. Oneal Simpson for the Applicant in
both applications

Mr. John Cato for the respondent in both applications

2013: July 25;
November 27;

JUDGEMENT

[1] On December 13th 2012 the Superintendent of Prisons and the Attorney General of Saint Christopher and Nevis filed two applications as a result of two applications by way of fixed date claim form for constitutional redress. Given the content and purpose of the two applications they will both be addressed in this judgment.

[2] The redress sought in both applications concern the striking out of the two actions seeking constitutional redress. As such there is no need to reproduce both.

- [3] The orders sought are as follows:-
- (1) An order striking out in its entirety, the fixed date claim number SBKHCV2012/0399 against the 1st applicant /1st defendant and the 2nd applicant/defendant, filed on 1st day of November 2012 claiming constitutional redress, damages and costs, pursuant to Rule 26.3 (1) and (c) of the Civil Procedure Rules "CPR 2000"
 - (2) An order that the respondent/claimant pay the costs of the 1st applicant/defendant for this application.
- [4] The grounds in both application, which are similar, are these:-
- (1) The respondent/claimant has failed to take cognizance of the provisions of section 66 of the Federation of St Christopher and Nevis constitutional order of 1983 (hereinafter "the Constitution) and as such has prescribed a claim that is at odds with pertinent provisions of the said constitution.
 - (2) The claim reveals no legitimate cause of action against the applicants.
 - (3) The respondent/ claimant has failed to comply with the provisions of Rule 56.7 (4) (c) of the CPR 2000 in that the claims against the 1st applicant/1st defendant and the 2nd applicant/2nd defendant do not contain reasonable information to ground the alleged cause of action against the 1st applicant 1st defendant and the 2nd applicant/2nd defendant.
 - (4) The respondent/claimant has failed to take cognizance of rule 56.5 of the CPR 2000 in that there has been an unreasonable delay in making the claim.
 - (5) Further, the claimant has through inordinate and egregious delay, slept on his alleged rights, which constitute an abuse of the process of the court.

- (6) The respondent/claimant has mounted a claim that is misguided, frivolous and vexatious, with no reasonable prospect of being successfully advanced.

Evidence

- [5] The content of the affidavits sworn to by Franklyn Dorset and filed on 13th December, 2012 are in similar terms
- [6] In his affidavit in support of the two applications Frankly Dorset deposes that he is the Superintendent of Prisons at Her Majesty Prisons for the Government of the Federation of Saint Christopher and Nevis. The affidavit deposes further regarding the fixed date claim form filed on 1st November 2012 by the respondent/claimant seeking certain remedies.
- [7] With respect to the applications, the deponent says that he has been advised by counsel for the 1st applicant/. 1st defendant and the 2nd applicant/2nd defendant that the said application is correctly based on the grounds stipulated.
- [8] A number of matters, based on the advice of counsel are identified by the deponent: these are the claim offends against. The "clear and unambiguous" provisions of section 66 of the Federation of St. Christopher and Nevis Constitutional order of 1983; the claim offends against the basic equitable principles by having been brought at an unreasonably long time offer the alleged breach; the claim has been brought against him in his personal capacity, and as such the 1st applicant/1st defendant is improperly joined; the alleged actions of the then Governor-General in his fully constitutionally authorized capacity and as such the issue of separation of powers does not arise, as the Governor General was not performing a sentencing function.

Submissions

- [9] The applicants assail the claims on three basic grounds 1. Failure to comply with the rules of court; failure to disclose on reasonable cause of action; abuse of process.
- [10] In terms of a failure to comply with a rules of court, which is in this instance is Rule 56.7 (4) (b) and (c) which make it mandatory for the affidavit accompanying the application for the state the nature of the relief sought identifying any interim relief sought and whether the claimant seeks damages, restitution and other matters. And in the case of a claim under the relevant constitution, the provision of the constitution which the claimant alleges has been, is being or is likely to be contravened.
- [11] It is the contention of the applicants that the respondents/claimants fails to include any of the requisite particulars to a satisfying degree. It is however acknowledged that the claimant in his affidavit in support does ask the court to make such declarations as it sees fit for the purpose of enforcing or securing the enforcement of any and all of the claimant's rights alleged to have been infringed.
- [12] This prayer is characterized by the applicants as being a "most vague and imprecise expression of what the respondent/claimant is seeking" and as such a fishing expedition.
- [13] Much reliance is placed on the Anguillan case of **Homer Richardson v The Attorney General of Anguilla** in which the learned judge Mr. Justice Bruce Lyle eloquently analysed and applied the relevant rule in the context of its mandatory nature and the failure to comply with the said Rule 56.7 (4) of **CPR 2000** was fatal.

[14] In so far as the second line of attack is concerned, it relates to a failure to disclose a reasonable cause of action. In this regard the contention is that: “the failure to state the relevant constitutional provision that is alleged to be breached is also a failure to disclose a reasonable cause of action”. Further, the failure to plead the necessary material facts is another manifestation of a failure to disclose a reasonable cause of action.

[15] The final basis upon which the action is being questioned is abuse of process. This has two strands. The first relates to the case being brought against the 1st applicant in his personal capacity which is improper and misconceived. The submission goes on to say that “there are no allegations against the 1st applicant in either his personal capacity or in his capacity as superintendant of prisons, he is merely a custodian of the respondent/claimant during his sentence”.

Respondents’ submissions

[16] After an identification of the grounds advanced by the applicants learned counsel for the respondent/claimant advances the following:

“All of the above submissions stripped of their technical language boil down to 4 central issues of law:

- i. Whether the Governor General had the authority under the constitution to sentence the convict as he did by warrant commutation to 50 years
- ii. Whether the convicts were entitled to be heard or to make representation by their counsel to the Advisory Committee on the prerogative of mercy.
- iii. Whether or not there is a sufficient detail the fixed date claim form and affidavit to ground a case under the constitution for infringement of the fundamental rights of the convicts, and if not whether the court will so find and strike out as requested or permit the claimant to amend.
- iv. Whether the convicts are entitled to a hearing in view of the passage of time between their conviction and now, bearing in mind the developments of the law during the

period which they allege to have given them a cause of action under the constitution”.

[17] Learned counsel for the respondent/claimants next cause is a “response to ground no.1.” in part it reads thus:

“The Governor General power to order imprisonment of the claimants for 50 years is a discretion reposed in the Govern-General by section 66 of the Constitution in his capacity as representative of the Crown in the exercise of the prerogative of mercy.”

[18] The point advanced by counsel for the applicants is that the Govern-General does possess the power to commute and that the sentence of imprisonment for 50 years is an integral part of the exercise of that power under section 66 of the Constitution.

[19] The point made here is easily disposed of in **Attorney General of Grenada v Bernard Coard et al**¹ the learned law Lords reversed the judgment of the Eastern Caribbean Supreme Court of Appeal, (Alleyne, CJ Ag., Gordon and D’ Auvergene) and restored the judgment of Benjamin J. (as he then was) at first instance in which the learned judge held, inter alia:

- I. The Death Penalty imposed upon the applicants for murder, was unconstitutional, and
- ii. The death penalty imposed upon the applicants for murder, was unconstitutional and
- iii. That the attachment of the final condition of a term of imprisonment for the rest of their natural lives is unconstitutional.

[20] Further in the **Coard’s case**, the Learned Law Lords also upheld the convict’s right of access to the court after years of languishing in jail

¹ Civil Appeal No. 10 of 2009 (PC)

serving an illegal sentence and gave them the full benefit of the development in the law that sanctioned declared rights under their rights under the constitution respectively. The case is on all fours with the presence case of Bernard Richards and Jeffrey Martin.

Analysis and Conclusion

- [21] The court's purpose in citing the foregoing is to illustrate the observation that learned counsel for the respondents/claimants is that, despite the citation of Rules 56 and 57 of **CPR 2000** that is as far as it goes. As it is, the remainder of the submission is dominated by discussions of subjective Constitutional law, ²rather than the relevant procedural law.
- [22] In light of the failure of the learned counsel for the respondents/claimants to advance submissions on the applications it is now for the court to examine the submissions of the applicants and the relevant parts of **CPR 2000**.
- [23] It will be recalled that the applicants that the respondents/claimants have failed to comply with Rules 56.7 and 56.5 and the applicants are seeking certain orders striking and the action pursuant to Rule 26.3(1) (b) and 3.
- [24] In terms of the power to strike sub-paragraphs (b) and (c) of Rule 26.3 (1) provide as follows:
- (1) In addition to any other power under these rules, the court may strike out a statement of case if it appears to the court that

² Among the cases cited in the submissions are: *Reyes v the Queen* [2002] 2 AE 235 (Belize); *Regina v Hughes* [2002] 2 AE 259 (St. Lucia); *Fox v The Queen* [2002] 2ER (St. Kitts); *Bowe v The Queen* [2006] 1 WLR 163 (Bahamas)

- a) The statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- b) The statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings

[25] But while the power is unambiguous, the rule is that it must be used very sparingly³ and as such only where there is no chance of success should it be exercised.

[26] In view of the import of the two applications it is necessary to set out one the respondent's case. In the fixed date claim form, the following is stated:

Brief statement of Claim

"The claimant is a prisoner at her Majesty's Prisons, Cayon Street, Basseterre. The prisoner was convicted of murder and sentenced to death. Following a hearing of the Mercy Committee at which the prisoner was not represented and therefore was not heard, the Governor-General commuted the sentence of death and substituted it with a sentence of 50 years with no remission.

The claimant is alleging that the sentence imposed was illegal in that the Governor-General had no authority under the Constitution or any other law to impose such a sentence, a function which is reserved to the courts. In the premises, the claimant alleges that his constitutional right to a due process, including his right to be fair hearing has been infringed and therefore seeks all the remedies allowed by the constitution of Saint Christopher and Nevis for breaches of the constitution including damages for such breach in relation to him and costs."

³ see *Williams and Humbert Ltd, Wand H. Trademark (Jersey) Ltd* [1986] AC 368

See: *Ian Peters v Robers George Spencer, HCVAP2009/016 Spencer v Attorney General of Antigua and Barbuda* [1986] LRC Anthony Pestaina and Hyacith Pestaina v First Caribbean International Bank et al ANUHCV2003/0385 decision on application delivered on November 27th, 2013

[27] In summary if the following are the main issues raised in the foregoing:
At a hearing of the Mercy Committee the claimants were not represented and hence not heard.

1. The Governor General commuted his sentence from that of death to imprisonment for 50 years with no remission.
2. The sentence imposed is illegal as the Governor General has no such power.
3. The respondents/claimants are entitled to a fair hearing and due process.
4. All remedies allowed by the Constitution of Saint Christopher at Nevis are sought.

[28] Under Rule 56.7 (4) an affidavit in support is required and the detailed contents of the affidavit are set out. The contents are conjunctive and include the following:

- a) The name, address and description of the claimant and the defendant.
- b) The nature of the relief sought identifying
 - i. Any interim relief; and
 - ii. Whether the claimant seeks damages, restitution, recovery of any sum due or alleged due or an order for the return of property, setting out the facts on which such claim is based and where practicable, specifying the amounts of any money claimed;
- c) In the case of a claim under the relevant constitution – the provision of the constitution which the claimant alleges has been, is being or is likely to be breached;
 - a) The grounds on which such relief is sought;
 - b) The facts on which the claim is based.....”

Have the Respondents/claimants complied

[29] Both of the affidavits in support of the claim are in identical terms and there hardly any compliance or as the applicant put it to any satisfying degree. They are both overwhelmed by legal submissions and constitutional proposition based on the advice of learned counsel which offends against Rule 56.7 (4) of **CPR 2000**. The following extract from the affidavit of Jeffrey Martin illustrates the point being made

- "(1) In or about the said year or soon thereafter, I was taken from the cell reserved for persons condemned to death and led to the office of the Superintendent of Prisons who, sitting at his desk and reading from a paper, informed me that the sentence of death imposed by the court had been commuted by the Governor-General on the advice of the Mercy Committee and that the execution of the said sentence would no longer be carried it.
- (2) He further informed me, that a sentence of a term of imprisonment of 50 years without remission had been imposed by the said Governor-General in lieu of and in substitution for the death sentence.
- (3) Since that time, I have been incarcerated at the said prison serving the sentence imposed by the said Governor-General and have duly completed 28 years of the said sentence.
- (4) I have sought the advice of counsel on this matter and I have been advised and verily believe that the said sentence is illegal under the Constitution of St. Kitts
- (5) I have been advised and verily believe that under the Westminster System of government which St. Kitts Constitution has enshrined, the doctrine of the separation of powers dictates that the functions of the judiciary, which includes the authority to sentence offenders, are exclusive to the courts and can only be exercised by a duly constituted court.
- (6) I have been further advised and verily believe that the Governor-General's usurpation of the court's power is without legal authority, does not carry the force of law and is therefore illegal, null and void.
- (7) In the premises, I am appealing to the honourable court for redress under the Constitution of Saint Christopher and Nevis.

- (8) I am advised and verily believe that constitutional jurisprudence that has been developed by the Privy Council over the years since my incarceration (*Ex parte Venables, Hinds, Greene Browne v The Queen, Mollison ect.* On which, among other authorities, my solicitors will reply) clothes this honourable court with the jurisdiction to declare the sentence imposed by the Governor-General null and void and to peremptorily set it aside.
- (9) This Honourable Court, and only this honourable court alone, has the constitutional authority to declare that the proceedings of the Mercy Committee, to the extent that it did not give me a hearing when it deliberated, was itself a breach of my right to make representation to the committee, either in person or by counsel, as an adjunct of the fair hearing subsumed in the notion of "due process" cognizable under and enshrined in the constitution of Saint Christopher and Nevis."

[30] Contrary to what is required by Rule 56.7 (4) (c), there is no mention of the provision of the Constitution of Saint Christopher and Nevis which has been is being or likely to be breached. Together with the other sub-paragraphs of Rule 56.7 (4), they are conjunctive and as such there must be total compliance. Nor does the affidavit state the nature of the relief sought. Rather, the relief sought is made conditional on findings of the court in terms of infringement.

[31] The court therefore agrees with the submissions on behalf of the applicants that there is non-compliance with sub-paragraphs (b) and (c) of rule 56.7 (4) of **CPR 2000**. This is fatal.

[32] Much reliance is placed on a number of Privy Council decisions including **Coard and others v The Attorney General of Grenada** especially in terms of the illegality of the sentence of death imposed and the hearing of the appeals many years after the **decision** by our Court of Appeal in July 1991. As their Lordship put it,: "the finality of the appeal does not mean that the convicted person is entirely without a remedy"

[33] The Coard case was concerned with the legality of the sentence of death imposed and the Board ruled that it was "invalid" and the case should be

remitted to the Supreme Court of Grenada for the appellants to be sentenced in accordance with the prescriptions of section 230 of the Criminal Code” this was after due consideration of the mechanism for the review of sentences in Grenada and failure thereof.

- [34] The foregoing signals the distinction between the Coard case and the respondents/claimants case. For one thing, what the Governor-General did under section 66 of the constitution of Saint Christopher and Nevis based on the Privy Council’s reasoning in the Coard case is a positive rather than a negative.
- [35] The more fundamental point is that the said section 66 is part of the Supreme Law of the land and the challenge on grounds of the separation of powers doctrine and other side issues is simply unwarranted and unbearable. In all of this, the respondents/claimants no longer faced the death penalty, but rather a sentence of 50 years without remission.
- [36] The conclusion, in agreement with the submission on behalf of the applicants, is that the respondent/claimants’ case does not disclose a reasonable ground for bringing in action.⁴
- [37] Abuse of process has been variously described as proceedings that are simply improper, wrong or unfair⁵. Therefore, given the context of the affidavits in support the fact that section 66 of the Constitution cannot be challenged on the bases of the separation of powers doctrine, it is the conclusion of the court that the actions constitute an abuse of the process.

⁴ See: *Homer Richardson v The Attorney General of Anguilla*, High Court Claim No. 31/2005

⁵ See: *Hui –Chi Ming v R* [1992]1 AC 34; *Johnson Gore Wood* [2001] 1 WLR 72, 81-82.

Costs

[38] In all the circumstances and given the nature of the proceedings there is no order as to costs.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows

1. The fixed date claim forms filed on October 12th, 2012 and November 1st, 2012 are struck out pursuant Rule 26.3 (b) and (c) of CPR 2000 because
 - a. The said claims disclose no reasonable ground from bringing the actions since there was a failure to comply with the conjunctive requirements of Rule 56.7 (4) of CPR 2000 in that the nature of the relief sought was not stated in the affidavit of support and the said affidavit does not reveal the relevant provisions of the Saint Christopher and Nevis constitution which the respondents/claimants allege has been, is being or likely to be breached.
 - b. The filing of the actions by the respondents/claimants constitutes an abuse of process.
 - c. Section 66 of the Constitution is part of the supreme law of the land which cannot be challenged on the basis of the separation of powers doctrine or at all.
2. There is no order as to costs

Justice Errol Thomas
High Court Judge [Ag]