**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO: 28 OF 2006**

**BEFORE:** **THE HON. MR. JUSTICE COOKE, J.A.**
**THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**
**THE HON. MS. JUSTICE SMITH, J.A. (Ag.)**

**ODEAN HARRIS**
**V**
**REGINA**

**Mr. Delano Harrison, Q.C. for the Appellant**

**Miss Maxine Ellis, Crown Counsel for the Crown**

**March 6 & May 2, 2008**

**SMITH, J.A. (Ag.):**

1. This is an appeal, against sentences, by the Appellant who was on the 17th December, 2004 convicted on an indictment containing three counts of murder. He was sentenced to 16 years imprisonment at hard labour on each count, with sentences to run concurrently.

2. The facts of the case emanated from an incident on October 16, 2003. At about 7:00 a.m. Arlene Davis was at her home in the usually quiet district of Rock Hall in St. Andrew with her three adult children Jacqueline Baugh, Jason Baugh and Natasha Nelson as well as her infant grandson Jordan. Suddenly

there was a knock on her door. She responded then opened the front door of her house where she was confronted by four men, two of whom were armed with guns. These men ordered her outside and when she refused to obey their command a number of explosions rang out. Natasha Nelson escaped through a back door of the house into a nearby gully where she remained until the explosions ceased. On her return to the house, she saw her 1½ year old nephew Jordan unharmed by the front door. She lifted him up in her arms and entered the house where she observed the bodies of her mother, brother and sister with gunshot injuries on the floor. They had been fatally injured. The police were summoned and a report was made to them. Subsequently, Natasha Nelson attended an identification parade where she identified the appellant as one of the four men (previously mentioned) who were present at her mother's house on the morning the murders were committed. The case against the appellant was that he was a party to the common design to commit murder.

3. The Appellant filed the following grounds of appeal:

> "(a) The learned trial judge erred in law in ordering that the appellant should not serve a period before eligibility for parole;
>
> (b) The only sentence the learned trial judge could impose, as the offences were committed when the appellant was under the age of eighteen years, was detention at the court's pleasure;
>
> (c) Further or in the alternative, the period imposed is excessive and harsh and contrary to law and the principle of sentencing in

accordance with the Privy Council decision in ***Mollison v Regina***."

4. Mr. Delano Harrison, Q.C., for the Appellant in his submissions before this court, indicated that he was abandoning ground (b) of the grounds of appeal and would argue grounds (a) and (c) together. The court was of the view that counsel's decision was inevitable. This was so because the Privy Council decision in ***Mollison v R No. 2*** [2003] 2 A.C. 411 which held that a person under the age of eighteen years at the time of the commission of the offence of murder and who was so convicted was to be held in detention at the Court's pleasure, had been overtaken by **section 78(1) of The Child Care and Protection Act.** This Act came into force in Jamaica on the 26th of March 2004 and replaced **section 29(1) of The Juveniles Act** which was then subject to the scrutiny of their Lordships' Board in ***Mollison N0. 2***, (supra).

5. The submissions on behalf of the Appellant may be summarized as follows:

(a) That although the learned trial judge had elected not to impose the maximum sentence of life imprisonment provided by s 78(1) of the Child Care and Protection Act, imposing instead a sentence of 16 years imprisonment at hard labour on each count, with sentences to run concurrently, should have gone on further to exercise his discretion under s 78(3) to "specify a period which [the Appellant] should serve before becoming eligible for parole.

(b) That though the sentences were not "contrary to law" might, nonetheless constitute a wrongful exercise of his discretion.

(c) Relying on dicta in ***Mollison v R No. 2*** (supra), Privy Council Appeal No. 88 of 2001 delivered on January 22, 2003 where the Board opined:

> "... In the course of time ... [the sentence] came to be seen as inhumane to punish as if adults those who had, when committing their crimes, been children or young persons, not in the eyes of the law fully mature adults."

Their Lordships continued:

> "Account may, be taken of the youthful detainee's progress and development as he 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."

6. In respect of the sentences which could be imposed by the learned trial judge, he had to bear in mind that there were two sentencing regimes which were applicable. There is the regime pursuant to **The Offences Against the Person Act** and another regime under **The Child Care and Protection Act.** As regards the first count which pertained to the death of Arlene Davis the applicable sentencing regime is provided by **section 3(1)(b) of The Offences Against the Person Act** which states that:

> "Every person who is convicted of murder falling within -
>
> (a) ...

> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

The first count falls within **section 2(2)** in that it pertained to a murder where the sentence of death was not an option. Accordingly on this first count the learned trial judge correctly applied the proper sentencing regime.

7. **The Offences Against the Person Act, section 3(1)(1A)** stipulates that if an accused is found guilty of another murder done on the same occasion then such a person "shall be sentenced to death or to imprisonment for life" (See section 3(1)(a)). It follows therefore that this appellant in respect of count 2 (murder of Jacqueline Baugh) and count 3 (murder of Joel Baugh) should have been sentenced either to death or imprisonment for life.

8. However, as regards these two guilty verdicts, the sentencing regime as set out in **section 3(1)(1A) of The Offences Against the Person Act** is displaced by that of **section 78(1) of The Child Care and Protection Act.** The learned trial judge accepted that the appellant was 17 years and 8 months at the time of the commission of the murders and accordingly applied **Section 78 (1)** which 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 eighteen years, but in place thereof such person shall be liable to be imprisoned for life."

9. This section in our view, gave the learned trial judge in the court below the discretion to impose a maximum sentence of imprisonment for life on a person under the age of eighteen years as the sentence of death was not an available option. Therefore, when the judge imposed the sentences of sixteen years imprisonment on counts 2 and 3 of the indictment (which were to run concurrently with the sentence on count 1) he was acting within the ambit of the provisions of this Act.

10. The submission by Mr. Harrison, Q.C., that the learned trial judge failed to exercise the discretion given to him under **section 78(3) of The Child Care and Protection Act** by not specifying a period which the appellant should serve before becoming eligible for parole, is without merit. **Section 78 (3)** states:

> "Notwithstanding the provisions of the Parole Act, on sentencing any child under subsection (1), the court may specify a period which that child may serve before becoming eligible for parole."
>
> [emphasis mine]

The learned trial judge's decision not to have employed **section 78 (3) of The Child Care and Protection Act,** in our view, did not constitute a wrongful exercise of his discretion. These were horrific murders. The passage extracted from **Mollison v R No 2** (supra) is not relevant to this case. The learned trial judge demonstrated that he was cognizant of the relevant statutory sentencing regimes mentioned earlier. But for the provisions of **section 78(1) of The Child Care and Protection Act**, the learned trial Judge would have been

empowered to impose far more severe sentences than he did. The sentences imposed by the learned trial judge were quite merciful rather than being manifestly excessive as was complained of by the appellant.

13. Accordingly, the appeal against sentences is dismissed. The convictions and sentences are affirmed. The sentences are to commence on the 10th May, 2005.