Privy Council Appeal No. 88 of 2001

The Director of Public Prosecutions *Appellant*

v.

Kurt Mollison (No. 2) *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd January 2003

Present at the hearing:-

Lord Bingham of Cornhill
Lord Slynn of Hadley
Lord Clyde
Lord Hutton
Lord Walker of Gestingthorpe

*[Delivered by **Lord Bingham of Cornhill**]*

---

1. On 16 March 1994, when he was aged 16, Kurt Mollison (the respondent) murdered Leila Brown in the course or furtherance of a robbery. This was a capital murder under the law of Jamaica. He stood trial before Langrin J and a jury, was convicted on 21 April 1997 (aged 19) and on 25 April 1997 was sentenced under section 29(1) of the Juveniles Act 1951 as amended to be detained during the Governor-General's pleasure. On 16 February 2000 the Court of Appeal refused his application for leave to appeal against conviction, but the court was concerned whether the sentence imposed on the respondent was compatible with the Constitution of Jamaica. That issue was adjourned to a separate hearing, and on 29 May 2000 the Court of Appeal (Downer and Bingham JJA, Walker JA dissenting) allowed the respondent's appeal: the sentence of detention during the Governor-General's pleasure was set aside and a sentence of life imprisonment substituted, with a recommendation that the respondent be not considered for parole until he had served a term of 20 years' imprisonment dated from 25 July 1997. The Director of Public Prosecutions appeals to the Board (with leave of the Court of Appeal) against the setting aside of the sentence of

detention during the Governor-General's pleasure. The respondent seeks to uphold that order, but cross-appeals against the sentence of life imprisonment which was substituted. At the heart of the appeal lie two main issues (sub-divided below): whether the sentence of detention during the Governor-General's pleasure authorised by section 29(1), conferring on the Governor-General as an officer of the executive the power to determine the measure of punishment to be inflicted on an offender, is compatible with the Constitution; and, if it is not, whether the terms of the Constitution protect it against effective challenge.

2. Without objection by the Director, leave to intervene was given by the Board to seven additional parties with a direct interest in the outcome of these proceedings. Each of these parties, when aged between 14 and 17, committed a crime of capital murder on a date between September 1980 (at the earliest) and November 1996 (at the latest). They were convicted on dates between January 1982 and March 2000. Each of them was sentenced (either at trial or on appeal) to be detained during the Governor-General's pleasure, save in the latest of the cases (that of Andrew Hunter) who was sentenced to life imprisonment. All the intervening parties are now confined in adult correctional centres. Four of the intervening parties have applied to the Supreme Court of Jamaica for writs of habeas corpus; the applications have been adjourned pending the outcome of this appeal.

Section 29 of the Juveniles Act 1951

3. Section 3 of the Offences against the Person Act 1864, as amended, provides that every person convicted of capital murder shall be sentenced to death. But special provision has been made for those who commit this crime when aged under 18. Following a number of amendments made pursuant to section 4 of the Jamaica (Constitution) Order in Council 1962 (SI 1962/1500), section 29 of the Juveniles Act 1951 now provides, so far as material to the main issue in this appeal, as follows:

> "(1) 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 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, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody.
>
> (4) The Governor-General may release on licence any person detained under subsection (1) or (3) of this section. Such licence shall be in such form and contain such conditions as

the Governor-General may direct, and may at any time be revoked or varied by the Governor-General. Where such licence is revoked the person to whom it relates shall return forthwith to such place as the Governor-General may direct, and if he fails to do so may be arrested by any constable without warrant and taken to such place."

4. Section 29 as originally enacted was amended in 1964 to substitute "Minister" for "Governor" in subsection (1) and "Governor-General" for "Governor" in each of the four references originally made to the Governor in subsection (4). In 1975 subsection (1) was further amended to make plain, reversing the effect of *Baker v The Queen* [1975] AC 774, that the statutory prohibition on pronouncement of the death sentence applied to those appearing to be aged under 18 at the time when they had committed the offence, not at the time of sentence. In 1985, the reference to "an adult correctional centre" was substituted for the previous reference to "a prison". The enacted reference to "Her Majesty's pleasure" has not, however, been amended, no doubt because section 68(2) of the Constitution of Jamaica provides that the executive authority of Jamaica may be exercised on behalf of Her Majesty by the Governor-General. In recognition of this constitutional reality, it appears to be the practice where section 29(1) applies, as was done in this case, to call the sentence one of detention during the Governor-General's pleasure, and in this opinion that usage will be adopted.

5. The sentence of detention during Her Majesty's pleasure originated in the United Kingdom for reasons which are not in doubt. In the course of time it came to be seen as inhumane to punish as if they were adults those who had, when committing their crimes, been children or young persons, not (in the eyes of the law) fully mature adults. The nature of the sentence also is not open to doubt. It has, of course, a punitive purpose, appropriately enough where a person above the age of criminal responsibility has been convicted of a very grave crime committed with the intent necessary to support conviction of murder. But a punitive purpose would usually be served by a determinate term of confinement, whether longer or shorter, and a key feature of this sentence is its indeterminacy: because the sentence is indeterminate, account may be taken of the youthful detainee's progress and development as he or she matures, by means of periodic reviews, and regard may be paid not only to retribution, deterrence and risk but also to the welfare of the young offender. If authority be needed for these uncontroversial observations it may be found in *The State v O'Brien* [1973] IR 50 at 72; *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407 at 498-500, 519-524, 530-532; *Browne v The Queen* [2000] 1 AC 45 at 47-49; *V v United Kingdom* (1999) 30 EHRR 121, para 110. It was a sentence of this character which was transplanted from the United Kingdom to Jamaica, and there is nothing to suggest that the amendments made to section 29 as originally enacted on the effective substitution of the

Governor-General for Her Majesty were intended to alter the character of the sentence.

6. It is also a key feature of this sentence in Jamaica (although no longer in the United Kingdom) that the decision on release is entrusted to the Governor-General as a member of the executive. Section 29(4) of the Juveniles Act as amended has that express effect. This feature also has been clearly recognised: see *The State v O'Brien* [1973] IR 50 at 59-60, 64, 71-72; *R v Secretary of State, Ex p Venables* [1998] AC 407 at 498-499, 519-524, 530-532; *Browne v the Queen* [2000] 1 AC 45 at 48; *V v United Kingdom* (1999) 30 EHRR 121, paras 110-111. Thus while, in a case falling within section 29(1), the judge sitting in court passes sentence, it falls to the executive to determine the measure of punishment which an individual detainee will undergo: *Hinds v The Queen* [1977] AC 195 at 227-228. It is clear that such determination is for all legal and practical purposes a sentencing exercise: see *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800, pp 1812, 1822-1823, 1830, [2002] UKHL 46, paras 24, 52, 74 and the authorities there cited.

The Constitution

7. On 6 August 1962 Jamaica became an independent state within the Commonwealth upon the coming into force of the Constitution scheduled to the Jamaica (Constitution) Order in Council 1962 (SI 1962/1550). Jamaica thereupon became subject to a new legal order. Section 2 of the Constitution summarised its effect:

> "Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Thus, subject to its terms, the Constitution was to be the supreme law of Jamaica. Section 49 lays down long and detailed conditions for the amendment of the Constitution. Section 50 lays down conditions, although less exacting conditions, for the amendment of sections 13-26 inclusive of the Constitution, being the sections which make up Chapter III.

8. It is unnecessary to repeat the detailed commentary on the Constitution given by Lord Diplock in *Hinds v The Queen* [1977] AC 195 at 211-214. The Constitution is divided into chapters, several of these governing the composition, powers and operation of different organs of government. Among these are Chapter IV, "The Governor-General"; Chapter V, "Parliament"; Chapter VI, "Executive Powers"; Chapter VII, "The Judicature"; Chapter IX, "The Public Service". The content of Chapter III is different. It is headed "Fundamental Rights and Freedoms" and lists a number of rights and freedoms to be enjoyed by

every person in Jamaica. The list is loosely based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), which had applied to Jamaica while it remained a British colony, although the provisions are differently ordered and to some extent differently expressed.

9. Section 15(1)(b) of the Constitution provides:

> "(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law –
>
> (b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted; ..."

Section 20(1) provides:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Chapter III ends, in section 26, with two subsections relevant to this appeal:

> "(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.
>
> (9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such a law by reason only of –
>
> (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council 1962, or
>
> (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

It will be noted that section 26(8) is general in its application to "any law" in force before independence and to "any of the provisions of this Chapter". But some sections contain their own specific saving provision. An example is section 17, which in (1) provides that no one shall be subjected to torture or to inhuman or degrading punishment or other treatment and in (2) continues:

> "(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

10. Section 4 of the Jamaica (Constitution) Order in Council 1962, to which reference is made in section 26(9)(a) of the Constitution, quoted above, was designed to facilitate and legitimise the transition from the former colonial to the new independent legal order. Section 4(1) provides:

> "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

There follows a series of subsections providing that references to old office-holders and institutions shall be understood as references to the new office-holders and institutions and then, in subsection (5)(a), a general although time-limited power is conferred on the Governor-General:

> "(5)(a) The Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the *Gazette*, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order."

It seems clear that section 4 had two complementary objects: to ensure that existing laws did not cease to have force on the coming into effect of the new legal order; and to provide a means by which existing laws could be modified or adapted to ensure their conformity with the Constitution and preclude successful challenge on grounds of constitutional incompatibility.

The first question: is section 29 compatible with the Constitution of Jamaica?

11. Both the Director and the Solicitor-General, who appeared with him, accepted at the hearing that, subject to their argument based on section 26(8) of the Constitution, section 29 of the Juveniles Act 1951 infringes the rights guaranteed by, and so is inconsistent with, sections 15(1)(b) and 20(1) of the Constitution. Given this concession, rightly made, it is unnecessary to do more than note the reason for it. A person detained during the Governor-General's pleasure is deprived of his personal liberty not in execution of the sentence or order of a court but at the discretion of the executive. Such a person is not afforded a fair hearing by an independent and impartial court, because the sentencing of a criminal defendant is part of the hearing and in cases such as the present sentence is effectively passed by the executive and not by a court independent of the executive.

12. No doubt mindful of the obstacle presented by section 26(8), Mr Fitzgerald QC for the respondent (with the able support of Dr Lloyd Barnett for the intervening parties) based his primary attack on section 29 not on its incompatibility with the specific rights guaranteed by sections 15(1)(b) and 20(1) of Chapter III but on its incompatibility with the separation of judicial from executive power which was, as he contended, a fundamental principle upon which the Constitution was built. This might at first sight seem an ambitious contention, but Mr Fitzgerald supported it by reference to the judgment of the Board, delivered by Lord Diplock, in *Hinds v The Queen* [1977] AC 195. The main issue in that case concerned the constitutionality of a new court established by the Parliament of Jamaica under a post-independence statute to try those accused of firearms offences. There was however a subsidiary issue concerning the constitutionality of two sections of the statute, one of which prescribed a mandatory penalty of detention at hard labour during the Governor-General's pleasure on conviction of certain offences, the other of which provided for release only by the Governor-General on the advice of a largely non-judicial review board. In his exposition of the principles underlying what he called "the Westminster model" of constitution, Lord Diplock referred (at page 212B) to "the basic concept of separation of legislative, executive and judicial power" and observed (at page 212D):

> "It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government."

He went on to observe (at page 213C):

> "What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to

> continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v The Queen* [1967] 1 AC 259, 287-288."

(In the cited case the Board, construing the Constitution of Ceylon and in particular Part 6 relating to "The Judicature", regarded the contents of that Part as "inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature": page 287F). In considering the constitutionality of the sentencing provisions under challenge in *Hinds*, Lord Diplock recognised the power of Parliament to prescribe maximum and minimum sentences by statute (at pages 225G-226D) but then continued:

> "What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. Whilst none would suggest that a Review Board composed as is provided in section 22 of the Gun Court Act 1974 would not perform its duties responsibly and impartially, the fact remains that the majority of its members are not persons qualified by the Constitution to exercise judicial powers. A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law. If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the executive in the whole field of criminal law. In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton v Attorney-General and the Revenue Commissioners* [1963] IR 170, 182-183, a case which concerned a law in which the choice of alternative penalties was left to the executive.
>
> > 'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case ... The legislature does not prescribe the penalty to be imposed in an individual

> citizen's case; it states the general rule, and the application of that rule is for the courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive ...'
>
> This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case: *Liyanage v The Queen* [1967] 1 AC 259."

Reference was then made to *The State v O'Brien* [1973] IR 50, in which a somewhat similar provision had been held to be unconstitutional. It was held ([1977] AC 195 at pp 227H-228B) that the Jamaican provisions were inconsistent with the provisions of the Constitution relating to the separation of powers and so void by virtue of section 2 of the Constitution.

13. The Court of Appeal majority relied heavily on the decision and reasoning in *Hinds* when resolving his appeal in the respondent's favour (see Downer and Bingham JJA at pp 6-13 and 41-46 of their respective judgments). It does indeed appear that the sentencing provisions under challenge in *Hinds* were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded. There appears to be no reason why (subject to the other arguments considered below) the reasoning in *Hinds* does not apply to the present case. It would no doubt be open to the Board to reject that reasoning, but it would be reluctant to depart from a decision which has stood unchallenged for 25 years, the more so since the decision gives effect to a very important and salutary principle. Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800, at 1821-1822, paragraph 50. In the opinion of the Board, Mr Fitzgerald has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive.

The second question: is section 29 immune from constitutional challenge?

14. The Director contended, in reliance on section 26(8) of the Constitution, that since section 29 was a law in force immediately before independence it could not be held to be inconsistent with any of the provisions of Chapter III of the Constitution, including sections 15(1)(b) and 20(1). The validity of section 29 could not therefore be impugned, even though it was inconsistent with those subsections. Subject to the argument considered in paragraphs 18-19 below, that submission is plainly correct and explains the respondent's reliance on the general separation of powers challenge considered above.

15. Since the respondent's challenge did not depend primarily on incompatibility with any provision of Chapter III of the Constitution, section 26(8) could not be relied on by the Director to defeat it. Instead he relied on section 4(1) of the Jamaica (Constitution) Order in Council 1962 (see paragraph 10 above) and on a passage of the Board's judgment in *Hinds v The Queen* [1977] AC 195 at 228A where Lord Diplock said:

> "Section 29(1) of the Juveniles Law and section 49 of the Criminal Justice (Administration) Law are of no assistance to the respondents' argument. They were passed before the law-making powers exercisable by members of the legislature of Jamaica by an ordinary majority of votes were subject to the restrictions imposed upon them by the Constitution – though they were subject to other restrictions imposed by the Colonial Laws Validity Act 1865. The validity of these two laws is preserved by section 4 of the Jamaica (Constitution) Order in Council. No law in force immediately before August 6, 1962, can be held to be inconsistent with the Constitution; and under section 26(8) of the Constitution nothing done in execution of a sentence authorised by such a law can be held to be inconsistent with any of the provisions of Chapter III of the Constitution. The constitutional restrictions upon the exercise of legislative powers apply only to new laws made by the Parliament established under Chapter V of the Constitution. They are not retrospective."

The Board finds this a puzzling passage. It does not appear from the summary of the respondents' argument in *Hinds* as reported that they placed reliance on section 29(1) of the Juveniles Act which, as a pre-independence law, was obviously distinguishable from the post-independence statute in issue. More significantly, the effect of section 4 of the 1962 Order is not to preserve the validity of existing laws. As already pointed out in paragraph 10 above, its effect is to continue existing laws in force, for reasons there given. Far from protecting existing laws against constitutional challenge, section 4 recognises that existing laws may be susceptible to constitutional challenge and

accordingly confers power on the courts and the Governor-General (among others) to modify and adapt existing laws so as "to bring them into conformity with the provisions of this Order". It was not suggested that "this Order" did not include the Constitution scheduled to it. Further, the Board cannot accept as accurate the statement "No law in force immediately before August 6, 1962, can be held to be inconsistent with the Constitution". Nowhere in the Order or the Constitution is there to be found so comprehensive a saving provision, which would indeed undermine the effect of section 2 of the Constitution. Section 26(8), as already noted, applies only to the provisions of Chapter III. Since the Board in *Hinds* was dealing with a post-independence statute, Lord Diplock's observations on the saving clauses in the Order and the Constitution were obiter, and in the opinion of the Board they cannot be supported. Section 4(1) of the Order cannot be relied on to defeat the respondent's challenge based on the separation of powers.

The third question: may the court modify or adapt section 29 and, if it may, should it do so and to what effect?

16. If the court has power to modify or adapt section 29 so as to make it conform with the Constitution, such power can only derive from section 4(1) of the Order. The terms of section 4, read in isolation, would leave room for an argument that the section is directed to the correction of descriptions and nomenclature and not to more far-reaching adaptations and modifications. But such an argument would encounter two difficulties. First, it is now well-established that constitutional provisions relating to human rights should be given a generous and purposive interpretation, bearing in mind that a constitution is not trapped in a time-warp but must evolve organically over time to reflect the developing needs of society: see *Reyes v The Queen* [2002] 2 AC 235, [2002] UKPC 11, paras 25-26 and the authorities there cited. Secondly, it is plain from authority that provisions similar to section 4(1) have not in practice been applied in a narrow and restricted way.

17. Five authorities call for brief mention. In *Kanda v Government of the Federation of Malaya* [1962] AC 322 the Board applied article 162(1) of the Constitution of Malaya, which was in terms similar although not identical to those of section 4(1), to rectify an inconsistency between an existing law and the Constitution concerning the power to dismiss police officers. The clause of the Constitution of Belize which the Court of Appeal of Belize was called upon to consider in *San José Farmers' Co-operative Society Ltd v Attorney-General* (1991) 43 WIR 63 was more elaborate than section 4(1) in referring to "qualifications, and exceptions" as well as "modifications" and "adaptations", but it was to similar effect. Section 21 of the Belize Constitution provided blanket protection for existing laws, limited to a period of five years. In an appeal concerning compulsory acquisition and compensation, Henry P said (at page 70):

> "[Section 21] does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law 'with such modifications, adaptations, qualifications, and exceptions as may be necessary' to bring it into conformity with the Constitution. At the same time the modifications, etc., must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution".

Liverpool JA (at p 86) spoke to similar effect:

> "Section 134(1) of the Constitution is explicit in its requirement that existing laws must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution; and it is acknowledged that the Land Acquisition (Public Purposes) Act is an existing law. In my view, the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction."

In *Vasquez v The Queen* [1994] 1 WLR 1304, finding an inconsistency between the Criminal Code and the Constitution of Belize relating to the burden of proving or disproving provocation, the Board relied on section 134(1) to rectify the anomaly. The issue in *Browne v The Queen* [2000] 1 AC 45 was very similar to that in the present case. The Saint Christopher and Nevis Constitution Order 1983 contained, in paragraph 2(1) of Schedule 2, a provision similar in effect to section 134(1) of the Belize Constitution. Section 3(1) of the Offences against the Person Act (cap 56) 1873 (as amended) provided that a person convicted of committing a murder, if aged under 18 when committing the offence, should be sentenced to detention during the Governor-General's pleasure. The Board held that sentencing provision to be incompatible with the Constitution, as infringing the separation of powers, and, in the absence of any general provision saving the validity of existing laws, exercised the power conferred by paragraph 2(1) to hold (at page 50G) that the sentence which the appellant "should have received was detention during the court's pleasure". Reference should finally be made to *Roodal v The State* (unreported) (17 July 2002) (CRA No 64 of 99), a case before the Court of Appeal of Trinidad and Tobago concerning the constitutionality of the mandatory death penalty, although, since leave to appeal against the Court of Appeal's decision has been granted, the Board would not wish to be understood to express any view on the decision itself. Section 5(1) of the Constitution of the Republic of Trinidad and Tobago Act 1976 was in terms somewhat similar to section 4(1) and other comparable provisions considered above, and in a judgment of the court de la Bastide CJ reviewed all the

the offender be punished but also to the requirement that the offender's progress and development in custody be periodically reviewed so as to judge when, having regard to the safety of the public and also the welfare of the offender, release on licence may properly be ordered. The Director considered that a suitable regime could be devised without undue difficulty, and the Board shares his confidence.

Section 29(3) of the Juveniles Act 1951

22. In the closing stages of argument, reference was made to section 29(3) of the Juveniles Act 1951 which, although not applicable to the respondent, calls for brief comment. As amended, the subsection reads:

> "(3) Where a young person is convicted of an offence specified in the Third Schedule and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence. Where such a sentence has been passed the young person shall, during that period notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including an adult correctional centre) and on such conditions as the Minister may direct and while so detained shall be deemed to be in legal custody."

The terms of this subsection are closely modelled on, but are not identical to, those of section 53(2) of the (British) Children and Young Persons Act 1933 as originally enacted. For purposes of both subsections "young person" was defined to mean a person who has attained the age of 14 years and was under the age of 17 (section 107(1) of the 1933 Act, section 2 of the 1951 Act). Under each statute it is the age at date of conviction which is relevant; the amendment made to section 29(1) following *Baker v The Queen* [1975] AC 774 was not made to section 29(3). But there is one significant difference between the two subsections. Section 53(2) was inapplicable to any offence the sentence of which was fixed by law. By contrast, section 29(3) was expressed to apply to any offence specified in the Third Schedule to the Act. One of the offences so specified was murder, for which section 29(1) would appear (unless qualified by section 29(3)) to require imposition of a sentence of detention during Her Majesty's pleasure, a sentence fixed by law. Since the respondent was aged 19 when sentenced, section 29(3) cannot apply to him, and in the absence of full argument the Board is unwilling to express a final conclusion. It would however appear that if a defendant is convicted of murder and is aged 14-16 at the time of conviction, the trial judge may either impose a sentence of detention during the court's pleasure under section 29(1) or a sentence of detention for a specified period under section 29(3). This was the construction put upon section 29(3) by Downer JA at p 34 of his judgment. It would not seem that this choice was available in the case of

any of the intervening parties, all of whom the Board understands to have been over 17 at the date of conviction.

23. The Board will humbly advise Her Majesty that this appeal should be dismissed, that the cross-appeal should be allowed, that the sentence of life imprisonment be quashed, that a sentence of detention during the court's pleasure be substituted and that the release of the respondent be determined by the court in accordance with section 29(4) of the Juveniles Act 1951 as modified in accordance with this opinion.