

*Privy Council Appeal No. 15 of 1969*

**Maloney Gordon** – – – – – *Appellant*  
v.  
**The Queen** – – – – – *Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE  
1ST DECEMBER, 1969

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*Present at the Hearing :*

LORD HODSON  
LORD DONOVAN  
LORD WILBERFORCE

[*Delivered by* LORD HODSON]

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The appellant was convicted of murder by the Home Circuit Court held at Kingston, Jamaica (Edun J. and a Jury) on 22nd November 1967.

His appeal to the Court of Appeal of Jamaica (Henriques, P. Shelley and Eccleston, JJA.) was dismissed on 1st May 1968. Special leave to appeal *in formâ pauperis* was granted on 23rd May 1969 on the ground that the trial judge sentenced the appellant to death without ascertaining in a proper manner that he had attained the age of 18 years. He was indicted with one Dennis Barth for the murder of Andrew Barton on 19th February 1967 in the Parish of Kingston. Dennis Barth was acquitted upon a submission that he had no case to answer and the appellant who gave evidence in his own defence was, after the trial judge had summed up the evidence, found guilty by the jury. No question now arises as to the justice of the conviction. The sole question is as to punishment.

The relevant restriction on punishment is contained in section 29(1) of the Juveniles Law, Cap. 189 of the Laws of Jamaica and reads as follows:

“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.”

By the Jamaica (Constitution) Order in Council 1962 Second Schedule section 20(7) it is provided:

“No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, 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 for that offence at the time when it was committed.”

There was thus no jurisdiction in the Court to pass sentence of death upon the accused if he was under 18 at the time of the commission of the offence.

Prior to passing sentence the judge having in mind this restriction on punishment called for evidence as to the age of the accused in this manner :

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

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 adjournment until say, 2.30. it would mean Spanish Town and back and a few 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."

After the adjournment had been taken Counsel for the prosecution addressed the judge and in the presence of the jury the following interchange took place:

" 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."

A police officer then produced a certified copy of a birth certificate registering the birth of a male child born on 28th September 1948 at the Victoria Jubilee Lying-in Hospital, Kingston, to Violet Bailey. The informant was the Chief Resident Officer at the hospital. The Registration took place on 1st October 1948 but the Baptismal name of the child, Eustace Washington Gordon, was added, after registration, on 7th January 1949.

Violet Bailey was then called and examined by the judge. She swore that she was the mother of the accused, that he was known by the name of Maloney Gordon and that she did not remember the date of his birth but would say that he was around seventeen. In cross-examination she swore she had three other sons besides the accused, named Eustace; Clive and Barrington and that Eustace was supposed to be the eldest. She maintained that Eustace was older than Maloney.

In this situation the following exchange took place between the judge and counsel for the Prosecution:

" 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."

The book to which the judge referred as authority is Archbold's Criminal Pleading Evidence and Practice (36th edition) which sets out section 80(3) of the English Criminal Justice Act 1948. This section has no application to the determination of age for the purposes of passing the death sentence either in this country or in Jamaica.

Although there is no reference in the Jamaica Act in this connection to "age at the material time" being "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" the judge's citation of this passage in no way caused him to misdirect himself. Visual evidence must always be relevant although it varies in weight with the apparent age of the person observed. He took steps to obtain evidence to assist him in his task and he did arrive at a conclusion which must have been based on his

view of the accused judged by appearance. This is plain from his observations when finally calling upon the accused before sentence was pronounced.

That the appearance of the accused raised a doubt in the judge's mind or at least that he required confirmation of his opinion as to age cannot be denied. This is shown by the fact that he called upon the prosecution for evidence as to age.

The evidence which was produced after a short adjournment to enable the prosecution to make research was all one way and did not show that the accused was over 18. The certificate produced relates to one "Eustace Gordon" not the accused "Maloney Gordon" and the mother Violet Bailey gave evidence that Eustace was her eldest son.

The date of birth on the certificate is 28th September 1948 and if Eustace was older than the accused the latter could not have attained the age of 18 on 19th February 1967, the date of the offence.

The position accordingly is that, the judge having indicated that he required to be satisfied as to the age of the accused, evidence was called that the accused was under the age of 18 on 19th February 1967. There was no evidence to the contrary and their Lordships have refused leave to the respondent to adduce further evidence upon the hearing of this appeal.

It may be that the judge in referring to his observation of the accused and all the circumstances was by implication rejecting all the evidence which had been adduced before him to show that the accused was in fact under 18. He did not however in terms reject that evidence. This is an exceptional case and their Lordships are of the opinion that a question as to age having arisen and the matter being one of difficulty and exceptional gravity the evidence cannot be ignored.

They have accordingly humbly advised Her Majesty that the appeal should be allowed and that the sentence of death be quashed and that the accused be detained during Her Majesty's pleasure.



In the Privy Council

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MALONEY GORDON  
v.  
THE QUEEN

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DELIVERED BY  
LORD HODSON