

Privy Council Appeal No. 22 of 1975

Eaton Baker and Another - - - - - *Appellants*

v.

The Queen - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 19TH MAY 1975

Present at the Hearing :

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD CROSS OF CHELSEA
LORD SALMON
SIR THADDEUS MCCARTHY

[*Majority Judgment delivered by LORD DIPLOCK*]

On 26th November, 1969, the appellants committed murder. Both were then under the age of eighteen years. They were actually seventeen and a half. By the date of their conviction on 3rd March, 1971, both had attained the age of eighteen years. They were sentenced to death. They appealed against their sentences to the Court of Appeal for Jamaica. Their appeal was dismissed. By special leave they now appeal to their Lordships' Board.

Sentence of death for murder is mandatory in Jamaica; but there is a statutory exception in the case of a person under the age of eighteen years. The only question in this appeal is whether the relevant date for ascertaining whether a convicted murderer falls within the exception is the date on which the murder was committed or the date on which the sentence is pronounced. This depends upon the true construction of section 29 (1) of the Juveniles Law and sections 20 (7) and 26 (8) of the Constitution of Jamaica.

There is a conflict of judicial authority as to the effect of these two provisions of the Constitution on section 29 (1) of the Juveniles Law. Their Lordships will revert to this later. They will first express their own opinion upon the question of construction as if the matter were *res integra*.

The mandatory sentence of death upon conviction of murder is imposed by section 2 of the Offences against the Person Law. The exception on account of youth is contained in section 29 (1) of the Juveniles Law.

The Juveniles Law contains a general code relating to the treatment of juveniles. They are defined in section 2 as persons "under the age of seventeen years". A juvenile under the age of fourteen years is classified as a "child"; above that age as a "young person". Part IV, in which section 29 appears, provides for how juvenile offenders in each of these classes are to be dealt with at various stages of the proceedings brought against them from arrest to the carrying out of any sentence pronounced on them. Section 29 (1) is the only provision which applies not only to "juveniles" but also to persons who, though no longer juveniles, are still under the age of eighteen years.

The relevant words of this subsection and that which immediately follows it are:—

"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

(2). A juvenile [sc. a person under the age of seventeen years] shall not be sentenced to penal servitude or to imprisonment . . . for any offence, or be committed to prison in default of payment of any fine, damages or costs."

Considered in isolation the words of each of these subsections, in their Lordships' view, are not capable as a matter of language of bearing the meaning that the date for ascertaining the age of a person for the purposes of either of the subsections is that of commission of the offence. The subsections are not dealing with criminal responsibility, the age of which is fixed at eight years of age by section 3 of the Juveniles Law. They are dealing only with the sentencing of persons whose criminal responsibility has been established at a trial. The "person" referred to in subsection (1) and the "juvenile" referred to in subsection (2) is a person who has already been convicted of an offence and upon whom sentence is about to be pronounced. Until that moment he does not fall within either subsection at all. So this must be the time at which he must be under the specified age in order to be entitled to the benefit of either subsection. In their Lordships' view if the words are to be given their ordinary grammatical meaning they are free from any ambiguity on this point.

That the words used were intended to be understood in their ordinary grammatical meaning is confirmed by a consideration of the relationship of section 29 to the other provisions of Part IV. Apart from section 29 (1) itself and section 29 (3) (which provides for an alternative custodial sentence for "young persons" convicted of a limited number of specified serious offences) the only permissible custodial sentence upon a juvenile is an approved school order authorised by section 27 (1) (f). Section 32 deals with the effect of an approved school order. Subsection (6) is in the following terms:—

"Where a court orders a young person to be sent to an approved school, the order shall be the authority for his detention in an approved school—

- (a) if at the date of the order he has not attained the age of sixteen years, until the expiration of a period of two years from the date of the order; and
- (b) if at the date of the order he has attained the age of sixteen years, until he attains the age of eighteen years."

This makes it clear that it is not the age of the offender at the date of commission of the offence but his age at the date of the order, *i.e.* the sentence, that determines the effect of the order. It is also clear that notwithstanding that the offence may have been committed when he was still a juvenile, the offender cannot be sent to an approved school if he has

attained the age of eighteen years by the time he was apprehended and convicted. He would therefore escape liability to a custodial sentence of any kind unless his age at the date of sentence was the relevant date for the purposes of section 29 (2).

Other sections in Part IV of the Juveniles Law provide for how a juvenile offender is to be dealt with at various stages of the proceedings between arrest and sentence. Their Lordships do not find it necessary to refer to these in detail. It is enough to say that they would be unworkable if the relevant date for determining whether a person was a "juvenile" for the purposes of a particular section were the date of commission of the offence and not the date at which the particular stage of the proceedings dealt with by the section was reached. Their Lordships can see no valid reason for distinguishing between the language used in these sections, particularly section 29 (2), and the language used in section 29 (1).

It does not appear ever to have been doubted in the courts of Jamaica that section 29 (1) or its predecessor, section 8 of Law No. 5 of 1936, bore the meaning that their Lordships have ascribed to it. The laws imposing restrictions on sentences that could be imposed on young offenders in Jamaica have followed after varying intervals broadly the pattern of the corresponding legislation in the United Kingdom and have adopted language which was first used in the (United Kingdom) Children Act 1908, in which the corresponding section dealing with capital punishment was section 103. At that time it applied only to children and young persons, *viz.* persons under the age of sixteen years. In *R. v. Fitt* [1919] 2 I.R. 35 it had been held by the Irish Court for Crown Cases Reserved that the relevant date for the purposes of section 103 of the Children Act 1908 was the date on which sentence was pronounced. In 1933, that section was replaced in the United Kingdom by section 53 (1) of the Children and Young Persons Act 1933, which merely raised the age limit to 18. It was in terms identical with those now contained in section 29 (1) of the Juveniles Law of Jamaica. When it next legislated after 1933, however, the Jamaican legislature did not follow this amendment. In Law No. 5 of 1936 it adopted a provision in the same terms as those of the earlier United Kingdom Act of 1908. It was not until Law No. 44 of 1948 that there was substituted for this the wording of section 53 (1) of the United Kingdom Act of 1933. By that time this had ceased to be the law in the United Kingdom. Section 16 of the Criminal Justice Act 1948 had substituted for the original wording of section 53 (1) a new provision, *viz.:*

"Sentence of death shall not be pronounced on or recorded against a person *convicted of an offence if it appears to the court that at the time the offence was committed* he was under the age of eighteen years; but in lieu thereof the court shall sentence him to be detained during His Majesty's pleasure"

It would appear therefore that when confronted with a choice between the original provision of the United Kingdom Act of Parliament, under which the relevant date was that of sentence, and the recently substituted provision under which the relevant date was that of the commission of the offence, the Jamaican legislature elected to adopt the former.

Before their Lordships' Board in the instant appeal it has been argued on behalf of the appellants that even if the ordinary and natural meaning of the words of section 29 (1) of the Juveniles Law is that which their Lordships have ascribed to them and which has never hitherto been challenged in the courts of Jamaica, nevertheless the consequences of giving effect to them would be so irrational and so unjust that some such words as those italicised above in the substituted version of section 53 (1) of the corresponding United Kingdom statute ought to be read into the Jamaican statute by necessary implication.

Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there and which, if there, would alter the effect of the words actually used can only be based on some assumption as to the policy of the Jamaican legislature to which the statute was intended to give effect. If without the added words, the provision would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by implication the added words. But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what it clearly said but must have intended something different. In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them. That is what this Board has been invited to do by Counsel for the appellants.

The argument was not advanced in the Court of Appeal in the instant case, nor is there any trace of its ever having been raised in any Jamaican court in previous cases under the section. It is just the kind of argument that it is not their Lordships' practice to allow a party to raise for the first time here when the Board does not have the benefit of the opinions on it of any of the Judges of the courts of Jamaica. Those Judges are familiar with conditions in Jamaica, with the pattern of violent crime among young people and, perhaps most important, with the state of public opinion there upon the controversial subject of capital punishment. This makes the judiciary in Jamaica much better qualified than any member of this Board to assess whether there is material, extraneous to the Juveniles Law itself, which could give rise to a presumption as to the policy of the Jamaican legislature sufficiently strong to justify the conclusion that it cannot have intended section 29 (1) to mean what it so plainly says.

The new argument sought to be developed before the Board in the instant case, however, does no more than rely upon the inequality of the punishments to which offenders, who commit offences when of the same age as one another, would be liable if the severity of the punishment depended upon the age they had attained by the time of their conviction and sentence. In his dissenting judgment in *R. v. Wright* (1972) 18 W.I.R. 302, a case in which a similar point had been raised, Edun J. A. had relied upon this, not as justifying putting a strained construction upon section 29 of the Juveniles Law, whose meaning he considered to be plain and obvious, but as justifying construing section 20 (7) of the Constitution of Jamaica in such a way as to effect an amendment of section 29 of the Juveniles Law by prohibiting any penalty upon an offender which was of greater severity than that prescribed for persons of the age that he had attained at the time that he had committed the offence.

Since this argument, though directed to the meaning of a different legislative provision, has been considered by the Court of Appeal in *R. v. Wright*, where it was rejected by a majority of four to one, their Lordships have not thought it necessary to debar Counsel from relying on it for whatever light it may throw upon the meaning of section 29 (1) of the Juveniles Law.

One's opinion as to whether the consequences of giving effect to the subsection would be irrational or unjust is inevitably coloured by whether one starts with the belief that capital punishment should be abolished for all offences except, perhaps, for treason—a view accepted by the legislature, if not by public opinion in general, in the United Kingdom; or with the contrary belief that capital punishment is normally the

appropriate penalty for murder—a view which the continuance in force of section 2 of the Offences against the Person Law suggests is accepted by the legislature in Jamaica.

There are alternative ways in which the age of the offender may be considered to be relevant in determining the appropriate punishment to be inflicted on him for a criminal offence. A legislature may take the view that particular forms of punishment ought not to be inflicted on persons below a particular age. This, in their Lordships' opinion, is the policy to which effect is given in Jamaica by Part IV of the Juveniles Law. Effect has been given to the same policy by the corresponding United Kingdom law since 1908, though with a special exception in the case of capital punishment after 1948 until it was totally abolished as a lawful punishment in this country except for treason. Under this policy the relevant date for determining whether an offender is of an age which makes him liable to any particular form of punishment is the date on which he is sentenced. It is inherent in this policy that it may give rise to some degree of inequality of punishment between two persons of the same age who committed similar crimes on the same day but one of whom is apprehended, tried and sentenced speedily before he reaches the prescribed age which qualifies him for a severer penalty, while the trial and sentencing of the other is delayed through no fault of his own until after he has attained that age. This inequality can, however, be mitigated in appropriate cases; either by the court of trial in the exercise of such discretion as it has as to the nature and duration of the sentence passed—as was done by the Court of Justiciary in *H.M. Advocate v. Crawford* [1918] S.C. (J) 1, a Scots case under the (United Kingdom) Children Act 1908; or, where sentence is a mandatory sentence of death, by the Governor-General on Her Majesty's behalf in the exercise of the royal prerogative of mercy conferred upon him by section 90 of the Constitution of Jamaica.

Alternatively a legislature may take the view that the age of the offender at the date of the offence ought to be regarded as a determining factor in his degree of culpability for the offence and that this ought to be reflected in the particular form of punishment to which he renders himself liable by committing the offence. This was the policy to which effect was given by the United Kingdom legislature, though in respect of capital punishment only, by its amendment in 1948 of section 53 (1) of the Children and Young Persons Act 1933. But the Jamaican legislature in amending its own law later in the same year and with knowledge of the United Kingdom amendment, chose to reject that amendment and to adopt in its place the previous version of section 53 (1) of the Children and Young Persons Act 1933.

To read into the Jamaican statute words that the Jamaican legislature has itself apparently rejected, so as to enable the court to give to the statute an effect which it would not otherwise have, would be a usurpation of the functions of the Jamaican legislature. This is not the function of a court of law—least of all, of a court of law which, like their Lordships' Board, is composed of members who are not personally familiar with conditions in Jamaica to-day or at the time the statute was passed.

Their Lordships turn next to consider the effect upon section 29 of the Juveniles Law of two provisions of the Constitution of Jamaica contained in sections 20 (7) and 26 (8). This is the only matter on which there is any conflict of authority.

Both provisions form part of Chapter III "Fundamental Rights and Freedoms". They are as follows:—

"20 (7). 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.

“26 (8). Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.”

Their Lordships will first express their own opinion as to the effect of these two provisions without recourse to the previous authorities.

Even if section 20 (7) were considered in isolation, their Lordships do not consider that section 29 of the Juveniles Law would be inconsistent with its provisions. So far as they relate to penalties for criminal offences, they are directed to invalidating laws *passed after an offence has been committed* which increase retrospectively the penalty that may be imposed for that offence. They are not directed to laws which have no retrospective effect but provide prospectively that different penalties for the same offence may be imposed on different categories of offenders. If they were, section 29 (1) is not the only provision in Part IV of the Juveniles Law that would be invalidated. The effect of Part IV is to impose alternative penalties for every criminal offence. To one or other of these penalties the offender is exposed at the time that he commits the offence. One penalty is that prescribed by the ordinary criminal law; to this the offender will be liable if at the time of trial and sentence he is over the age specified in the Juveniles Law. The alternative penalty is that prescribed by the Juveniles Law; to this the offender will be liable if at the time of trial and sentence he is under the age specified in that law. In the case of young offenders one of the principal purposes of any penalty imposed upon them is to reform their characters. Different ways of treating them with a view to their reformation are appropriate to different age groups, and for this purpose the segregation of offenders in the particular age group into which they fall at the time of undergoing the treatment, from offenders in other age groups, is a generally accepted principle of modern penology. This would not be possible if section 20 (7) of the Constitution were construed so as to compel a young offender to be treated not in the manner most appropriate to his age at the time of the treatment in association with others of a similar age group, but to be treated in the manner appropriate to and in association with young persons of the age which he was when he committed the offence, notwithstanding that by the time that he is sentenced he is in a higher age group.

Their Lordships have thought it right to deal with the construction of section 20 (7) in isolation from section 26 (8) because of its effect on any law which may be passed in the future of the same kind as the Juveniles Law. This would not fall into the category of “any law in force immediately before the appointed day” and section 26 (8) of the Constitution would not apply to it.

Section 2 of the Constitution lays down the general rule that if any law is inconsistent with the Constitution it shall to the extent of the inconsistency be void. Section 26 (8) creates an exception to this general rule if the law alleged to be inconsistent with the Constitution is one that was in force immediately before the appointed day and the alleged inconsistency is with a provision of the Constitution that is contained in Chapter III. The Juveniles Law is such a law; section 20 (7) of the Constitution is such a provision. In their Lordships' view it is too clear to admit of plausible argument to the contrary that even if section 29 (1) of the Juveniles Act had on its true construction been inconsistent with section 20 (7) of the Constitution it would nevertheless have been saved from invalidity by section 26 (8).

Turning next to the authorities, the first in point of time is the opinion of this Board in *D.P.P. v. Nasralla* [1967] 2 A.C. 238. This was a case in which a new trial of Nasralla had been ordered in circumstances which he claimed involved a contravention of his fundamental right under section 20 (8) of the Constitution—the subsection which deals with double jeopardy. Against this order he applied for redress to the Supreme Court of Jamaica under section 25 of the Constitution. The Crown contended that the order should be upheld upon the ground that it was in accordance with the common law rule relating to the plea of *autrefois acquit* that was in force in Jamaica immediately before the appointed day and that, whether or not the common law rule was inconsistent with section 20 (8) of the Constitution, it was preserved by section 26 (8).

So in order to dispose of the appeal it was necessary for the Board to decide the preliminary question of law: whether Nasralla's rights were governed by section 20 (8) of the Constitution or by the common law rule. Upon this preliminary question Lord Devlin, who delivered the opinion of the Board, said this about the effect of section 26 (8) of the Constitution upon the applicability of section 20 (8):

“This chapter [sc. Chapter III of which section 20 (8) forms part] . . . proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. 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. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.”

The Board went on to reject an argument which would not have been available in a case involving the Juveniles Law, *viz.* that the expression “any law in force immediately before the appointed day” was restricted to statute law and did not include the common law doctrine of *autrefois acquit* because it was not embodied in a statute.

That part of the *ratio decidendi* of the Board in *D.P.P. v. Nasralla* which is contained in the passage that has been cited is accordingly authority for holding, as their Lordships themselves have done in the instant case, that section 29 (1) of the Juveniles Law cannot be held to be inconsistent with section 20 (7) of the Constitution.

In 1969, the appeal in the case *Maloney Gordon v. Reg.* (15 W.I.R. 359) was heard by this Board. It arose in the following circumstances. A young man, Maloney Gordon, had been convicted on 22nd November, 1967, of a murder which he had committed on 19th February, 1967. Before passing sentence the Judge expressed the view, to which Counsel for the prosecution assented, that section 20 (7) of the Constitution required him to be satisfied beyond reasonable doubt whether Maloney Gordon had or had not attained the age of eighteen years on the date he committed the offence. He adjourned the case for evidence to be produced as to Maloney Gordon's age on 19th February, 1967. The only evidence produced was a certificate of the birth on 28th September, 1948, to the mother of Maloney Gordon of a child who was named Eustace Gordon, and the evidence of the mother that Eustace was an elder brother of Maloney Gordon. If this evidence were accepted it proved that Maloney Gordon could not have been born before 19th February, 1949, and so could not have attained the age of eighteen years on the date he committed the offence; but it threw no light upon whether or not he could have been born before 22nd November, 1949, and so could have attained the age of eighteen years before the date on which sentence was pronounced on

him. The Judge, however, despite this uncontradicted evidence found as a fact that Maloney Gordon was over eighteen years old by the time he committed the offence.

On the appeal both in the Court of Appeal for Jamaica and before this Board no question was raised as to the relevant date at which the age of Maloney Gordon had to be determined. Counsel for both parties accepted that the Judge had been right in ruling that the effect of section 20(7) of the Constitution was to make the relevant date that on which the offence had been committed. The only matter argued was whether or not the Judge was entitled to make a positive finding of fact that Maloney Gordon was *over* eighteen years on that date, when the only evidence was to the contrary.

Their Lordships have examined the written cases lodged by the appellant and the respondent in the appeal to this Board. Each of them accepts as a correct proposition of law the Judge's ruling as to the effect of section 20(7) of the Constitution on section 29(1) of the Juveniles Law. The hearing before the Board was very short—about an hour and a half. The attention of the Board was not drawn to *D.P.P. v. Nasralla* and it is evident that in saying as they did in a single sentence dealing with the matter which follows the recital of section 29(1) of the Juveniles Law and section 20(7) of the Constitution,

“There was thus no jurisdiction in the court to pass sentence of death upon the accused if he was under eighteen at the time of the commission of the offence”,

the Board were doing no more than assuming for the purpose of disposing of the particular case, and without any further consideration on their own part, that the proposition of law relevant to the issue of fact in dispute between the parties to the appeal had been formulated correctly by Counsel for both parties in agreement with one another.

Nevertheless, having regard to the nature of the evidence as to Gordon Maloney's age the Board's acceptance of that proposition was a necessary step in the conclusion that they reached that the uncontradicted evidence which the judge had not in terms rejected proved that he was of an age at which he could not lawfully be sentenced to death. The proposition contained in the words cited from the Board's opinion cannot be classified as *obiter dicta*. It forms part of the *ratio decidendi* of the case and for the reasons already given it cannot, in their Lordships' view, be reconciled with the *ratio decidendi* of the Board in the earlier case of *D.P.P. v. Nasralla*.

The Judicial Committee of the Privy Council is not strictly bound to follow the *ratio decidendi* of its previous decisions. It has always claimed the power to over-rule its previous decisions even where they are fully reasoned, although in the interests of certainty of the law this is a power that it will exercise only in exceptional circumstances. It clearly was not purporting to do so in *Maloney Gordon v. Reg.* In any consideration of the binding effect of a decision of a Board of the Judicial Committee, however, it is important to bear in mind that its normal practice is not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it. A consequence of this practice is that in its opinions delivered on an appeal the Board may have assumed, without itself deciding, that a

proposition of law which was not disputed by the parties in the court from which the appeal is brought is correct. The proposition of law so assumed to be correct may be incorporated, whether expressly or by implication, in the *ratio decidendi* of the particular appeal; but because it does not bear the authority of an opinion reached by the Board itself it does not create a precedent for use in the decision of other cases.

Although the Judicial Committee is not itself strictly bound by the *ratio decidendi* of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the *ratio decidendi* of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself. To this general rule there is an obvious exception, viz. where the *rationes decidendi* of two decisions of the Board conflict with one another and the later decision does not purport to over-rule the earlier. Here the Jamaican courts may choose which *ratio decidendi* they will follow and in doing so they may act on their own opinion as to which is the more convincing.

This was one of the grounds on which the majority of the Court of Appeal for Jamaica in *R. v. Wright (supra)* chose to follow the *ratio decidendi* of the Board in *D.P.P. v. Nasralla*. They were entitled to do so. As an alternative ground for refusing to follow the decision of this Board in *Maloney Gordon v. Reg.*, the Court of Appeal also relied upon the conclusion they reached that the decision was given *per incuriam* inasmuch as this Board in *Maloney Gordon v. Reg.* did not have its attention drawn to section 26 (8) of the Constitution or to the case of *D.P.P. v. Nasralla*.

Strictly speaking the *per incuriam* rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own previous decisions, (*Young v. Bristol Aeroplane Co.* [1944] K.B. 718) does not apply to decisions of courts of appellate jurisdiction superior to that of the court in which the rule is sought to be invoked (*Broome v. Cassell & Co.* [1972] A.C. 1027). To permit this use of the *per incuriam* rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple device of holding that decisions of superior courts with which it disagreed must have been given *per incuriam*. Nevertheless, in view of the practice of the Judicial Committee as respects raising new points of law in appeals to this Board to which reference has already been made, the Court of Appeal for Jamaica in dealing with the case of *R. v. Wright* was entitled to examine closely the report of the opinion of this Board in *Maloney Gordon v. Reg.* to see whether an inference could be drawn as to what part, if any, of its *ratio decidendi* did not bear the authority of an opinion reached by the Board itself but was merely a proposition of law assumed by the Board to be correct for the purpose of disposing of that particular case. The report of *Maloney Gordon v. Reg.* that was available to the Court of Appeal for Jamaica did not include the arguments of Counsel; but the absence from the Board's opinion of any reasoning supporting the proposition of law as to the effect of section 20 (7) of the Constitution on section 29 (2) of the Juveniles Law and, in particular, the absence of any reference to section 26 (8) of the Constitution or to *D.P.P. v. Nasralla* gave rise to a very strong inference, not that the Board had acted *per incuriam* but that it had merely accepted as correct for the purpose of disposing of the particular case a proposition which Counsel in the case either had agreed or under the practice of the Judicial Committee were not in a position to dispute. Their Lordships have had the advantage, denied to the Court of Appeal for Jamaica in *R. v. Wright*, of perusing the Cases lodged by the parties in the appeal to this Board in *Maloney Gordon v. Reg.* In their Lordships' view these provide clear confirmation that such was the case.

For these reasons the Court of Appeal for Jamaica were not bound to follow the decision of this Board in *Maloney Gordon v. Reg.* as to the effect of section 20 (7) of the Constitution on section 29 (1) of the Juveniles Law. Their decisions in *R. v. Wright* and in the instant case were correct. Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed.

[*Dissenting Judgment prepared by LORD SALMON*]

After a lengthy trial, the appellants were convicted of murder and sentenced to death on the 3rd March 1971. The murder of which they were convicted was committed on the 26th November 1969. On that date they were under eighteen years of age but on the date when the sentence was pronounced upon them they were over that age. Their appeal against sentence was dismissed by the Court of Appeal and they now appeal to this Board by special leave.

Section 3 of the Juveniles Law of 1948 (Cap. 189) provides that "it shall be conclusively presumed that no child under the age of eight years can be guilty of any offence". It follows that any persons over that age may be guilty of any offence including murder.

Sections 2 and 3 of the Offences against the Persons Law provide that sentence of death is mandatory upon a conviction for murder.

Section 29 (1) of the Juveniles Law however 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, 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 result of this appeal depends upon the true construction of this subsection. Does it preclude a sentence of death being passed on a person under eighteen years of age at the date when he committed the crime for which he is being sentenced or does it only preclude a sentence of death being passed on a person who is under eighteen years of age at the date when he is sentenced?

This question would not have arisen if after the words "under the age of eighteen years" the legislature had added some such words as "at the date when he committed the crime for which he is sentenced" or "at the date when he is sentenced". In the absence of any such express words, the subsection is, in my view, capable of either meaning.

The function of the Court is to give effect to the intention of the legislature as expressed in the language of the statute under consideration. If the language is capable of bearing only one meaning then that is the meaning which the Courts are bound to apply even if to do so leads to injustice. If however, as here, the language of the statute is, as I think, capable of two meanings, the Court is free to decide which is the meaning intended by the legislature. Nevertheless, in making that decision, the Court must first consider which of the two meanings is the more consistent with a strictly literal construction. I recognise that in its literal sense the language of subsection (1) of section 29 is probably more consistent with the meaning for which the Crown contends than with that which has been urged before this Board on behalf of the appellants. It

is, of course, well settled that a statute must ordinarily be construed according to its literal meaning but not when there are strong grounds for concluding that this is not the meaning which the legislature could have intended, *e.g.* if this meaning leads to manifestly unjust or absurd results. Even so, however unjust or absurd these results may be, the statute must be given its literal meaning unless its language is reasonably capable of bearing some other meaning which avoids injustice and absurdity. *Becke v. Smith* (1836) 2 M. and W. 191 *per* Parke B. at p. 195; *R. v. Tonbridge Overseers* [1884] 13 Q.B.D. 339 *per* Brett M.R. at p. 342; *Gill v. Donald Humberstone and Co. Ltd.* [1963] 1 W.L.R. 929 *per* Lord Reid at p. 934.

Looking at section 29 (1) in isolation I have no doubt that it is reasonably capable of bearing either of the meanings to which I have referred; nor have I any doubt that to adopt the meaning which makes it mandatory for anyone who may commit murder at any time between the ages of eight and eighteen to be hanged for the crime providing that he is not sentenced to death until after he has attained eighteen years of age leads to shocking and indeed barbarous results. Whatever one's views may be about the necessity or desirability for retaining or abolishing capital punishment or on the appropriate age limit relating to a sentence of death (and these opinions must clearly depend upon existing local conditions and the climate of public opinion), I do not suppose that in any conditions or climate of opinion, anyone anywhere in the civilised world would consider it to be a good thing for the law to require a man to be sentenced to death for a crime which he had committed when he was, say, fourteen years old. Supposing such a boy commits murder in Jamaica and is spirited away by his parents to some distant island. Later, perhaps fifteen years later, having entirely reformed, he returns to his native land. He is recognised, prosecuted and convicted of murder. On the Crown's construction of section 29 (1), the only sentence which the Courts could pass upon him would be death—death for a crime which he had committed fifteen years previously and for which he could not then, nor during the ensuing four years, have been sentenced to death. For the law to compel such a sentence to be passed in the circumstances postulated is barbarous and absurd.

Suppose two boys of say about sixteen years of age jointly commit a murder; one is apprehended before the other. He is tried expeditiously, convicted and sentenced before reaching the age of eighteen. He of course cannot be sentenced to death. The other is caught later at a time when there is a good deal of congestion in the Courts; he is not sentenced until one week after his eighteenth birthday. He has to be sentenced to death. Suppose a boy of seventeen is tried with a number of other defendants for murder. The trial starts three months before his eighteenth birthday. Perhaps through the prolixity of counsel, perhaps unavoidably, at any rate through no fault of the boy, the trial lasts just over three months. He is found guilty and has to be sentenced to death. If there had not been so many defendants, if the trial had been conducted more expeditiously (all matters for which the boy was in no way responsible), he would have been convicted some weeks before his eighteenth birthday and could not have been sentenced to death. It would be easy to multiply similar instances of cases in which, if section 29 (1) has the meaning attributed to it by the Crown, liability to be sentenced to death would depend upon mere chance and the law would inevitably produce arbitrary, unreasonable and unjust results. I cannot accept that this can have been the intention of the legislature nor that the legislature can have overlooked the sort of circumstances of which I have given a few random examples. Still less can I accept that the legislature intended to introduce a law having such strange and palpably inhuman results in the hope that they might be rectified by the prerogative of mercy.

The objects of sentencing have for long been punishment, deterrence and reform. Even when penology was in its infancy, it was recognised that young offenders had less criminal responsibility and blameworthiness than those of maturer years and were more capable of reform. Accordingly, apart from sentimental or humanitarian reasons, the justification for immunising young offenders against the death sentence was that they might not deserve it so much as others; besides, if imposed, it would certainly obliterate all their prospects of reform. In this context, it is surely the young offender's age at the date of the commission of the offence which is relevant, rather than his age at the necessarily fortuitous date when he happens to be sentenced.

Apart from *Maloney Gordon v. R.* (1969) 15 W.I.R. 359, to which I shall presently refer, the only authority directly in point is *R. v. Fitt* [1919] 2 I.R. 35. That case was decided at a time when "the troubles" in Ireland were at their height and a state of near civil war existed. As Lord Atkin pointed out in *Liversidge v. Anderson* [1942] A.C. 206 at p. 244, on principle, "amid the clash of arms, the laws are not silent . . . they speak the same language in war as in peace." In practice however, as the majority decision in *Liversidge v. Anderson* illustrates, the voice of the law amid the clash of arms is sometimes muted and discordant.

In *R. v. Fitt*, the Irish Court for Crown Cases Reserved had to consider the effect of section 103 of the Children Act 1908 which was virtually in the same terms as section 29 (1) (*supra*). Fitt was tried for having committed a murder a few weeks before his sixteenth birthday. The jury found him guilty a few weeks after his sixteenth birthday and made a strong recommendation to mercy on account of his youth. Precisely the same question arose in that case as in the present. In reaching their decision that Fitt must be sentenced to death, the Court for Crown Cases Reserved relied upon the decision in *The King v. Cawthron* [1913] 3 K.B. 168. In my judgment, it is plain that that case was wrongly decided. Cawthron was convicted under section 4 of the Criminal Law Amendment Act 1885 of having had carnal knowledge of a girl under the age of thirteen years. At the date when he committed the offence he was under the age of sixteen but at the date of his conviction he was over that age. Section 4 after enacting that anyone convicted of the offence might be sentenced to penal servitude or imprisonment provided that "in the case of an offender whose age does not exceed sixteen years the court may, instead of sentencing him to any term of imprisonment, order him to be whipped". The trial judge said that if he had the power to do so, he would order Cawthron to be whipped instead of being imprisoned but concluded that he had no such power and sentenced him to twelve months' imprisonment. Cawthron appealed contending that there was power to order him to be whipped and asked for such a sentence to be substituted for the sentence of imprisonment. I should have thought that, even on the strictly literal construction of the proviso, the object of giving the Court power to order whipping instead of imprisonment was to protect a boy who committed the statutory offence when under sixteen years of age against the risk of being evilly influenced by those whom he would meet in prison. Darling J. in delivering the judgment of the Court dismissing the appeal said,

"In the course of argument I put to Mr. Raikes an extreme case of a boy of the age of fifteen committing an offence under this section and then running away and evading prosecution until after a lapse of twenty years, and I asked whether upon conviction at the age of thirty-five he could be ordered to be whipped. He was obliged to contend that he could. That . . . affords a good test of the soundness of the contention, and is to my mind enough to shew that it cannot be supported."

It is fantastic to imagine a man being charged when thirty-five years of age with having had unlawful carnal knowledge of a girl when he was fifteen and still more fantastic to suppose that, if he were, any judge would order him to be whipped or indeed impose any punishment upon him.

Darling J.'s judgment was approved and applied in *Fitt's* case and strongly relied upon by the Court in coming to its conclusion. After citing it *in extenso*, Molony C.J. said,

"In the present case, when Mr. Denning was specifically asked what would have happened if a person under the age of sixteen committed murder and evaded prosecution for twenty years, he had to admit that upon his argument the only thing that a Court could do would be to sentence him to detention under section 103."

This appears to have struck the Court as strange. But they did not consider the alternative which their construction of section 103 would necessarily have involved. If they had, it might have occurred to them that for the law to require a mandatory sentence of death to be passed on a man of thirty-five for a crime which he had committed when he was a boy of fifteen would be not only strange but would shock the conscience of any civilised human being.

H.M. Advocate v. Crawford [1918] S.C. (J) 1 was also referred to and relied on by the Court in *Fitt's* case. But only a note of it was then available. This did not set out the judgments. Crawford who was indicted for murder but convicted only of culpable homicide attained the age of sixteen between the date of his offence and conviction. The question arose as to whether the Courts had power to sentence him to penal servitude. The High Court of Justiciary decided that such power existed, but that it need not be exercised, and that in all the circumstances the prisoner should be sent to a Borstal Institution. The Court clearly did not decide that if the prisoner had been convicted of having committed murder when he was only fifteen, they would have been compelled to sentence him to death. On the contrary, the Lord Justice-General after stating his opinion upon the question before the Court said,

"If that conclusion had constrained us to find that the prisoner required to be dealt with as an ordinary criminal, I must say, for my own part, I should have been prepared to stretch the Act so as to enable the Court to deal with the prisoner as if he had been a 'young person'. But it is wholly unnecessary to do any violence to the terms of the statute . . . because, although we hold that he is not a 'young person' . . . nevertheless it is within the power of the Court to send the prisoner to a Borstal Institution, where he will have an opportunity of reforming . . .".

The Lord Justice-Clerk entirely agreed with the Lord Justice-General. This was not a reserved judgment and the expressions "stretching the law" and doing violence to the terms of the statute are unfortunate. What, I think, the Court meant was that if, *e.g.*, it had been faced with construing section 103, it would not have treated the prisoner as an ordinary criminal upon whom the law required a mandatory sentence of death to be passed because the result of construing section 103 literally in the case of a boy who was only fifteen when he committed the crime would be so repugnant that it could not be what Parliament had intended and that he would accordingly have given section 103 its alternative and non-literal but possible meaning.

I have taken some time in explaining why I do not accept the decision in *Fitt's* case because it is the only case other than *Maloney Gordon v. R.* which deals directly with the point raised by this appeal. *R. v. Cawthron* and *H.M. Advocate v. Crawford* deal indirectly with the same point and

I have therefore explained why, in my view, the former was wrongly decided and the latter has been misunderstood. So far as I know, except for the present case and *Maloney Gordon v. R.* there has been no case in the Common Law world, other than *Fitt's* case, which purports to decide whether the age limit for a sentence of death is to be ascertained as at the date of the crime or the date of the sentence.

I do not think that the fact that the United Kingdom Parliament expressly spelt out in its amending Act of 1948 that it was the date of the crime which was the material date means that Parliament was altering the law. Section 16 of the Criminal Justice Act 1948 is just as consistent with the view that Parliament was clarifying the law. Nor can I agree that because the Jamaican legislature in its own amending Act, passed a little later in the same year, did not incorporate the United Kingdom amendment, it follows that the Jamaican legislature rejected it. The interval between the two Acts was so short that it is at least equally possible that, at the time, the Jamaican legislature had no knowledge of the United Kingdom amendment or had learnt of it too late to incorporate it in its own Law of 1948. There is no reason to suppose that the Jamaican legislature moves with any more expedition than that of the United Kingdom.

It has been suggested that if section 29(1) is capable of referring to a boy's age at the date when he committed the offence, section 29(2) which enacts that "A juvenile shall not be sentenced to penal servitude or to imprisonment . . . for any offence . . ." must also be capable of the same meaning, which could create difficulties. This may be so. There would not, however, be the same reasons in the case of section 29(2) for departing from its literal meaning because that meaning could not involve the unjust, arbitrary or absurd results inseparable from giving section 29(1) its literal meaning. This is because of the crucial difference between the two subsections; the one is concerned with a death sentence which the Court is *bound* to impose even in circumstances such as those to which I have already referred: the other is concerned only with the Court's *power* to order imprisonment which it is free to exercise or not as justice requires. *H.M. Advocate v. Crawford (supra)* and *R. v. Williams* (1971) 16 W.I.R. 63 are good examples of cases in which the Courts held that they had power to imprison a boy who was below the statutory age when he committed the offence but above it when he was sentenced. In each case the Court decided that it would be wrong to exercise the power and refused to do so.

I must now, as briefly as may be, consider *Maloney Gordon v. The Queen* (1969) 15 W.I.R. 359 upon which the appellants strongly rely. The headnote reads:

"In Jamaica there is no jurisdiction in a Court to pass sentence of death upon a prisoner convicted of a capital offence if he was under the age of eighteen years at the time of the commission of the offence."

There can be no doubt but that the headnote accurately states the grounds upon which this Board allowed the appeal against sentence of death. The uncontradicted evidence in the case, if accepted, clearly showed that the prisoner must have been less than eighteen years old when he committed the murder but the evidence was quite consistent with his being above that age when he was sentenced. Accordingly unless this Board held the law to be as stated in the headnote they must have dismissed the appeal. The case is however unsatisfactory because there was no argument either before this Board or the Court of Appeal or the trial judge on the point of law on which the decision rested. The trial judge and the Crown accepted that the critical factor was the age of the prisoner at the date on which he committed the murder. The only point argued before this Board was whether the trial judge, although he did not expressly reject

the uncontradicted evidence, was entitled to have ruled, on the view he formed of the prisoner's appearance, that he was eighteen years old or more when he committed the murder. In spite of this unsatisfactory state of affairs, the decision was clearly binding on the Court of Appeal. It had no power to depart from the decision on the ground that it had been reached *per incuriam*, see *Broome v. Cassell & Co.* [1972] A.C. 1027. This Board however has the power to refuse to follow its own decisions but does so only in most exceptional circumstances. If this Board considered that the *Maloney Gordon* case was wrongly decided, then, in all the circumstances, there would be ample justification for overruling it. In which event, I think that the law should be taken to have always been as now pronounced by this Board and accordingly the judgment of the Court of Appeal in the present case need not be reversed. For my part, however, I do not consider that the decision in *Maloney Gordon* was wrong. After reciting section 29 (1), this Board set out the Jamaica (Constitution) Order in Council 1962, Second Schedule, section 20 (7), the relevant part of which reads,

“ . . . 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.”

This Board then added,

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

There is nothing in my view to suggest that this Board did not adopt the construction of section 29 (1) which, for the reasons I have given (and which have nothing to do with section 20 (7) of the Constitution), I believe to be correct. I can find no reason for thinking that this Board reached a different conclusion as to the proper construction of section 29 (1) and held that the law as laid down in that section had been altered by section 20 (7) of the Constitution. Section 20 (7), in my view, merely tends to support the construction of section 29 (1) which I favour and I do not think that it should be inferred that this Board prayed it in aid for any other purpose.

I agree that section 26 (8) of the Constitution makes it plain that nothing in Chapter III (which includes section 20 (7)) can alter the law in force immediately prior to the 6th August 1962. I also recognise that section 26 (8) was not drawn to the attention of this Board in *Maloney Gordon* but I hardly think that this is a sufficient reason for assuming that this Board based its decision in that case on the supposition that section 20 (7) had altered the law or regarded that subsection any differently than I do myself. I find it unnecessary to express any opinion about the principle which it embodies but I must not be taken as assenting to the view that it is necessarily confined to retrospective legislation.

On the view I take of *Maloney Gordon* it clearly cannot conflict with *D.P.P. v. Nasralla* [1967] 2 A.C. 238. It is only if the Board in the former case had construed section 29 (1) in the sense for which the Crown now contends and had held that it was therefore inconsistent with but had been amended by section 20 (7) (*supra*) that the latter case could have been relevant. It would then have been relevant because of the finding, *obiter*, but clearly correct, that by reason of section 26 (8) nothing in Chapter III of the Constitution was capable of amending any law (including section 29 (1) (*supra*)) existing at the time when the Constitution came into force.

I therefore would respectfully dissent from their Lordships' conclusion and would humbly advise Her Majesty that the appeal should be allowed.

I desire to add only this. Since Edun J.A. and I, albeit for somewhat different reasons, have differed from the view that this appeal should be dismissed, it may be thought that this case is perhaps not entirely devoid of some slight shadow of doubt. Moreover, five and a half years have elapsed since the crime was committed and over four years since the appellants were sentenced to death. I respectfully express the hope that these matters may be considered to be worthy of consideration when the time comes to decide whether or not the prerogative of mercy should be exercised.

In the Privy Council

EATON BAKER AND ANOTHER

v.

THE QUEEN
