

29, 1969

1.

No. 15 of 1969

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :-

MALONEY GORDON

Appellant J. L. SPURGE  
LONDON, W.C.1.

- and -

THE QUEEN

Respondent

C A S E F O R T H E A P P E L L A N T

Record

1. This is an appeal in forma pauperis by Special Leave from the Judgment and Order of the Court of Appeal of Jamaica (Henriques, P. Shelley and Eccleston J.J.A.), dated the 1st day of May, 1968, dismissing the Appellant's Application for Leave to Appeal against his conviction by the Home Circuit Court held at Kingston (Edun J. and a Jury) on the 22nd day of November, 1967 upon a charge of murder.

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2. The Appellant was convicted of the murder on the 19th day of February 1967 of Andrew Barton and was sentenced to death.

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3. The principal ground of this Appeal is that the learned trial Judge sentenced the Appellant to death without ascertaining in a proper manner and without sufficient evidence that he had attained the age of eighteen years.

4. The Appellant was charged as follows:

"Maloney Gordon and Dennis Barth are charged with

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the following offence:

## STATEMENT OF OFFENCE

Murder

## PARTICULARS OF OFFENCE

Maloney Gordon and Dennis Barth on the 19th day of February 1967 in the parish of Kingston, murdered Andrew Barton. "

5. The case for the Prosecution was that one Andrew Barton, the deceased, was with one Camille Chung on the Palisadoes Road outside Kingston sitting on the beach when they were attacked by some five youths including the Appellant. The said Camille Chung testified that the Appellant carried a gun which did not change hands and in the course of the attack shot the said Andrew Barton; she subsequently identified the Appellant as being the person who held the gun on an identity parade.

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6. The Appellant gave evidence that on the 18th day of February, 1967 one Howard Simmonds had invited him and five other youths for a ride in a car he was driving and they had seen the deceased's car parked beside the road. Howard Simmonds said "mek we go for some money from the people in that car", and that if his companions did not join him they would have to walk back. They all went down to the deceased's car where the co-defendant (who was acquitted) and another youth approached the said Camille Chung whilst the remainder went towards the deceased but the Appellant and another man remained some distance away. The said Howard Simmonds then closed with the deceased, but the Appellant then separated them as Howard Simmonds said "You lucky I didn't shoot you". The Appellant then went to search for money where the deceased and the said Camille Chung had been sitting but on failing to find any he returned towards the car he had come in when he heard a shot. The Appellant then ran towards the said Howard Simmonds with the intention of preventing him from firing again but was unable to do so. The Appellant then ran away. He also said that he did not know of the existence of the said

gun until the said Howard Simmonds referred to it.

7. On the 22nd day of November, 1967 the learned trial Judge summed up to the Jury which convicted the Appellant.

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8. Following the said conviction the learned trial Judge sentenced the Appellant to suffer death in the manner authorised by law.

9. Prior to passing the said sentence the learned trial Judge called for evidence of the age of the Appellant in this manner:

"HIS LORDSHIP: Mr. Kerr, I would like some evidence as to the age of this accused.

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MR. KERR: Yes, M'Lord, I feel that is important.

HIS LORDSHIP: Is there evidence available?

MR. KERR: M'Lord, apparently it is not here.

HIS LORDSHIP: Yes, I know the provisions of the Juvenile Law.

MR. KERR: M'Lord, apparently this evidence is not now available. I assume, being what it is, it is not difficult to get.

HIS LORDSHIP: Well, you see, I have certain provisions of the constitution to look into . . . .

MR. KERR: I know M'Lord.

HIS LORDSHIP: . . . and that is relevant as far as the age of the accused person at the date of the crime, so that is why I must have evidence as to his age. When can you get that? I cannot postpone it any longer today, that is, the sentence.

MR. KERR: M'Lord, it seems to me an adjustment until say, 2.30, it would mean Spanish Town and back and a few

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minutes for research - three o'clock  
M'Lord to be safe.

HIS LORDSHIP: In order not to do anything which would perhaps not be in the practice of criminal procedure I would ask you, Members of the Jury, to be present, because this is usual, Mr. Kerr, to have a sentence of this kind passed in the presence of the jury who have delivered the verdict.

MR. KERR: Yes.

HIS LORDSHIP: Members of the Jury, I take the adjournment until 3.00, and that is to ascertain the age of the accused person. I believe I will get the information by 3.00 o'clock. May I ask you to return at 2.45 p.m. in order to make yourself available as jurors in this case. We will take the adjournment until 3.00 p.m. The accused, of course, is in custody.

Adjournment taken:

Resumption: 3.06 p.m.

Registrar takes jury roll call - all present.

HIS LORDSHIP: Yes Mr. Kerr?

MR. KERR: May it please you, M'Lord, we have made strenuous endeavours and there is a certificate to hand. As it stands M'Lord, it will be necessary for some oral evidence to identify the accused man with the certificate because his name under which he is charged is not on the certificate.

HIS LORDSHIP: You see, the difficulty has arisen, Mr. Kerr, because of Article 20 sub-section (7) saying " . . . no penalty shall be imposed for any criminal offence which is severer in

degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed." Therefore then my duty is, to be satisfied beyond a reasonable doubt that on the date - the 19th of February 1967, whether the accused person was over or under the age of eighteen.

MR. KERR: I know, sir, it is of cardinal importance.

HIS LORDSHIP: And I do not think I should place Mr. Kirlew in any invidious position in the circumstances.

MR. KERR: Yes, M'Lord.

HIS LORDSHIP: When will you be ready?

MR. KERR: Well M'Lord, the mother of the accused man is here, but I have no idea what evidence she is capable of giving.

HIS LORDSHIP: Well let the Officer come and produce the certificate and subpoena the mother or somebody to say that these particulars compare favourably with the names of the mother and father of the accused person and then this becomes a question of fact.

MR. KERR: I think the mother is here, M'Lord. (To police) Call Violet Gordon please.

HIS LORDSHIP: Anyone can produce the certificate under oath?

MR. KERR: Yes, anybody.

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No. 21

Wesley Roach - Examination

WESLEY ROACH: SWORN: SAITH: EXAMINED BY  
MR. KERR.

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Wesley Roach, M'Lord.

Q. Yes, your office?

A. Detective Corporal of Police  
stationed at Half-way Tree.

HIS LORDSHIP: Have obtained what?

A. Birth Certificate, M'Lord.

Q. Is it a certified copy?

A. Yes Sir.

Q. Copy of the birth certificate of a  
person in what name? A. Eustace Gordon,  
sir.

Q. Born when? A. 28th of September, 1948.

Q. 28th. A. of September, 1948.

Q. Yes, where? A. At the Victoria Jubilee  
Lying-in Hospital, Kingston.

Q. Victoria Jubilee? A. Yes sir, Lying-in  
Hospital.

Q. Father's name mentioned? A. No sir.

Q. Mother's name? A. Violet Bailey.  
Age, 21 years.

Q. Yes? A. Hairdresser of 167 Windward  
Road, Kingston.

Q. Who reported the birth? A. The birth  
was reported by I. Dundas.

Q. And recorded by?  
A. J.N. Russell on the 1st of October,  
1948.

Q. Yes Mr. Kerr, anything else?

MR. KERR: No M'Lord. I beg to tender the  
certificate.

HIS LORDSHIP: Any questions Mr. Kirlew?

MR. KIRLEW: No please M'Lord.

HIS LORDSHIP: Certificate is tendered.  
Yes, next witness.

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No. 22

Violet Bailey

VIOLET BAILEY: SWORN: EXAMINED BY HIS LORDSHIP

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- Q. What is your full name? A. What sir?
- Q. What is your full name? A. Violet Bailey.
- Q. You know the accused person? A. Yes sir.
- Q. What is he to you? A. Maloney Gordon, sir?
- Q. Is he your son? A. Yes sir.
- Q. Is he known by the name of Eustace Washington Gordon?  
A. Well, Your Honour, please is not me register him please, sir.
- Q. No, no, is he known by the name of Eustace Washington Gordon?  
A. I know him as Maloney Gordon, sir.
- Q. What date was he born? A. Don't remember the date of his birth, sir.
- Q. You don't remember the date of his birth? A. No sir, I don't quite remember the date of his birth.
- Q. You don't quite remember the date of his birth? A. No sir.
- Q. How old is he? A. I don't remember the date that him born, sir.

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Q. Yes, but you know how old he is?  
You know or you don't know?  
A. I say him is around seventeen, sir.

Q. You don't know how old he is?  
A. No Your Honour, sir.

Q. Yes Mr. Kerr.

CROSS-EXAMINATION BY MR. KERR.

Q. Lady, where was he born? A. What sir?

Q. Where was he born? A. Jubilee Hospital.

Q. Victoria Jubilee Hospital in Kingston?  
A. Yes sir.

Q. You know who registered him? A. My  
aunt yes sir.

Q. What is her name? A. Emiline Bernard;  
is she I ask was to register him, sir.

Q. I see. Where is she now? A. She is  
dead, sir.

Q. What name you told her to register him  
under?  
A. I give her name to register him as  
Maloney Gordon, sir, so I don't know  
if she did change the name, sir.

Q. Can you read? A. No sir.

Q. Have you got any other son? A. Yes sir.

Q. What is the name of that son?  
A. I have one the name of Eustace;  
I have one the name of Clive; I have  
one the name of Barrington, sir.

Q. Eustace, Clive and Barrington? A. Yes  
sir.

Q. Eustace what? A. Gordon.

Q. Clive what? A. Gordon.



- Q. Barrington? A. Gordon.
- Q. How many sons in all you have?  
A. I has four sons, sir.
- Q. Four sons. Who is the eldest.  
A. The one that name Eustace suppose to be the oldest one.
- Q. And what position does he come? A. What sir?
- Q. What position he comes into the four?  
A. Say what position he come into the four?
- Q. Is he first, second, third or last?  
A. No, he is not the first one, sir.
- Q. You must know. A. He is the second one.
- HIS LORDSHIP: Who is the second one, Maloney? A. Yes sir.
- HIS LORDSHIP: Mr. Kerr I think we will have to get some more evidence.
- MR. KERR: It looks like we are running up a blank wall because she really has a son named Eustace she says. (To witness) Where is Eustace now?  
A. I don't know where he is now.
- HIS LORDSHIP: Where is he?  
A. I don't know where he is now, he was with his grandmother in the country, so I don't know where he is, sir.
- MR. KERR: Where you had Eustace?  
A. Whole of them born at Jubilee, sir.
- HIS LORDSHIP: You were in hospital when Maloney was delivered? A. Yes sir.
- Q. Who was the doctor? A. I don't know sir.
- Q. The nurse? A. I don't know sir.

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MR. KERR: M'Lord we are faced with this position: she has four sons; she has one named Eustace, she says, which is the name on the certificate. (To witness) Is he Eustace? A. No sir.

Q. He isn't Eustace? A. Maloney.

Q. You have one named Eustace? A. Yes sir.

Q. Older than him? A. Yes sir.

HIS LORDSHIP: Eustace is older than Maloney?  
A. Yes sir.

HIS LORDSHIP: So the question now is, Mr. Kerr, in connection with this certificate is it the accused person?

MR. KERR: It looks so M'Lord. What the evidence has established is that there is a Eustace and that he is not Eustace. (To witness) How much older than this boy is Eustace?

A. Well, I have one Nineteen Forty something, sir, nineteen forty-seven or eight. I don't really remember. I think it is 1947.

Q. Which one is that? A. That is the first one, sir.

Q. And when you had the next one?  
A. And I have the next one 1950.

Q. 1950? A. Yes Sir.

HIS LORDSHIP: Yes Mr. Kirlew, is there anything . . .

MR. KIRLEW: No please, M'Lord, I don't wish to ask any questions.

Q. With regard to the proper age, are you prepared to assist the court and to cause the accused person to give evidence?

A. I asked him previous to this trial

but he was not able to give any information. While taking a statement I asked but he couldn't help me.

HIS LORDSHIP: Well, there is authority which says - "Where the age of any person at any time is material for the purposes of any provision of the law under the Juvenile Act, - paragraph 692 - or of any Order in Council made thereunder, regulating the powers of the court, his age at the material time shall be deemed to be or to have been that which appears to the court "after considering any available evidence to be or to have been his age at that time".

I have before me what appears to be a certified copy of the birth certificate in the name of Eustace Washington Gordon and according to the certificate the mother's name mentioned as Violet Bailey and the age of that person is that in October last year he was 18 years old. (To Mr. Kerr) Is that so?

MR. KERR: In September last year, according to the certificate, Eustace Gordon was 18 years old - 1966.

HIS LORDSHIP: Last year?

MR. KERR: Yes M'Lord.

HIS LORDSHIP: So then on the date of the 18th February, 1967 he was over eighteen years old. I have seen the accused person in the course of evidence in the witness-box. He has given evidence. I have had an opportunity of observing him and I find as a fact from all the circumstances that on the date of the 18th of February 1967 he was over eighteen years old.

Yes, call on him. "

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10. It is respectfully submitted that the learned trial Judge erred in passing the sentence of death since on the evidence before him it was not proved at all that the Appellant was eighteen years old at the time the offence was committed. On the contrary, it is submitted that the evidence of Violet Bailey, the Appellant's mother, clearly establishes

- (a) that the certificate of birth produced relates to her eldest son Eustace and not to the Appellant Maloney;
- (b) that therefore the date of birth on the certificate i.e. 28th September, 1948 relates to the age of Eustace and not Maloney;
- (c) that since Eustace was older than Maloney, the latter could not have attained the age of 18 on the 19th February, 1967, the date of the offence.

11. The relevant provisions governing the passing of death sentence on persons under 18 in Jamaica are contained in S.29(1) of the Juvenile Law (Cap.189) and Article 20(7) of the Constitution and provide as follows:-

"S.29(1) Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this law, be liable to be detained in such place (including, save in the case of a child, a prison) and under such conditions as the Governor may direct, and while so detained shall be deemed to be in legal custody."

"Article 20(7) . . . and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed at the time the offence was committed."

12. That it is respectfully submitted that the

learned trial Judge, having first correctly stated that

"Therefore then my duty is, to be satisfied beyond reasonable doubt that on that date - the 19th February, 1967, whether the accused person was over or under the age of eighteen".

subsequently fell into error in citing paragraph 692 of Archbold's Criminal Pleading, Evidence & Practice. This paragraph sets out Section 80(3) of the English Criminal Justice Act 1948 which, it is submitted, has no application in relation to the determination of age for the purposes of passing the death sentence either in England or in Jamaica.

13. The Appellant applied for Leave to Appeal to the Court of Appeal of Jamaica on the following grounds:-

1. The verdict is unreasonable and cannot be supported having regard to the evidence:
  - (a) The witness Camille Chung, the only eye witness on behalf of the Crown, stated in evidence that she did not remember which one (of the five or six persons) had the gun which did the fatal shooting and that she thought the Appellant was the one who did the shooting.
  - (b) The said witness said it was a clear night at the hour when the shooting was done but the metrological officer said it was a dark night.
2. Any reasonable jury must have had doubts as to the guilt.
3. The learned trial Judge did not direct the jury as to common designs and such a direction was necessary in the circumstances of this case.

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14. On the 1st May, 1968, the Court of Appeal of Jamaica dismissed the Appellant's Application saying that it was unable to say that the verdict of the jury was obviously and palpably wrong even though the case presented points of difficulty especially with regard to the evidence of the witness Chung.

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15. The Appellant was granted Special Leave to Appeal in forma pauperis to Her Majesty in Council by Order dated 23rd May 1969.

16. The Appellant respectfully submits that this Appeal should be allowed and that the sentence of death passed on him on the 22nd day of November 1967 should be set aside for the following amongst other

R E A S O N S

1. BECAUSE there was no evidence before the learned trial Judge that the Appellant had attained the age of 18 on the 19th February 1967.
2. BECAUSE there was evidence before the learned trial Judge that the Appellant was under the age of 18 on the 19th February 1967.
3. BECAUSE the learned trial Judge determined the age of the Appellant by reference to a law that had no application in Jamaica.
4. BECAUSE it was not established beyond a reasonable doubt that the Appellant had attained the age of 18 on the 19th February 1967.

EUGENE COTRAN.

No. 15 of 1969

IN THE PRIVY COUNCIL

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O N    A P P E A L  
FROM THE COURT OF APPEAL OF JAMAICA

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B E T W E E N :-

MALONEY GORDON    Appellant

- and -

THE QUEEN    Respondent

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CASE FOR THE APPELLANT

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