JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 44/2006

BEFORE: THE HON. MR JUSTICE HARRISON, J.A
THE HON. MR JUSTICE DUKHARAN, J.A.
THE HON. MISS JUSTICE PHILLIPS J.A

DAMION THOMAS v R

Nancy Anderson for the appellant

Maxine Ellis, Crown Counsel for the Crown

21st September, 4th and 18th December, 2009

PHILLIPS, J.A.

1. This is an appeal against a sentence of life imprisonment, with no possibility of parole before 25 years, imposed on the appellant Damion Thomas on March 3, 2006 at a re-sentencing hearing, which took place pursuant to the Offences Against the Person (Amendment) Act, 2005. The appeal was heard on the 21st September, 2009, and decision was given on the 4th December, 2009. We promised to put our reasons in writing. This we now do.

2. The appellant was born on November 21, 1980. On November 18, 2002, he was convicted of murdering Donovan Brown on February 4, 1998 and, since this was his third non-capital murder conviction (the first murder had been committed in 1994), he had originally been sentenced on December 3, 2002 to suffer death as authorized by law.

3. On July 7, 2004 the Judicial Committee of the Privy Council (JCPC) decided, in the case of ***Lambert Watson v R*** (2004) 64 WIR 241, that the mandatory imposition of a sentence of death was unconstitutional in Jamaica. As a consequence of this decision, the Offences against the Person Act was amended on February 18, 2005 to reflect this and to make provision for a re-sentencing hearing in the case of persons who were already under a sentence of death (S. 8). As a result, the appellant was re-sentenced to life imprisonment as set out in paragraph 1 above.

4. At the appellant's re-sentencing hearing, it was submitted on his behalf that the only appropriate sentence which ought to have been imposed, him being 17 years of age at the date of the offence, was detention at the Court's pleasure. However, on March 26, 2004, the Child Care and Protection Act was promulgated and section 78(1) of the Act states:

> " 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 when the offence was committed he was under the age of 18 years, but in place thereof such person shall be liable to be imprisoned for life."

On the basis of this provision, the Crown contended successfully that the appellant was liable to imprisonment for life.

The grounds of appeal

5. Miss Nancy Anderson, who appeared for the appellant before us, sought and was granted leave to rely on and argue three grounds of appeal which are set out below:

> "1. The Learned Trial Judge erred in law in failing to hold that the legislation in force at the time of the commission of the offence by the appellant and the date of conviction was section 29(1) of the Juveniles Act, as modified by the Judicial Committee of the Privy Council in ***DPP v Mollison*** (2003) UKPC 6.
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> 2. By imposing a life sentence, the Learned Trial Judge erred in law in that he applied section 78(1) of the Child Care and Protection Act retrospectively in contravention of the general presumption against the retrospective operation of statutes.
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> 3. The Learned Trial Judge erred in law in imposing a sentence that was in breach of section 20(7) of the Constitution which prohibits the imposition of a punishment more severe than any available at the time of the commission of the offence."

The appellant's submissions

6. At the hearing of the appeal, Miss Anderson set out in detail the history of the relevant legislation, as well as the rules, which greatly assisted the Court in our deliberations. Her submissions revealed the following:

> (i) Since the enactment in 1951 of the Juveniles Act, persons under the age of 18 years convicted of murder, were detained during Her Majesty's pleasure in accordance with section 29(1) of the Act.

(ii) In 1975, as a result of the decision of the JCPC in ***Baker v R*** [1975] AC 774, section 29(1) of the Act was amended to make it clear that the relevant age with regard to the statutory prohibition against the imposition of the death sentence on a juvenile was the age of the juvenile at the time of the commission of the offence, rather than at the time of sentencing.

(iii) The key feature of the sentence of detention during Her Majesty's pleasure is its indeterminacy, which permits periodic review of the progress and development of young offenders as they mature, and due consideration should be given not only to retribution, deterrence and risk, but also to the welfare of those detained.

(iv) In 2003, section 29(1) of the Act was modified by the JCPC in ***DPP v Mollison*** [2003] UKPC, so that on conviction thereafter the young offender was detained at the court's pleasure and not Her Majesty's pleasure. It was noted and recognized in the judgment that an order directing imprisonment for a fixed period is a harsher penalty than an order for detention for an indeterminate period at the court's pleasure.

(v) In 2006, the Civil Procedure Rules were amended to include Part 75 in order to make provision for "Review of Inmates held at the Court's Pleasure". The rules set out, inter alia, the time periods within which applications are to be made to a single judge in chambers, the procedure to be followed, and the powers of the court in respect of the applications.

(vi) In March 2004, as already noted (see paragraph 4 above), the Child Care and Protection Act was enacted.

7. Miss Anderson then argued that, in imposing the sentence of life imprisonment, the judge below had applied section 78(1) of the Child Care and Protection Act, which provision would only have been applicable after that Act

received Assent on March 26, 2004. This provision, she submitted, was therefore applied retrospectively, contrary to the general presumption against retrospective punishment and operation of legislation.

8. Miss Anderson referred to and relied on the maxim, **nullum crimen nulla poena sine lege** (no person should be punished for conduct deemed not criminal when committed), which, she submitted, embodied this principle. She also referred to and relied on the leading case on the subject, ***L'Office Cherifien des Phosphates v Yamashita- Shinnichon Steamship*** [1994] 2 WLR 39 and the seminal judgment of Lord Mustill in that case, which she further submitted was the authority for the proposition that the basis for the prohibition against the retrospective effect of legislation is fairness. In his judgment Lord Mustill, referred to an excerpt from Maxwell on Interpretation of Statutes, 12th edition, (1969), p. 215, cited in the Court of Appeal by Sir Thomas Bingham MR:

> "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. "

9. Miss Anderson drew our attention to the case of ***Hilroy Humphreys v Attorney General of Antigua and Barbuda*** PC No. 8 of 2008 delivered 11th

November 2008 in which, she submitted, the JCPC had affirmed Lord Mustill's judgment. She concluded by submitting that as there is no express provision in the Child Care and Protection Act for retrospective application, the judge should not have imposed a life sentence on the appellant pursuant to section 78(1) of the Act.

10. Additionally, and even more importantly, Miss Anderson then referred the Court to section 20(7) of the Constitution, which provides as follows:

> "No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

11. Counsel then referred to ***R v Laing, Riley and Prendergast*** (1988) 25 JLR 445, in which a sentence imposed pursuant to the Dangerous Drugs (Amendment) Act (No. 17 of 1987) was quashed by this Court, the Amendment Act (which provided for severer penalties) having come into force almost eight weeks after the commission of the offences under consideration. Delivering the judgment of the court, Wright JA stated that to hold otherwise "would be to give retroactive effect to criminal legislation in contravention of section 20(7) of the Constitution".

12. It was therefore the contention of the appellant that the sentence of life imprisonment which had been imposed on him was more severe than the maximum penalty available at the time of the commission of the offence which was detention at the court's pleasure. Counsel relied on the dicta in ***Kurt Mollison*** (paragraphs 20-21) which we repeat here, as it sets out the principles cogently and pellucidly and which, in our view, is determinative of the appeal.

> "Having ruled that " the court's pleasure" should be substituted for the 'Governor General's pleasure,' the Court of Appeal majority ruled that the respondent be imprisoned for life and that he be not considered for parole until he had served a term of 20 years' imprisonment. This is the subject of the respondent's cross-appeal. His point is a short one. A sentence of imprisonment for life is a sentence of a different nature from a sentence of indefinite detention specifically designed to address the special circumstances of those convicted of murders committed under the age of 18. Substitution of the court for the Governor- General should not lead to a change, and a change disadvantageous to the detainee, in the punishment imposed.
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> The Board did not understand the Director to resist this argument, to which there is, in the opinion of the Board, no answer. The cross-appeal therefore succeeds. The sentence of life imprisonment must be quashed and a sentence of detention during the court's pleasure substituted."

13. Finally, counsel referred the Court to the fact that the prohibitions captured in section 20(7) of the Constitution are also embodied in Article 15 of the United Nations International Covenant on Civil and Political Rights and Article 9 of the

American Convention on Human Rights, whilst also confirming that Jamaica is a party to both conventions.

14. Counsel then submitted in conclusion that the sentence which had been imposed in the instant case was unlawful, in breach of the Constitution and that a sentence of detention at the court's pleasure should be substituted therefor.

15. In response, counsel for the Crown, Miss Maxine Ellis, did not seek to challenge the submissions of Miss Anderson, stating that she was persuaded by the authorities.

Discussion on the submissions

16. It is clear that the appellant has been the beneficiary of the development of the law as it relates to those persons who are to be punished having been found guilty of murder committed before the age of 18 years. As stated at the beginning of this judgment, the appellant was initially sentenced to suffer death according to law, but this sentence was quashed pursuant to the case of ***Lambert Watson*** (supra). He was then re-sentenced, but it appears not pursuant to the Juveniles Act as modified, but pursuant to the Child Care and Protection Act, which was not in effect at the time of the commission of the offence, or at the time when the death penalty was imposed, but was in effect at the time of the re-sentencing. This statute ought not and cannot be construed to have any retrospective operation. The statute itself does not expressly say so, which is how one would directly ascertain the intention of

Parliament and we accept the principles of law as set out in the ***L'office Cherifien*** case (supra). Indeed Lord Mustill again quoted the judgment of Sir Thomas Bingham MR in the Court of Appeal in that case (who was himself quoting Staughton LJ in the ***Secretary of State for Social Services v Tunnicliffe*** [1991] 2 All ER 712):

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

17. In this case, the sentence that was imposed was more severe than the penalty available at the time of the commission of the offence. That, in our view would be manifestly unfair. In ***Lowell Lawrence v the Financial Services Commission*** SCCA No. 129/2005 delivered March 29, 2007, a recent decision of this Court, Smith JA expressed the view that, when reviewing the import of legislation having a retrospective effect, what was important was the intention of the legislature. At page 12 of the judgment, he stated:

> "The authorities establish that although the rights of litigants are generally to be determined according to the law in force at the time the matter arose, the legislature may pass an Act to affect retrospectively pending actions. Such an Act must contain clear

> words to that effect or deal with matters of procedure only."

18. In any event, it is clear that the Constitution, in section 20(7), effectively prohibits two specific types of retrospective legislation, and thus provides protection in two clear circumstances:

> (1) One cannot be guilty of an offence, if at the time of the commission of the act, the act did not constitute an offence,
>
> (2) One cannot be subjected to a penalty more severe than the maximum penalty existing at the time of the commission of the offence.

19. It is clear that the penalty imposed on the appellant of life imprisonment without the possibility of parole before 25 years is unlawful and in violation of section 20(7) of the Constitution. Therefore, it should be substituted with detention at the court's pleasure in accordance with section 29(1) of the Juveniles Act, as modified, which was the relevant law at the time of the commission of the offence and at the date of conviction. Pursuant to section 8(2) of the Offences Against the Person (Amendment) Act, it is this Court's view that at the re-sentencing hearing, the learned judge ought to have determined the appropriate sentence, having regard to the date of conviction. As a consequence, the sentence we intend to impose shall be determined as of the date of conviction of the appellant in respect of the murder of Donovan Brown, that is, November 18, 2002.

20. The appeal is therefore allowed. The sentence of life imprisonment imposed by the learned judge is set aside and the following orders substituted therefor:

The appellant is detained at the court's pleasure with effect from the date of conviction, that is November 18, 2002. This sentence does not address the two previous murder convictions of this appellant, the first of which was on May 3, 1996, which convictions were the subject, initially of the imposition of the death sentence. The release of the appellant is to be determined by the court in accordance with section 29(4) of the Juveniles Act 1951 as modified by the decision of the JCPC in ***Kurt Mollison.***