

29, 1969

IN THE PRIVY COUNCIL

No.15 of 1969

ON APPEAL FROM THE COURT OF JAMAICA

B E T W E E N:

UNIVERSITY OF LONDON
INSTITUTE OF CRIMINAL JUSTICE
25 BEDFORD SQUARE
LONDON, W.1

MALONEY GORDON

Appellant

and -
THE QUEEN

Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an appeal against the judgment of the Court of Appeal of Jamaica (Henriques P., Shelley and Eccleston JJ.A.) dated 1st May, 1968, which had dismissed the Appellant's appeal against his conviction by the Supreme Court of Jamaica (Edum J. and a jury) on 22nd November, 1967 for murder, in respect of which he was sentenced to death.

pp.163-169
p.150

20 2. The issues in this appeal were specifically limited in the Order in Council granting special leave to appeal in this case to the single ground raised by the Appellant's original petition for special leave to appeal, which alleged that the sentence of death passed upon him should not have been imposed.

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11.22-33

3. The relevant statutory provision is:

Juveniles Law, Chapter 189, Laws of Jamaica

30 '29 (1) Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Law, be liable to be detained in such

Record

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 lawful custody.'

p.1

4. The Appellant was indicted with one Dennis Barth for the murder of Andrew Barton on the 19th February, 1967 in the parish of Kingston.

5. The trial in the Supreme Court (Edum J. and a jury) took place between the 20th and 22nd November, 1967. The prosecution led evidence that Andrew Barton had been murdered on 19th February, 1967, and which implicated the Appellant, who gave evidence in his own defence. The co-accused _____ acquitted after a submission had been made that he had no case to answer. After a full summing-up by the trial Judge, the jury retired and returned a verdict of guilty of murder against the Appellant.

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p.150

6. Immediately after this verdict, Edum J. told prosecuting counsel that he would like evidence as to the age of the Appellant, making a reference to the Juveniles Law. The hearing was adjourned to 3 p.m. on the same day, 22nd November, 1967 when the trial judge said that, because of the provisions of Article 20 (7) of the Constitution of Jamaica, his duty was to be satisfied beyond a reasonable doubt that, on the 19th February, 1967, the date of the crime, the Appellant was over or under the age of eighteen.

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11.9- 21

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154

7. Detective Corporal Roach then gave evidence and produced a certified copy of a birth certificate showing that Eustace Gordon had been born at the Victoria Jubilee Lying-in Hospital, Kingston, on the 20th September, 1948; no father's name was on the certificate, the mother was named as Violet Bailey, and the birth had been reported by I. Dundas.

pp.154-157

8. Violet Bailey was then called to give evidence by the trial judge; she said that the accused man was Maloney Gordon, that he was her son, and that she did not remember his date of birth. When asked his age, she said he was 'around seventeen', but when the question was repeated, she said that she did not know his age.

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In cross-examination by prosecuting counsel, she said that the Appellant was the second of her four sons, that the eldest son was called Eustace, whose present address she did not know; she further said that her second son was born in 1950. At this stage the trial judge said that the question now raised was whether the birth certificate related to the Appellant.

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10 9. After the Appellant's counsel had said that his client could not say what his age was, the learned judge referred to 'paragraph 692' (of Archbolds Criminal Practice 36th Ed:) and stated that the birth certificate produced showed that Eustace Gordon became 18 in September, 1966; he continued:-

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

p.158 1.26

The Appellant was then called upon and sentence of death was passed on him.

30 10. The Appellant appealed against his conviction to the Court of Appeal of Jamaica, which dismissed his appeal by a judgment dated 1st May, 1968. No argument was raised as to the passing of sentence upon him, and no reference to that issue was made in the judgment.

pp.163-169

40 11. It is respectfully submitted that the learned trial judge was justified in reaching the conclusion which he stated as to the age of the Appellant, and that accordingly sentence was properly passed upon the Appellant. It is submitted that the learned trial judge in referring to paragraph 692 of Archbold, was indicating how he was directing himself upon the common law on the question of deciding the age of the Appellant, and that such direction was a proper one. In the absence of direct acceptable

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evidence as to the age of any person, a court is entitled to act on a conclusion reached from seeing that person before it, as happened, for example, in Wallworth v. Balmer (1965) 3 A.E.R. 721. It is further submitted that it must be implied from the learned trial judge's conclusion as to the age of the Appellant that he rejected the evidence of Violet Bailey, and that his omission so to state expressly does not vitiate the conclusion which he was entitled to reach upon the issue before him. 10

12. The Respondent therefore respectfully submits that this appeal should be dismissed for the following, among other

REASONS

1. BECAUSE the trial judge was entitled to reach a conclusion as to the age of the Appellant from a visual examination.
2. BECAUSE upon the evidence the decision of the trial judge was correct. 20
3. BECAUSE once the trial judge had reached a conclusion, he had no discretion as to the sentence to be passed.

MERVYN HEALD.

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MALONEY GORDON Appellant

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THE QUEEN Respondent

C A S E FOR THE RESPONDENT

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