16 of 1975

(16)

IN THE PRIVY COUNCIL No. 22 of 1975

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N : -

EATON BAKER

-and-

PAUL TYRELL Appellants

- and -

T H E Q U E E N Respondent

CASE FOR THE APPELLANTS

1. This is an appeal in forma pauperis from the dismissal of an application by the Court of Appeal of Jamaica (Smith, Edun and Hercules S.J.J.A.) dated 31st July 1972 refusing the Appellants leave to appeal against sentence of death, passed on them by Parnell J., sitting in the Home Circuit Court, Kingston, Jamaica on the 3rd March 1971, upon the Appellants' conviction of murder committed on 26th November 1969. On that date both Appellants were aged seventeen and a half, the first Appellant having been born on 14th July 1952, and the second Appellant on 25th July 1952. Special leave to appeal to Her Majesty in Council was granted by Order in Council, dated 18th December 1974, consequent upon a report of the Judicial Committee of the Privy Council (Lord Wilberforce, Viscound Dilthorne and Lord Salmon) dated 5th December 1974.

2. The main issue in this appeal is whether the Court of Appeal of Jamaica was correct in holding that the date on which the Appellants became liable to suffer the death penalty was the date upon which they were convicted (when both of them were over the age of eighteen) as opposed to the date of the commission of the offence (when both of them were under the age of eighteen).
In the determination of this issue the following questions arise:-

(a) Whether the Court of Appeal in Jamaica was bound by the decision of the Judicial Committee of the Privy Council in Maloney Gordon v. The Queen (1969) 15 W.I.R. 359 (J) in which it was held (Lord Hodson delivering the opinion of the Board) that there is no jurisdiction in the Courts of Jamaica to pass sentence of death upon the accused if he was under eighteen at the time of the commission of the offence.

(b) Whether the Judicial Committee of the Privy Council is bound by its own previous decision in Maloney Gordon v. The Queen, to the effect that a court of trial in sentencing a convicted person to death looks to the time of the commission of the offence for ascertaining liability to suffer the death penalty.

(c) Whether Section 29(1) Juveniles Law of Jamaica, Cap.189, which provides that "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", should be held to mean that there is no liability to suffer the death penalty for crime by those under age at the time of commission of the offence.

(d) Whether Section 20(7), Constitution of Jamaica 1962, (in providing that 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 the offence at the time when it is committed").

Either (i) is declaratory of the law of Jamaica as at the date of the coming into force of the Constitution of Jamaica.

or (ii) if, before 1962, the law of Jamaica under Section 29(1), Juveniles Law of Jamaica did compel the Jamaican Courts to pass the death sentence on convicted persons over the age of eighteen at the date of such conviction,

after 1962 amended such law so as to restrict liability for the death penalty to those over eighteen at the time of the commission of the offence.

3. FACTS

(a) The Appellants were convicted before Mr.Justice Parnell and a jury on 1st March 1971 of the murder of Reginald Tate, after a trial lasting 31 days. The indictment appears on page 1 of the annexure to this case. The Appellants were tried jointly with 11 others, 2 of whom were acquitted at the end of the prosecution case, on the direction of the learned trial judge, and another 5 were acquitted by the jury's verdict. 2 other co-accused had their convictions quashed by the Court of Appeal. The remaining 2 co-accused were convicted of murder; their appeals against conviction were dismissed by the Court of Appeal and they unsuccessfully petitioned the Board for leave to appeal in forma pauperis on the 5th December 1974.

(b) The deceased, Reginald Tate, had been employed as a prison officer at Bamboo, in St. Ann. He was killed while on duty on the night of 26th November 1969, during a riot among the prisoners, a number of whom had armed themselves with machetes.

(c) After the jury had delivered their verdict and before sentence was passed, Counsel for the Appellants, having called evidence on the question of the Appellants' age, argued before the learned trial judge that the Appellants, by virtue of the joint operation of Section 29(1) of the Juveniles Law and Section 20(7) of the Constitution, were not liable to be sentenced to death. The learned trial judge found against the Appellants and sentenced them to death. On page ___ of the annexure hereto, the judgment of the learned judge is set out.

(d) The Court of Appeal, after 44 days of argument, refused the Appellants' application for leave to appeal against the conviction. The Appellants' applications for leave to appeal against sentence were refused, the Court holding that the Appellants were precluded from arguing that they were not liable to suffer the death penalty by virtue of the decision of the Court of Appeal in R. -v- Martin Wright (1972) 18 W.I.R. 302(J). The relevant portion of the judgment of the Court of Appeal in the instant case is set out at page of the annexure hereto.

4. The Board's decision in
Maloney Gordon -v- The Queen (No.15 of 1969; 1st December 1969 (1969) 15 W.I.R. 369 (J).

This case is reported only in (1969) 15 West Indian Reports at page 359, where it is set out without the benefit of Counsel's argument. In the printed Case for the Appellant therein before the Privy Council, at paragraph 11, it was submitted that the learned trial judge had correctly stated it was his duty to determine the accused's age as at the date of the commission of the offence, but that he fell into error in relation to the evidence establishing the accused's age. In the Case for the Respondent (the Crown in Jamaica) it was stated, in paragraph 6, thereof that the learned trial judge had indicated that, because of the provision of Section 20(7) of the Constitution of Jamaica, the date of the crime was the relevant date for determining the Appellants' age. It was not contended by the Respondent that the trial judge had misinterpreted the law, as contained in Section 29(1) of the Juveniles law, and no such contention was advanced at the hearing of the appeal before the Board. In the instant Appeal it was submitted by Counsel for the Crown before Parnell J. that the Board in Maloney Gordon had not sufficiently considered the terms of the Juveniles Law. Neither before Parnell J., nor

before the Court of Appeal in the instant Appeal, did Counsel for the Crown inform either Court that the Crown had not asserted the contrary in Maloney Gordon -v- The Queen, and had indeed by implication accepted that Edun J.'s interpretation of Section 29 of the Juveniles Law as affected by the constitutional provision was correct.

5. Judgment of Parnell J. and the Court of Appeal

The learned trial judge gave judgment on 3rd March 1971, sentencing both Appellants to death, having rejected a defence submission that neither Appellant could be lawfully sentenced to death, due to their being under the age of 18 at the time of the commission of the offence. The learned trial judge held:-

(a) that the relevant date for considering liability to the death penalty under Section 29(1), Juveniles Law is the date when the jury returned its verdict of guilty to murder;

(b) that the Jamaican legislature had not amended the Juveniles Law along the lines of Section 53 of the English Children and Young Persons Act 1933, to the specific effect that the relevant date for testing liability to be sentenced to death was the time the offence was committed;

(c) that Section 20(7), Constitution of Jamaica, which came into force on 6th August 1962, did not confer any rights, privileges or freedom which were not known or enjoyed prior to that date citing Nasralla -v- D.P.P. (1967) 2 A.C. 238, 247-8;

(d) that the decision of the Judicial Committee of the Privy Council in Maloney Gordon -v- The Queen had wrongly construed either or both Section 29(1), Juveniles Law and Section 20(7), Constitution of Jamaica, and that in

any event the statement of the Judicial Committee of the Privy Council in Maloney Gordon -v- The Queen was an obiter dictum, as stated by Shelley, J.A. in R. -v- Ronald Williams (1970) 16 W.I.R. 63.

6. The Court of Appeal of Jamaica on 31st July 1972, refused the Appellants' application for leave to appeal against sentence of death imposed on them, on the grounds that the decision of the Court of Appeal of Jamaica in Martin Wright -v- The Queen (1972) 18 W.I.R.302 precluded the Appellants from arguing that the relevant date for ascertaining their liability to be sentenced to death was the date when the offence was committed.

Judgments of the Court of Appeal of Jamaica in Martin Wright -v- R. (1972) 18 W.I.R. 302

7. The Court of Appeal of Jamaica (Lukhoo P. (Ag.), Fox, Smith, and Graham Perkins JJ.A., Edun J.A., dissenting) held, in a case of robbery with aggravation committed by a person under the age of 17, that the decisive date for ascertaining the offender's liability to imprisonment was, under Section 29(2) Juveniles Law, the date of conviction and not the date of the offence.
Lukhoo P. (Ag.), delivering the judgment of the majority of the court, held:

(a) that the only circumstances in which the courts in Jamaica would not be bound by the decision of the Judicial Committee of the Privy Council in Maloney Gordon -v- The Queen would be if the Board's interpretation of the meaning and effect of the relevant statutory provision was reached per incuriam.

(b) that, as the decisionof the Judicial Committee of the Privy Council in Maloney Gordon -v- The Queen was made without consideration of the decision in D.P.P. -v- Nasralla (1967) 2 A.C. 238, and that inthe light of

differing views expressed on the true meaning and effect of theprovisions of Chapter III of the Constitution (of which Section 20(7) forms part) the courts in Jamaica were free to decide which of the two decisions to follow;

(c) that, on any true construction of Section 29(1), Juveniles Law (following the precedent of English statutory provisions before Section 16 of the Criminal Justice Act 1948 was passed) a court in Jamaica would have jurisdiction to sentence a person to death for murder if that person, though under the age of 18 at the time of the commission of the offence, had attained the age of 18 at the time of conviction.

(d) that, since on the decision in D.P.P. -v- Nasralla, the relevant constitutional provision did not operate to alter the law immediately preceding the coming into force of the constitution. Section 29(1) Juveniles Law (as interpreted above) remain in full force and effect.

8. Edun J.A., in his dissenting judgment, held

(a) that Section 20(7) Constitution of Jamaica had effected a change in the law relating to the punishment of juveniles.

(b) that the Judicial Committee of the Privy Council in Maloney Gordon -v- The Queen had handed down a considered opinion that Section 20(7), Constitution of Jamaica had materially altered the effect of Section 29(1), Juvenile Laws.

(c) that although the decisionof the Judicial Committee of the Privy Council in D.P.P. -v- Nasralla held that Section 20(8), Constitution of Jamaica was declaratory of the common law on the subject of autrefois convict

or acquit, Section 20(7), Constitution of Jamaica, by contrast met the mischief of the retrospective operation of penal statutes as they affected juvenile offenders.

(d) that, while Sections 29(1) and 29(2), Juvenile Laws, are inconsistent with the provisions of Section 20(7) Constitution of Jamaica, Section 26(8) Constitution of Jamaica (which provides that "nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any provisions of the Chapter") applies only to those parts of Chapter III of the Constitution which derogates from the rights the individual enjoyed at the coming into force of the Constitution.

(e) that the judicial interpretation placed upon Section 29(1) Juvenile Laws, which sanctioned the retrospective operation of penal statutes to individual youthful offenders, was abrogated by the operation of Section 20(7), Constitution of Jamaica in 1962.

Submissions

Doctrine of precedent

9. (a) Since the Judicial Committee of the Privy Council is the final appellate court for Jamaica (Section 110(1), Constitution of Jamaica) the courts in Jamaica are bound by the decisions of the Board: Bakhshuwen -v- Bakhshuwen (1952) A.C.1 (Halsbury's Laws of England, 4th Ed; Vol.10, para.821).

(b) It is not for the courts in Jamaica to conclude that a binding decision of the Judicial Committee of the Privy Council has been arrived at *per incuriam*, so as to release the courts of Jamaica from the obligation to follow loyally those binding decisions: Broome -v- Cassell & Co. Ltd. (1972) A.C. 1027, Miliangos -v- George Frank (Textiles) Limited (1975) (C.A. as

yet unreported).

(c) The learned trial judge, Parnell J., had no jurisdiction to pass sentence of death on the Appellants, against which sentence the Court of Appeal wrongly refused to grant leave to appeal. The only and mandatory sentence which the learned trial judge could lawfully pass was that the Appellants should be detained during Her Majesty's pleasure. Had the learned trial judge not acted without jurisdiction, the Appellants would have been ordered tobe detained during Her Majesty's pleasure, against which order no appeal could have lain at the instance either of the Appellants or the Crown.

(d) It is respectfully submitted that this Appeal should be allowed on the ground that the learned trial judge (as confirmed by the Court of Appeal) had no jurisdiction to pass sentence of death on the Appellants, and that the Board should automatically substitute orders of detention during Her Majesty's pleasure.

10. If, contrary to the submission made in paragraph 7 above, the courts in Jamaica were not strictly bound by the decision of the Board in Maloney Gordon -v- The Queen, it is alternatively submitted:-

(a) that the Judicial Committee of the Privy Council is bound by its own previous decisions, since the Order in Council implementing the decisions of the Board is in everything but form the equivalent of a legal judgment; Ibrallebe -v- The Queen (1964) A.C. 900.

(b) that the Practice Statement (Judicial Precedent) of 26th July 1966 (1966) 1 W.L.R.1234) permitting the House of Lords to depart from its own previous decisions when it appears right to do so, provides specifically that the new practice "is not intended to affect the use of precedent elsewhere than in this House".

(c) that, if contrary to the submissions made in paragraph

8(a) and (b) above, the Judicial Committee of the Privy Council is not bound by its own previous decisions, it will nevertheless decline to depart from its earlier decisions on matters either of constitutional importance or affecting constitutionally guaranteed rights; Bakhshuwen -v- Bakhshuwen (1952) A.C.1 and Att.-Gen. for Ontario -v- Canada Temperance Federation (1946) A.C.193, per Viscount Simon at p.206

(d) that, if contrary to the submission made in paragraph 8(c) above, the Judicial Committee of the Privy Council may depart from its own previous decision, it will decline to do so

(i) where it would subject individuals to the supreme penalty; and

(ii) where, as in the criminal law, there is a special need for certainty: Knuller -v- D.P.P. (1973) A.C.435.

Statutory construction of Section 29(1), Juveniles Law, Cap.189

11. Section 29(1), Juveniles Law provides: "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".

The provision replicated the Imperial legislation contained in Section 103 of the Children Act 1908, which prohibited sentence of death being pronounced on or recorded against a child or young person; by Section 123(1) a person of the age of sixteen years or upwards was deemed for the purposes of the Act not to be a child or young person. By

Section 131 the expression "young person" meant a person who is aged fourteen or upwards and under the age of sixteen. In two cases - one before the Court for Crown Cases Reserved in Ireland: R. -v- Fitt (1919) 2 I.R.35 and the other before the High Court of Judiciary in Scotland: H.M. Advocate -v- Crawford 1918 S.C.(J)1 - it was held that the words of section 103 were applicable to the moment in time when the trial judge came to pronounce sentence, and if the convicted murderer was not a child or young person at that time, he was not entitled to the benefit of the lesser penalty than the death sentence prescribed by the Act.

12. It is submitted:

(a) that, on a proper construction of section 29(1), Juveniles Law, the legislature has not unambiguously provided that the court of trial shall test the age of the convicted person as at the moment of sentencing; and that in a penal statute the courts will search for unambiguous expression, and inthe event of ambiguity will prefer the construction which imposes the lesser penalty: Ealing London Borough Council -v- Race Relations Board (1972) A.C.342. Accordingly, the decisions in R. -v- Fitt and H.M. Advocate -v- Crawford are wrong and ought not to be followed;

(b) that, in any event, the courts of Jamaica should have preserved a construction of Section 29(1), Juveniles Law in a way that is consistent with the declared rights of the individual in Section 20(7), Constitution of Jamaica;

(c) that the majority of the Court of Appeal in R. -v- Martin Wright (1972) 18 W.I.R.302 at p.307, and Edun J.A. at p.308, were wrong in holding that the construction of Section 29(1), Juveniles Law was conclusively determined by the comparable statutory provision in England as interpreted in R. -v- Fitt and H.M. Advocate -v- Crawford;

(d) that the majority of the Court of Appeal in R. -v- Martin Wright (1972) 18 W.I.R.302 at p.307 was wrong in concluding that, unless Section 20(7) of the Constitution had altered the interpretation placed upon Section 29(1), Juveniles Law, immediately prior to the coming into force of the Constitution, Section 26(8) of the Constitution precluded any reversal of such interpretation. The majority of the Court of Appeal wrongly failed to apply the constitutional provision in Section 20(7) as an aid to the construction of Section 29(1), Juveniles Law.

(e) that, for the following reasons, some of which have been advanced by Edun J.A. in his dissenting judgment in R. -v- Wright (1972) 18 W.I.R. 302 at pp.309-310, policy considerations dictate a construction of Section 29(1), Juveniles Law in accordance with the decision of the Board in Maloney Gordon -v- The Queen;

(f) If the date of conviction was the relevant date for ascertaining liability to the death penalty, Section 29(1), Juveniles Law would operate capriciously, since any delay in bringing the accused to trial, re-trials after jury disgreement or re-trial ordered by the Court of Appeal would all subject the accused to the death penalty merely by the effusion of time. Moreover the fear of delay beyond the accused's eighteenth birthday might lead to pressure on him to plead guilty so as to avoid a trial verdict of guilty with the imposition of the death penalty;

(g) No arbitrariness would ensue from the adherence to the date of the commission of the offence as the relevant date for testing the liability to the death penalty. The reasoning of the English Court of Criminal Appeal in R. -v- Cawthron (1913) 3 K.B.168, to the effect that avoidance of detection by the accused beyond the age limit for a specific penalty, would lead to absurdity,

is faulty and ought not to be followed.

Application of Sections 20(7) and 26(8), Constitution of Jamaica

13. Section 20(7) of the Constitution of Jamaica provides:- "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 at the time the offence was committed."

Section 26(8) of the Constitution of Jamaica provides:- "Nothing contained in any law in force immediately before the appointed day (6th August 1962) shall be held to be inconsistent with any of the provisions of this Chapter (III, which includes Section 20(7)); and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

14. It is submitted that the majority of the Court of Appeal in R. -v- Wright musunderstood the opinion of the Board as delivered by Lord Devlin in D.P.P. -v- Nasralla (1972) A.C.238 at pp.247-8. The Board held that the provisions of Chapter III of the Constitution proceed upon the assumption that the fundamental human rights are already secured to the people of Jamaica by existing law. While the laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions, it is implicit that existing statutory provisions shall be construed so as to conform and not be in conflict with the protective provisions of the Constitution. The Board in Nasralla's case went on to conclude that the common law rules relating to autrefois acquit and autrefois convict were accurately reflected in Section 20(8) of the Constitution, so that any argument that

the Constitution had altered those rules could not arise.

15. It is submitted that, far from the decision of D.P.P. -v- Nasralla being inconsistent with the Board's decision in Maloney Gordon -v- The Queen, the latter was wholly consistent with the view expressed in Nasralla that the constitutional protections in Chapter III accurately declared or intended to declare what was the law of Jamaica; and that, while the law as stated by the Court of Appeal in Wright -v- R. unquestioningly accepted the judicial interpretations of Section 29(1), Juvenile Laws, the legislature on the other hand, in passing Section 20(7) must be taken not to mean to have understood the statutory construction placed upon Section 29(1) to have been in accordance with the law pertaining to the sentence of juvenile offenders in the United Kingdom since 1948.

16. The view expressed by Edun J.A. in his dissenting judgment, that Section 20(7) is declaratory of what was the law of Jamaica immediately before 6th August 1962, and that Section 26(8) should be construed to validate that declaration, rather than to perpetuate a capricious law, is respectfully adopted.

17. In the further alternative, it is submitted that, if the Appellants' submissions made above are wrong, then the Appellants contend that because of the decision in Maloney Gordon -v- R., the construction by the courts of Section 29(1) of the Juveniles Law is wrong. It is not permissible for the courts in Jamaica to change again the construction of a statute so as to be inconsistent with the entrenched provision of Section 20(7) of the Constitution. Maloney Gordon -v- R., having decided that the relevant date for sentencing an offender to death was the date of the offence, to reverse that decision now would be to make new law contrary to Section 20(7) of the Constitution, and is therefore struck down by Section 2 of the Constitution.

18. If the Appellants' submissions made above are wrong, it is alternatively contended that, in the light of the Board's construction of Section 29(1) in Maloney Gordon -v- R., the relevant date for sentencing a juvenile offender to death is the date of the commission of the offence. Such judicial construction did not constitute any change "in any law in force immediately before the appointed day", within the meaning of Section 26(8) of the Constitution, and accordingly the law, as expounded in Malohey Gordon -v- R., has at all material times been the law of Jamaica.

19. The Appellants were granted Special Leave to Appeal in forma pauperis against that part of the Judgment of the Court of Appeal of Jamaica, dated the 31st July, 1972, which dismissed their applications for leave to appeal against sentence to Her Majesty in Council by Order dated the 18th day of December 1974.

20. The Appellants respectfully submit that this Appeal should be allowed with costs, and that the sentence of death passed on them on 3rd March 1971 should be set aside for the following, amongst other

REASONS

1. BECAUSE the correct interpretation of the Constitution of Jamaica and/or the Juveniles law prohibits the passing of a death sentence on the Appellants.

2. BECAUSE the decision in Maloney Gordon -v- R. is correct and ought to be followed.

3. BECAUSE the ratio of the decision in Maloney Gordon -v- R. is binding on the Judicial Committee of the Privy Council.

LOUIS BLOM-COOPER, Q.C.

NIGEL GAUVAIN MURRAY

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