



2. The decision of the Judicial Committee of the Privy Council in Director of Public Prosecutions v. Mollison (Kurt) (No.2) 2003 62 WIR 268 heralded a change as all such sentences were declared to be unconstitutional and therefore unlawful.

Our Court of Appeal therefore quashed this sentence on the 23<sup>rd</sup> of July, 2007 and as a result the applicant is now being held at the court's pleasure.

The applicant is now able to seek a review of his detention pursuant to part 75 of the Civil Procedure Rules 2002.

3. By way of notice of application for court orders dated the 22<sup>nd</sup> of February, 2010, the applicant seeks the following orders:-

1. That the applicant be released unconditionally or alternatively
2. That the applicant be released on parole with condition.

4. The grounds on which he is seeking the orders are as follows:-

1. The applicant was convicted of capital murder on the 4<sup>th</sup> on November, 1996.
2. The applicant was sentenced to be held at the Governor General's pleasure.
3. The applicant has been detained for over five years under the said sentence.
4. The applicant made a previous application which was refused on 31<sup>st</sup> October, 2007
5. The applicant has made no application for review in the past two (2) years.
6. The application has been in custody for over ten (10) years and has been sufficiently punished for his offence.

7. The applicant has been rehabilitated and is not a danger to society.

8. Pursuant to CPR 75.6 this Honourable Court has power to grant the orders sought.

5. Having made an application in October 2007 which was dismissed with some recommendations the court saw fit to make, this application is made pursuant to CPR 75 (2) (4)

The general rule is that an application may not be made less than two (2) years after the previous application by that applicant.

6. Thus, this application must not be considered a review of the one dismissed by Miss Justice K. Beckford on October 31, 2007. It is a fresh application to be fully considered on its merit.

In his submission Lord Gifford put it thus – the court now has a duty to consider this application at this time on this evidence presented on behalf of the applicant.

7. The starting point – to my mind however, must be a reference to the facts on which the applicant was convicted i.e. the circumstances of the offence for which he has been convicted and sentenced.

Lord Gifford shared with the court a portion of the transcript of the notes taken of the summation of the trial judge dealing specifically with the caution statement the applicant had given after his arrest.

In the reasons for her decision relative to the first application Miss Justice Beckford said that “Mr. Hubert Gordon was bludgeoned to death at his home”.

8. It was thought useful to get a better understanding of the circumstances and thus the Court of Appeal decision in the matter was the source of information. This unreported decision was delivered by President Rattray on April 3, 1998 – recorded at SCCA No. 145/96.
9. The deceased Hubert Gordon lived and kept a small shop in the Mount Charles District in the Mavis Bank area of Saint Andrew. Workers at a coffee co-operative factory in the area would have their salary cheques cashed by Mr. Gordon at his shop.

He was found dead at his home on 4<sup>th</sup> June, 1994 with a building block and a piece of stick with blood stains found beside him.

10. The medical evidence given by Dr. Bhatt who conducted the post mortem examination disclosed the following injuries:-
  1. Laceration  $\frac{1}{2}$ "X  $\frac{1}{4}$ " on upper lip on the right side of mouth
  2. Laceration  $\frac{3}{4}$ "X $\frac{1}{2}$ " on the right side of the forehead.
  3. Laceration  $\frac{1}{2}$ "X $\frac{1}{4}$ " on the right elbow
  4. Laceration  $\frac{1}{2}$ " in length on corner of mouth.

In the doctor's opinion "death was due to intracranial hemorrhage as a result of injuries to head, caused by blunt external force" The doctor had found that the "scalp showed contusion on right temporal region and right side of frontal region. Skull showed fracture of right temporal wall and contusion on frontal lobe in the inferior surface".

11. This had all the appearance of a killing done in the course or furtherance of a robbery. All the pockets of the deceased were rifled. The premises which comprised the home and the shop of the deceased was ransacked.

Investigations led to the detention of the applicant who under caution when asked about cash and cheques which were taken from the deceased Gordon's pocket, he said "the cash already spent downtown" but with respect to the cheques he said he had tried to change them but was unsuccessful and so had thrown them into some bushes.

He took the police to bushes near to the road at Mavis Bank and there they retrieved three cheques issued by the Mavis Bank Central Factory drawn in the name of three persons, two of whom gave evidence that these cheques had previously been cashed for them by the deceased.

The operator of a wholesale/retail business in the area disclosed that the applicant had come to her business place seeking to cash a cheque which he handed to her but on noting that it had been endorsed to Hubert Gordon, she had refused to change it. By that time it was known that Mr. Gordon had been killed.

12. The applicant had given a statement under caution which was challenged but admitted at trial and formed the crux of the crown's case as to the killing of Hubert Gordon

The applicant in the statement tells of knowing one Godfrey who, he met on the Friday who told him he wanted him on the Saturday to follow him up the deceased, Mass Hubert. Upon enquiries of Godfrey as to the reason for this visit he was advised, in his own words.....

“he said mi mustn’t question him because if mi noh come  
him a goh kill me”

13. The applicant went on in the statement to tell of how on the Saturday he reached down to Mass Hubert shop where he saw this Godfrey in a tree and he called him out. Godfrey then gave him four cheques and gave him directions as to getting them changed.

The applicant admitted following Godfrey over to Mass Hubert, acting as look out for him when Mass Hubert left the shop and went to his home.

On Mass Hubert’s return he said Godfrey used a piece of board to hit him causing him to fall to the ground.

The applicant said he ran but Godfrey chased him, took him back to Mass Hubert where Godfrey used a block to hit Mass Hubert in his head. Then he was instructed to hit Mass Hubert and his refusal was met with a threat. In his own words he described what he did thus:-

“Him sey him ah go kill mi if mi noh do it, and mi tek  
up di block and mi lick him pon di side of him face  
wid it. Godfrey say mi must search Mass Hubert pocket  
and mi search him and mi find a bungle a twenty dollar  
and him search him two pockets a di back and tek  
out Mass Hubert billfold. Mi show him di twenty  
dollar bill dem wey mi tek out and him grab it from mi”

14. He went on to explain how he was approached by Godfrey the following day with enquiries as to whether he had changed the cheques. When he admitted he had

not Godfrey “draw him cutlass and run me down” is what the applicant said happened.

Ultimately he explained how he did in fact try to change the cheques at Miss Yvonne’s shop and when confronted by her with the fact that Mass Hubert was dead, he admitted knowing. He was given back the cheque and he went elsewhere to find out how much he could get on it. Again he failed to get them changed.

Eventually he told his brother about the cheques and was advised to return them to the person who had given him. He choose instead to tear up two, wet up two at a pipe and throw them away.

15. He went on to tell of further movements till ultimately he learnt his brother had been arrested. He told his mother how he got the cheques and she took him in to the Gordon Town Police Station.

16. In his address to the court at the start of this application, Lord Gifford asked the court to note the manner in which this statement was left to the jury at the trial.

The learned trial judge said:-

“What is the probative value and effect of that statement?

If you accept what he is saying that he ‘lick’ use part of a brick to hit the deceased, then that would mean that he was present, participating in the robbery, if you so find, and the death of the deceased”.

17. Having made this application, the matter came up in chambers where orders were made as to how it should then proceed. This Case Management Conference was held on 21<sup>st</sup> July, 2010.

It is to be noted that the Civil Procedure Rules at section 75 (2) (b) provides that within thirty (30) days of the filing of the application, the Superintendent of the relevant correctional centre shall submit to the Supreme Court:-

- a. A psychiatric report of the applicant
- b. A report from the Superintendent on the applicant.

The need for these reports was further re-enforced as one of the orders made was for their submission. Further a social enquire report was ordered to be submitted.

The applicant was ordered to be brought to the hearing and his aunt Aldith Wray was to attend the hearing for cross-examination.

18. The applicant's application was also supported by affidavits of staff officer Marva Minott-Dixon and civilian teacher at Saint Catherine Adult Correctional Facility – Charles Wheatle.

At a second Case Management Conference held on the 1<sup>st</sup> of February 2011 more time was given for the reports to be submitted. An order was made that if the makers of the report were needed to give evidence they were to be given thirty (30) days written notice.

The persons who had given affidavits were also ordered to attend for cross-examination i.e Aldith Wray, Marva Minott-Dixon and Charles Wheatle.

19. There was full compliance with the orders made at the Case Management Conferences. At the hearing, these witnesses were called:-

- (1) Aldith Wray
- (2) Marva Minott-Dixon
- (3) Charles Wheatle
- (4) Frederica Campbell – Probation officer
- (5) Dr. Myo Kyaw Oo - Consultant Psychiatrist

The applicant himself also gave evidence. The court also had the report from the Superintendent of the St. Catherine Adult Correctional Centre in the form of a letter to the Office of the Director of Public Prosecutions. It is noted that the applicant was transferred to that Correctional Centre on the 18<sup>th</sup> of November, 2003.

20. The Social Enquiry report presented to the court and signed by the probation officer in attendance was deemed by the court to be of little or no weight and could not be relied on. The person who prepared the report had not in fact conducted any of the investigation reported on. Indeed another officer had done all the necessary work and then from discussions Ms. Campbell had with this officer, a report was prepared.

This report contained reference to discussions had by this other officer with other individuals including the applicant. It also included reference to the subject file being thoroughly scrutinized and investigations carried out regarding the applicants conduct in the institutions for the past eighteen (18) years.

However the fact is that the applicant was not incarcerated at any institution for eighteen (18) years.

The report also however, referred to certain warnings and punishments meted out to the applicant gleaned from his file whereas the Superintendent report indicated that since his incarceration inmate's penal record had not shown any breach of the institutions rules or regulation.

It is to be noted that CPR 75 (5)(7) states that the judge may receive in evidence any document or information, notwithstanding that such document or information would be inadmissible on a court of law. However, the nature of the Social Enquiry Report is such that it would be best that the maker of the report should be the one who actually conducted the interviews, investigations and observations which are spoken to in the report.

21. The evidence led on behalf of the applicant from the persons who had filed affidavits centered around his educational accomplishments and development since 2007. His evidence also seemed to be focused on this area.

This clearly stemmed from the fact that his application in October 2007 had been dismissed with certain recommendations and it was sought to be shown how he had complied with these recommendations.

22. The relevant recommendations which had been made were:-
  - a) That the applicant be permitted to pursue any one of the several skills training programmes offered at the institution and
  - b) Continue his academic studies up to CXC or O'Level examinations level or any other examination within his capacity.

23. Hence both Marva Minott-Dixon and Charles Wheatle spoke glowingly about his efforts to improve himself academically, the latter in the capacity as his actual teacher and the former in the capacity as supervisor of the school area.

Significantly they agreed that at least since 2007 or 2008 he was obviously very focused on his education and has advanced from level 1 to level III over the years.

24. In her affidavit, however, Mrs. Minott-Dixon also spoke to the fact that she had discussions with the applicant about the offence for which he had been convicted. In it she said he had been honest and open and willing to acknowledge the role he had played in causing death of a man. She considered him genuinely remorseful and not attempting to minimize the seriousness of the conviction.

In her opinion she considered that “prison had done its job” with Troy.

25. Under cross-examination by Mr. Smith she explained further that such was his attitude while discussing the case, he had told her he was forced because of threats to hit the man with a stone and if he could turn back the hands of time he wouldn't have done it.

She interacts with him frequently and got to know him well.

26. Mr. Wheatle is the person who actually instructs the applicant in English, Mathematics and General Knowledge. He is satisfied that “Troy has a real desire to learn and to be in school”. His attendance has been excellent and there has been no disciplinary problems.
27. Mr. Wheatle shared with the court two of the applicant's workbooks which demonstrated that he is doing well.

Under cross-examination when the applicant was asked a question on mathematics, based on something he had done correctly in one of these workbooks, he was unable to understand the question much less to answer it properly.

28. However, Mr. Wheatle expressed satisfaction with the applicant's progress – currently still at the level three he was at when the affidavit was written in November 2010. In his affidavit Mr. Wheatle was of the opinion that if the applicant continued to apply himself in the way he has, he would be able to progress to level 1V during the current academic year.

Under cross-examination he admitted that at this time nearing the end of the academic year, the applicant has not progressed to that level.

He is doubtful of the applicant's ability to progress much further than level 1V and may never achieve level V. He is however able to give him great credit for having become functionally literate in the prison conditions after coming in illiterate.

29. He too feels that prison has done its job with the applicant in that he has chosen to find himself in one of the school programmes which were available.

He has been affiliated with the facility since 2000 and he was not aware that the applicant was in a class prior to 2007 i.e prior to the time the recommendation was made.

It is apparent therefore that the applicant's dedication focus and determination was fostered by the recommendation.

30. There is however one concerning feature about this thrust on the part of the applicant to prove his compliance with the recommendations.

In his affidavit he spoke of taking a HEART examination in July 2009 but not having had the results. Neither Mr. Wheatle his teacher not Mrs. Marva Minott-Dixon who supervises the school area knew anything about any such examination.

Under questioning he explained that some other correctional officer just came and gave him the examinations on behalf of HEART and he still was unable to get the results.

31. Another aspect of the recommendation which the applicant could not speak so successfully of having addressed was the recommendation that he pursue one of the several skills training programmes offered.

As Mr. Smith pointed out in submissions this was a conjunctive and not alternate recommendation.

It became clear from the evidence that the skills available are tailoring, carpentry, welding, woodwork and plumbing on a regular basis. Computer class was available on a more irregular basis dependent on the availability of a teacher and an entrepreneurship class was once offered but stopped when there was no teacher.

32. It was the last two skills, available irregularly, that seemed to have been attractive to the applicant so he has clearly not completed any training in either area.

There was some inconsistency in the evidence as to whether the applicant could have attended any other skill class.

He said he could not have gotten in to any as the classes were filled.

Mrs. Marva Minott-Dixon said he could not, due to the fact that the time the classes were held did not allow for it. She said the applicant attended school at the time the skills training took place so it was one or the other.

Mr. Wheatle said the skills training took place in the mornings whereas the applicant attended class in the afternoon session.

In any event the applicant under cross-examination said he took part in sporting activities during the morning when skills training was taking place.

There really was no satisfactory explanation but it is clear that the applicant has acquired no skill since 2007. He admitted that he wanted to get his reading and education prefect so he spent more time at school.

33. It is however beyond dispute that the question of whether the applicant ought now to be released does not rest solely on how well he has complied with the recommendations made.

I am satisfied that from the demonstration done in Court of his reading ability that the applicant is not very good at reading. Lord Gifford submitted that the section from the Bible from which he was asked to read was a difficult one. However, I note the applicant describes himself as a capable reader but I am not satisfied that he is as competent as he feels he is.

He said his writing is good and from the books exhibited his writing is indeed quite legible and his grammar and comprehension skills seem satisfactory.

As already indicated his mathematical skills still shows room for improvement.

34. I also do not doubt that the applicant is a mannerly, respectful young man as attested to by the persons from the correctional facility.

I am satisfied that any infractions he may have committed were not significant enough to be reported in his file.

The applicant may well be a 'model prisoner' – but his release cannot be based on this fact alone.

35. His aunt Miss Aldith Wray is to be commended in her desire to have the applicant come reside with her, back in the community in which he grew – where the offence took place.

Her plans for him is that he can engage in farming which his uncle, now deceased, had been doing prior to his death. If that fails she plans to try and get him a job at the coffee factory where she works.

There is also a chicken-coop that is available for him to rear chickens.

The applicant has no objections to these plans although to my mind, he has not signified any overwhelming desire to be a farmer.

Prior to his conviction he was an apprentice electrician. It was when asked specifically that he admitted that he did do a little farming as well.

36. There is no dispute that the applicant has the support of this aunt. His mother resides in England but seems to be supportive of him from that distance and has visited him while she was here.

Miss Wray also speaks of other family members who lives in the area and would be supportive of him.

The Superintendent in his report mentioned that the applicant has been visited by family and friends from time to time.

37. Other aspects of the applicant's progress in prison were addressed by Dr. Oo.

It is noted that the doctor spoke of the applicant being defensive and guarded in the interview held in January 2011. This follows three (3) previous interviews. It was noted that there was some inconsistencies with the information the applicant had given in the various interviews.

His writing skill was tested and the doctor formed the view he could not write well after instructing him to write something dictated to him.

His reading skill was tested and the doctor thought he struggled in his reading.

It was noted that in discussing the offence he did not deny his participation but did not want to reveal the details.

Dr. Oo was of the opinion that the applicant would benefit from psychological counseling. When pressed he admitted the limitations on the services available in the correctional system but insisted that they would be made available if required.

38. Ultimately in considering whether the applicant should be released, it is accepted that section 7 of the Parole Act should provide guidance.

Section 7 (7) is of particular significance – it provides:-

The Board shall grant parole to an applicant if the Board is satisfied that:-

- (a) he had derived maximum benefit from imprisonment and he is at the time if his application, fit to be released from the adult correctional centre on parole;
- (b) the reform and rehabilitation of the applicant will be aided by parole and
- (c) the grant of parole to the applicant will not in the opinion of the Board constitute a danger to security.

39. The attitude of the court in regards to applications under CPR 75 is seen in decision of Mrs. Justice McDonald-Bishop in Regina v. The Director of Correctional Services *ex parte* Garfield Peart, Claim No. 2009 HCV02240; Mr. Justice Campbell in Gibson Bunting v. Regina and of course the decision of Miss Justice Beckford in the former application of this applicant.

40. Although Lord Gifford has urged that not too much emphasis ought to be placed on the question of whether the applicant had been sufficiently punished, I find this a very important consideration.

The applicant was convicted of a capital murder – a killing in the course of furtherance of a murder. The sentencing provisions for this offence under the Offences Against the Person Act provides for imprisonment for life with the court specifying a period being not less than twenty years which that person should serve before becoming eligible for parole.

The applicant has up to this application spent fourteen (14) years in prison – is this sufficient punishment?

41. I do not think that question can be answered without considering the applicant's attitude now to the offence for which he was convicted.

When questioned about it by Mr. Smith, the applicant felt he should never have followed someone to do something against the law. He recognized that his mother had grown him up the best she could and when he reached a certain age he had followed someone who lead him to do something wrong which he regret doing. He regretted doing it because it was against the law, he knew he had gone beyond the rules and regulations and done some wrong.

He felt disappointed in doing something wrong.

It was glaring how at no time did the applicant acknowledge that he had done something which led to a man losing his life. He expressed no remorse for having killed another human being.

42. I note of course that the applicant was found to be genuinely remorseful by Mrs. Minott-Dixon who admits to having spent much time with him. This remorse was in no way evident when the applicant spoke in court – not in anything he said or the way he spoke. He was in no way apologetic.
43. Lord Gifford noted that there is nothing unusual in an inmate convicted of a serious offence refusing or reluctant to come to terms with a wrong he may have done.

He pointed out that there has been growth and maturity in the appellant's attitude to the offence. At one point he had denied committing the offence, he told his aunt he was framed, he admitted participating but blames someone else for causing his participation and he puts more blame elsewhere than what he is prepared to accept on himself.

The latter position is what was displayed in court.

44. Mr. Smith submitted that the applicant is not fit and proper to be released at this time for these reasons:-

- (a) recommendations has not been complied with especially as it concerned his acquisition of a skill – hence this application is premature
- (b) he has not been sufficiently punished.
- (c) He has not derived sufficient benefit from his period of incarceration and if released is still a danger to society.

45. Lord Gifford urged the court to consider seven (7) overwhelming positives to be viewed in the applicant's favour.

- 1. His behaviour
- 2. His attitude to his offence
- 3. The family support
- 4. The stable community to which he would return
- 5. His prospects for work
- 6. His zeal to learn
- 7. His skills – with the focus being what he has done, given the problems in the institution since it's no fault of his, he could do no more.

In concluding Lord Gifford opined that the applicant had derived maximum benefit from being in prison and it is unquestionable that his reform and rehabilitation will be aided by parole. This applicant, he said, has shown fully

adequate development, progress and maturity to justify his release without fear of his being a threat to society.

46. Having considered all the evidence and the submissions along with the circumstances of the offence, the involvement of the applicant and his age at the time, I am of the opinion that the applicant has not been sufficiently punished for the crime for which he was convicted.

I am further satisfied that while his efforts to improve himself must be commended, he has not adequately benefited from the opportunities he has embarked on in an effort to comply with the recommendations made at his previous application.

The applicant is to my mind not sufficiently rehabilitated to permit him to rejoin society at this time.

47. In accordance with CPR 75 (3) the application is hereby dismissed with the following recommendations.

- (a) That the applicant continue his academic studies up to a level where he can do some examination within his capacity.
- (b) That he pursue one of the several skills training programmes offered at the institution.
- (c) That the applicant be subjected to a period of counseling sufficient to ensure that his rehabilitation is completed.
- (d) Not to be eligible to be released on parole or otherwise for another five (5) years.