J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No.58/1971

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

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REGINA v. MARTIN WRIGHT

Horace Edwards, Q.C., and H.L. Dale for the appellant.

Chester Orr, Q.C., Deputy Director of Public Prosecutions and H. Downer for the Crown.

January 10, 11; February 4, 1972.

HON. PRESIDENT (AG.):

This is the judgment of the majority of the Court.

The appellant Martin Wright was convicted in the Portland Circuit Court at Port Antonio on June 3, 1971, on both counts of an indictment charging him with wounding, contrary to s. 18 of the Offences against the Persons Law, Cap. 268 and robbery with aggravation, contrary to s. 34 (1) (a) of the Larceny Law, Cap. 212. He was sentenced to 2 years at hard labour in respect of his conviction for wounding and to 5 years at hard labour and three lashes in respect of his conviction for robbery with aggravation. The sentences were ordered to run concurrently. His application for leave to appeal against these convictions was refused first by a single judge and then by the Court. He was however granted leave to appeal against the sentences imposed on him and in view of the circumstances which will

/be mentioned .....

be mentioned later on his appeal against those sentences was referred to this Court consisting of five judges.

Both offences were proved to have been committed on January 21, 1971. The appellant was born on April 4, 1954, so that at the time the offences were committed the appellant was under the age of 17 years of age. However at the time of conviction and sentence on June 3, 1971 he had already attained the age of 17 years.

It was submitted by Mr. Horace Edwards on behalf of the appellant that as at the date the offences were committed the appellant had not attained the age of 17 years and was therefore a juvenile within the meaning of s. 29 (2) of the Juveniles Law, Cap. 189, it was not competent for the learned trial judge to have sentenced the appellant to a term of imprisonment even though at the date of conviction and sentence he had already attained the age of 17 years and was then no longer a juvenile.

Mr. Edwards contended that this was the result of the joint operation of s. 29 (2) of the Juveniles Law, Cap. 189 and s. 20 (7) of the Second Schedule to the Jamaica (Constitution) Order in Council, 1962. This contention he urged found support in the opinion of Lord Hodson who on December 1, 1969 delivered the reasons for report of the Judicial Committee of the Privy Council in the local case of Maloney Gordon v. The Queen (1969) 15 W.I.R. 359, and should be upheld even though there is a decision of this Court delivered on June 4, 1970 in R. v. Ronald Williams Cr. App. No. 113 of 1969 which conflicts therewith.

It was as a result of this apparent conflict that this Court comprising of five judges was constituted for the hearing of this appeal.

/Section 29 .....

Section 29 (2) of the Juveniles Law, Cap. 189 provides as follows -

> "29 (2). A Juvenile shall not be sentenced to imprisonment whether with or without hard labour for any offence or be committed to prison in default of payment of any fine, damage or costs."

Section 20 (7) of the Schedule to the Jamaica (Constitution) Order in Council, 1962 provides 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."

This provision of the Constitution which also appears in the Constitution of a number of other newly independent Commonwealth territories seems to have had its origin in Art. II (2) of the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly resolution 217A (III) of December 10, 1948 -

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

This was followed by the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) which was signed in Rome by members of the Council of Europe on November 4, 1950 and ratified by the United Kingdom on March 8, 1951, Art. 7 (1) of which provides as follows -

/"7. (1) No.....

"7. (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

These provisions appear to be directed to preserving the presumption against retrospection in relation to offences of a penal character. So that where a statute increases the penalty for an existing offence the increased penalty will not apply in relation to an offence committed before the date of its commencement.

This Court (Shelley, Eccleston and Fox, JJ.A.) in R. v. Ronald Williams had to deal with exactly the same contention, Mr. Edwards now advances on behalf of the appellant and speaking through Shelley, J.A. rejected it in the following terms -

" The maximum penalty which might have been imposed for the offence of robbery with aggravation at the time when the appellant committed his offence was 21 years imprisonment and flogging. The provisions of the Juveniles Law setting out methods of dealing with juvenile offenders apply to persons who are juveniles when they are convicted, so do the provisions of section 29 placing restrictions on punishment of juveniles. For purposes of the Juveniles Law the decisive date is the date of conviction, not the date of the offence. The fact that a person is under 17 years at the date of the offence does not entitle him to any advantages offered by the provisions of the Juveniles Law to convicted juveniles. We do not think that the provisions of s. 20 (7) of the Second Schedule of the Jamaica Constitution Order quoted above, are in any

/way .....

> related to the age of the offender at the time when the offence is committed. The Section in our view deals with the penalty for the offence and is not in any way affected by the provisions of section 20 (2) of the Juveniles Law, Cap. 189!"

Before reaching that conclusion the Court considered the opinion of the Judicial Committee of the Privy Council in Maloney Gordon v. The Queen where it was stated that by the combined effect of s. 29 (1) of the Juveniles Law, Cap. 189 and s. 20 (7) of the Second Schedule to the Jamaica (Constitution) Order in Council, 1962 there was no jurisdiction in the trial court to pass sentence of death upon the accused (who was convicted of murder) if he was under 18 years of age at the time of the commission of the offence. Section 29 (1) of the Juveniles Law, Cap. 189 provides as follows -

> "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 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 Judicial Committee which had granted special leave to appeal on the ground that the trial judge sentenced the appellant to death without first ascertaining in a proper manner that he had attained the age of 18 years, set aside the sentence of death imposed on the appellant as it was of the view that the evidence adduced was all one way and did not show that the appellant had attained the age of 18 years at the time of the commission of the offence. The Court in R. v. Ronald Williams stated that there was no reasoning to support the Privy Council's statement that

/"there

"there was thus no jurisdiction in the court to pass sentence of death upon the accused if he was under 18 at the time of the commission of the offence" and pointed out that the learned trial judge in that case seemed to have taken that view, the learned Director of Public Prosecutions seemed to have assumed that view to be correct and that it seemed, not to have been challenged anywhere. Indeed the point was never raised nor adverted to before the Court of Appeal in that case.

Mr. Edwards further submitted that in stating the combined effect of s. 29 (2) of the Juveniles Law, Cap. 189 and s. 20 (7) of the Second Schedule to the Jamaica (Constitution) Order in Council, 1962, the Privy Council was declaring the law in so far as s. 20 (7) aforesaid was concerned and this Court was therefore bound by that declaration despite the contrary interpretation given the provision in question by this Court in Ronald Williams' case.

The learned Deputy Director of Public Prosecutions, Mr. Chester Orr on the other hand sought to support the judgment of this Court in Ronald Williams' case and to distinguish that case from Maloney Gordon's case. He attracted our attention to the earlier case of the D.P.P. v. Nasralla (1967) 2 All E.R. 161 where the Judicial Committee of the Privy Council in considering the terms of s. 20 (8) of the Constitution of Jamaica said -

> "Whereas the general rule, as is to be expected in a Constitution and as is here embodied in s. 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Ch. III. This Chapter, as their Lordships have already noted, proceeds on 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 ...

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. Accordingly s. 26 (8) in Ch. III provides as follows -

> "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.' "

Mr. Orr contended that it follows from this passage in the Privy Council's opinion that the purpose of s. 20 (7) of the Constitution is to ensure that no future enactment should cause any offender to become liable to a penalty greater than the maximum penalty which could have been imposed at the time of the commission of the offence for which he is convicted.

In respect of Maloney Gordon's case Mr. Orr urged that that case proceeded upon the assumption that there was in Jamaica no jurisdiction in a court to pass sentence of death upon a person who was under the age of 18 years at the time of the commission of the offence and that what the Privy Council actually decided was that the evidence adduced by the Crown did not disclose that the accused was over the age of 18 years at the date of the commission of the offence. He pointed to the reason for the Privy Council granting special leave to appeal and submitted that there was in fact no interpretation of the provisions of s. 20 (7) of the Second Schedule to the Jamaican (Constitution) Order in Council, 1962 but rather an adoption without argument

/of the .....

of the view of counsel as to the effect of that subsection. He concluded that in these circumstances this Court was at liberty to find that the interpretation put by this Court upon that subsection in Ronald Williams' case was correct and to determine the instant appeal accordingly. He conceded, however, that if this Court were of the view that the Privy Council in Maloney Gordon's case did interpret the subsection this Court would be bound by such interpretation.

We do not take the view that the Privy Council in Maloney Gordon's case proceeded merely on an adoption of counsel's view of the interpretation to be put upon the relevant law. While it is true that the process of reasoning leading to the conclusion reached as to the effect of the provisions does not appear in the opinion of the Board it is clear that the Board considered what was the joint effect of the provisions to which reference has already been made by giving an interpretation to the provisions of s. 20 (7) of the Constitution. We would be constrained therefore to feel ourselves bound by the Board's interpretation of the meaning and effect of that provision in that case despite the contrary view taken by this Court in Ronald Williams' case of its meaning and effect unless it can be shown that that interpretation was reached per incuriam or that the Privy Council has on some other occasion taken a contrary view of the interpretation to be put upon the provision.

Now it does appear to us that regard must be had to the view expressed by the Privy Council in Nasralla's case as to the effect of the provisions of Ch. III of the Constitution (of which s. 20 (7) forms part) to see whether it accords with the view of the Privy Council in Maloney Gordon's case as to the combined effect of s. 20 (7) of the Constitution and s. 29 (1) of the Juvenile Law, Cap, 189.

/For if ...

For if it does not and there are thus two differing views this Court will be free to decide which of the two views expressed by the Privy Council it will adopt and give effect to. A convenient starting point is a consideration of the provisions of s. 29 (1) of the Juveniles Law, Cap. 189, as they stand alone. They are in substance the same as those which were in force in England under the provisions of the Children and Young Persons Act, 1933, s. 53 (1) prior to the enactment of the Criminal Justice Act, 1948, s. 16. The 1933 Act had replaced the Children Act, 1908, s. 103 of which had provided that sentence of death could not be pronounced on or recorded against "a person under the age of 16 years." As the law in England and indeed in Scotland and Ireland stood before the enactment of the 1933 Act it seems that an accused person convicted of murder could lawfully be sentenced to death if he had attained the age of 16 years at the date of sentence even though he was under 16 years at the time of the commission of the offence. The case of R. v. Fitt (1919) 2 I.R. 35 cited as footnote in 13 Digest 491 is stated to have so decided. The minimum age for pronouncing or recording sentence of death was raised from 16 years to 18 years by the 1933 Act. Later on the Criminal Justice Act, 1948, s. 16 which repealed s. 53 (1) of the Children and Young Persons Act, 1933 for the first time provided that sentence of death could not be passed on or recorded against a person if it appears to the court that at the time when the offence was committed he was under 18 years.

It follows that unless s. 20 (7) of the Constitution has altered the position as it stood under s. 29 (1) of the Juveniles Law, Cap. 189 immediately before the former provision came into force a court would have jurisdiction

/to sentence ...

to sentence a person to death for murder if that person, though under 18 years at the time of the commission of the offence, has attained the age of 18 years at the time of sentence. As we understood the Privy Council's view in Nasralla's case of the effect of the provisions of Ch. III of the Constitution, the provisions of s. 20 (7) of the Constitution would not operate to alter that position, s. 29 (1) of the Juveniles Law, Cap. 189 having been enacted in 1951, that is prior to the coming in operation of Ch. III of the Constitution. By parity of reasoning s. 20 (7) of the Constitution would not affect the operation of s. 29 (2) of Cap. 189. Under s. 29 (2) of Cap. 189, which is the counterpart of the s. 102 of the English Children Act, 1908, the court could sentence an offender to imprisonment if he was over the age of 17 years at conviction (16 years under the English 1908 Act) even though at the time of the commission of the offence he was under 17 years. (See reference at footnote (k) in 13 Digest 491 to H.M. Advocate v. Crawford (1918) Sc. (J) 1; 55 Sc. L.R. 10 and also see R. v. Cawthron (1913) 3 K.B. 168).

It appears to us therefore that the abovementioned views expressed by the Privy Council in the two cases are in conflict one with the other and that those views cannot be reconciled. It does not appear that Nasralla's case was brought to the attention of the Board in Maloney Gordon's case. Nor does it appear that the effect of s. 26 (8) of the Constitution was considered in that case and the Board's opinion would therefore have been given per incuriam. Had the Board been referred to these matters we venture to think that the opinion given in Maloney Gordon's case as to the effect of s. 20 (7) of the Constitution would have been different.

/So far .....

So far we have proceeded on the assumption that the construction the Privy Council gave s. 20 (7) of the Constitution in Maloney Gordon's case is correct. The Board there construed that provision as if the words "on that offender" appear between the word "imposed" and the word "for" whereby the provision would read - "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 on that offender for that offence at the time when it was committed." This would indeed alter the whole meaning of this part of the provision. There is no reason why any such words should be read into the passage. The passage as printed in the Constitution can be construed intelligibly without the insertion of such words. We hold that the reasoning of the Court in R. v. Ronald Williams already cited is impeccable and that the conclusion of the Court in that case is correct. For these reasons we are unable to entertain Mr. Edwards' submission that the trial judge had no jurisdiction to pass sentences of imprisonment on the appellant in respect of the offences for which he stood convicted.

Mr. Edwards further submitted that in any event the sentences were unduly severe and that this was a fit case for placing the appellant on probation. We do not agree. The appellant, when a juvenile, was placed on probation and did not benefit therefrom. The circumstances in which he committed the offences of which he has now been convicted are such that the trial judge was justified in taking a serious view of the matter. We do not think that the sentences he imposed are unduly severe.

The appellant's appeal against sentence is dismissed and the sentences are affirmed.

/Before parting .....

Before parting with the case we would like to express the hope that urgent consideration will be given to the question whether those provisions which govern the sentencing of persons who were juveniles at the time of the commission of criminal offences but have ceased to be juveniles at the date of their conviction and sentence should not be revised in the light of present day circumstances.

EDUN, J.A.

The law relating to the punishment of youthful offenders is of an exceptional character. Thus, for example -

1. Sentence of death cannot be passed on or recorded against a person under 18 years: Section 53 (1) of the Children and Young Persons Act (U.K.) 1933; Section 29 (1) of the Juveniles Law (Jamaica) Cap. 189.
2. Nor can a sentence of imprisonment be passed on a person under 17 years of age: Section 29 (2) of the Juveniles Law (Jamaica) Cap. 189.
3. A young person (of 14 years and upwards but under 17) can be imprisoned only in exceptional circumstances: S.52(3) of the Children and Young Persons Act (U.K.) 1933; S.29(3) of the Juveniles Law (Jamaica) Cap. 189. And
4 the amendments effected by the Schedule to the Prevention of Crime (Special Provisions) Act (Jamaica) No.42 of 1963 are not applicable to a juvenile.

There has been no doubt that by interpretation the offender's age at the time of conviction was the deciding factor: R. v. Fitt (1919) 2 I.R.35. H.M. Advocate v. Crawford (1918) S.C.(J) 1 and R. v. Cawthron (1913) 3 K.B.168. In England, section 53 (1) of the Children and Young Persons Act 1933 was substituted by S.16 of the Criminal Justice Act 1948, relevant provisions of which provide, thus -

> "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, ..."

There has not been any similar amendment to Section 29(1) of the Juveniles Law, Cap.189. However, the Jamaica (Constitution) Order in Council 1962 Second Schedule Section 20(7) provides, thus -

> "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."

The interpretation of S.20(7) of the Constitution and section 29(1) of the Juveniles Law, Cap.189 was considered in Maloney Gordon v. The Queen, Privy Council Appeal No.15 of 1969, reported in part 2 of 15 W.I.Rep. p.359. Their Lordships, after stating both provisions, declared: "There was thus

no jurisdiction in the court to pass sentence of death upon the accused if he was under 18 at the time of the commission of the offence." However, views have been expressed by three judges sitting in the Court of Appeal in Jamaica in R. v. Ronald Williams, Supreme Court Criminal Appeal No.113 of 1969, which doubted the correctness of their Lordships' opinion. In their reasons for decision, Shelley J.A., delivering judgment of the Court, added -

1. "The provisions of the Juveniles Law setting out methods of dealing with juvenile offenders apply to persons who are juveniles when they are convicted, so do the provisions of section 29 placing restrictions on punishment of juveniles. For the purposes of the Juveniles Law the decisive date is the date of conviction, not the date of offence."
2. "We do not think that the provisions of S.20(7) of Second Schedule of the Jamaica Constitution Order quoted above, are in any way related to the age of the offender at the time when the offence is committed. The section in our view deals with the penalty for the offence and is not in any way affected by the provisions of section 29(2) of the Juveniles Law, Cap.189."

In the instant appeal before five judges of the Court of Appeal in Jamaica, this conflict of views has come up for consideration. I am of the view that the interpretation placed upon S.20(7) by their Lordships in Maloney Gordon v. The Queen is the correct one and I wish to add my reasons for so holding.

A. A Change in the law. Section 20(7) of the Constitution has effected a most important and fundamental change in the attitude of punishment towards youthful offenders in Jamaica. Lindley M.R., in In Re Mayfair Property Co. (1898) 2 Ch. 28 at page 35 said, "... in order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's Case to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief." Before section 20(7) of the Constitution came into force, we had these situations -

(a) If a person under 18 or 17 years of age committed murder or other serious offences, the prosecution could with various excuses and inevitable delays (allowed within the discretion of a court) secure the trial and a conviction may result at a time when the offender attained the age of

18 or 17 years, as the case may be. The youthful offender would then be liable to punishment severer in degree or description than at the time when he committed the offence, through no fault of his.

(b) It may well be possible that a conviction for murder may result after a speedy trial at a time when the offender was still under 18 years but through misdirection, or for other good reasons, a mistrial may result and a court of appeal may quash the conviction and order a retrial. In such circumstances, the youthful offender may well be advised to abandon his appeal against his first conviction even though he was wrongly convicted in law, if at the date of the second trial he would attain 18 years of age. It may be argued that in these enlightened days, a minister of justice would not commit or encourage such iniquities but is it not in keeping with the rule of law to guard against arbitrary arrest, detention and punishment by providing a safeguard - in writing, if possible?

(c) If an adult committed robbery with aggravation, contrary to S.34(1)(a) of the Larceny Law, Cap.212, say in October 1963, he was liable on conviction to a maximum penalty of 15 years with hard labour but no flogging. If he was tried and convicted on a date after 5th November 1963 when the Governor-General gave his assent to the Prevention of Crime (Special Provisions) Act No.42 of 1963 a penalty of 21 years and a flogging (under that law) could not have been imposed upon him because S.2(2) of that Act provided that the increased punishment effected thereby shall have effect in relation to offences committed on or after the commencement of that Act.

But if after that Act came into force, a juvenile commits such an offence but was tried and convicted after he attained the age of 17 years, a minimum penalty of 5 years and a flogging can be imposed upon him (as has been done in a few cases) even though S.87 of the Juveniles Law as amended by S.3 of the Act, No.42 of 1963 provides that such punishment (severer in degree or description) shall not apply to a juvenile. In other words, there has been no remedy to cure the mischief or the injustice of penal provisions having retrospective operation against the individual juvenile offender.

(d) If the view of the learned Deputy Director of Public Prosecutions is correct, that the only purpose of section 20(7) of the Constitution is to ensure that no future enactment should cause any offender to become liable to a penalty greater than the maximum penalty which could have been imposed upon him at the time of the commission of the offence for which he is convicted, then the adult is in a more privileged position than a youthful offender. Has section 20(7) of the Constitution provided a

change in the law to cure that kind of mischief? I honestly and sincerely believe that it has.

B. Literal construction of S.20(7) of the Constitution. In my view, the text of the provision itself deals not only with the penalty for the offence but by necessary implication is also related to the age of the offender at the time when the offence was committed. The penalty of death or imprisonment becomes severer in degree or description if any individual youthful offender has been convicted after he has attained the age of 18 or 17 years, as the case may be. Their Lordships in Maloney Gordon v. The Queen has handed down that considered opinion. No reasons are necessary to accompany that conclusion.

C. Nasralla v. D.P.P. (1967) 2 A.E.R. 161. Section 20(8) of the Constitution provides -

> "No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence."

Both sections 20(7) and 20(8) come under Chapter III of the Constitution which is entitled "Fundamental Rights and Freedoms," and their Lordships in considering the terms of S.20(8) stated - at p.165

> "Whereas the general rule, as is to be expected in a Constitution and as is here embodied in S.2, is that the provisions of the Constitution should prevail over other law, an exception is made in Ch.III. This Chapter, as their Lordships have already noted, proceeds on 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. Accordingly S.26(8) in Ch.III provides as follows:
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> > '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.' "

The learned Deputy Director of Public Prosecutions submitted that the object of section 20(7) of the Constitution has been to ensure that no future enactment shall in any matter which Chapter III covers derogate from

the rights which at the coming into force of the Constitution the individual enjoyed. In my view, different considerations are necessary in the construction of each of sections 20(7) and 20(8) First of all, their Lordships in Nasralla's Case never considered the meaning of S.20(7) vis-a-vis S.20(8). Section 20(8) has declared or intended to declare what was the common law on the subject of autrefois convict or acquit. On the other hand, before S.20(7) came into force, the individual juvenile offender never enjoyed any protection against but rather suffered from the retrospective operation of penal statutes, that is, those provisions which would subject the individual juvenile offender to a penalty severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

D. Section 26(8) of the Constitution is not the appropriate section to be considered in this appeal. Section 26(8) of the Constitution provides - "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;" but instead, S.2 which provides: "... 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," is applicable. It is obvious that sections 29(1) and (2) of the Juveniles Law, are inconsistent with the provisions of section 20(7) of the Constitution because by the interpretation placed upon them the relevant date for the consideration of punishment has been the date of conviction whereas in S.20(7) the relevant date is the commission of the offence. Section 26(8) of the Constitution can only be applied (even if the construction placed upon it by Nasralla's Case is correct) to those parts of Chapter III which derogate from the rights which at the coming into force of the Constitution the individual enjoyed. There has never been in Jamaica any presumption that the individual youthful offender ever secured any protection from the retrospective operation of penal statutes before the coming into force of the Constitution. It is inconceivable that the intention and spirit of the Constitution would perpetuate an injustice especially when the draftsmen of the Constitution must have had in mind the Convention for the Protection of Human Rights and Freedoms (1953) to which the

United Kingdom was a signatory and the state of the juvenile law in Jamaica, having regard to the provisions of the Criminal Justice Act (U.K.) 1948. I prefer to regard S.20(7) as a declaration of what was the law in Jamaica immediately upon the coming into force of the Constitution, and S.26(8) should be construed rather to validate that declaration than perpetuate an injustice. The opinion of their Lordships in Maloney Gordon v. The Queen (supra) as to the effect of S.20(7) of the Constitution upon the meaning of S.29(1) of the Juvenile Law is in keeping with that declaration. It is therefore considered necessary unlike the situation contemplated by S.20(8), in order correctly to interpret S.20(7) to scrutinise the laws in force before the coming into force of the Constitution to see whether or not they conform to the precise terms of the protective measures granted by the Constitution; and if there is any inconsistency, the provisions of the Constitution shall prevail.

E. The lenient view. In Tuck & Sons v. Priester (1887) 19 Q.B.D.629 Lord Esher M.R. said at p.638: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

F. Position in England as compared with Jamaica. Wright J., in In re Athlumney (1898) 2 Q.B. at pp. 551 and 552 said -

> "No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

However, the authority for hanging or imprisoning youthful offenders for crimes which they committed when under 18 or 17 years but tried and convicted after they had passed those ages is to be found in the decisions of R. v. Fitt (supra); H.M. Advocate v. Crawford (supra) and R. v. Cawthron (supra). By the passing of S.16 of the Criminal Justice Act (U.K.) 1948 a youthful offender who committed murder when under

18 years cannot any longer be sentenced to death. By the passing of sections 17, 18, 19 and 20 of the said Act of 1948, a youthful offender under the age of 21 years, where no other method of dealing with him was appropriate, could be sent to prison, be detained in a detention centre, be received at an attendance centre or be sentenced to undergo a period of Borstal training. The authorities of R. v. Fitt & Ors (supra) are no longer law in England.

There have been no similar amendments to sections 29(1), (2) and (3) of the Juveniles Law, in Jamaica, and those sections are silent as to what should happen to a youthful offender who is tried and convicted after he has attained the age of 17 or 18 years. But the interpretation of R. v. Fitt & Ors. (supra) which sanctioned the retrospective operation of penal statutes to individual youthful offenders, has been followed here without question. However, in 1962 we have in Jamaica, the coming into operation of section 20(7) of the Constitution, but as yet no appropriate measures have been enacted to deal with youthful offenders between the ages of 17 and 21 years. In the face of the plain and unambiguous language of S.20(7) which has accorded a substantial and fundamental right to the individual youthful offender, I am of the view that the decisions of R. v. Fitt and Others (supra) have had no longer the effect of law at the coming into force of the Constitution of Jamaica in 1962. Thus, any court in Jamaica which deprives a youthful offender of his personal freedom and imposes upon him penalties not in accordance with any authority in law, exercises no jurisdiction at all.

In the appeal before us, the judge in passing sentences on the appellant made it clear that on Count 2, he was inflicting the minimum sentence of 5 years and 3 lashes, obviously in keeping with his powers under S.34(1)(a) of the Larceny Law Ch.212, as amended by the Schedule to the Prevention of Crime (Special Provisions) Act No.42 of 1963, despite the fact that the provisions of the Act do not apply to a juvenile. On Count 1, for the conviction of wounding, Contrary to S.18 of the Offence against the Person Law, Ch. 268, the appellant was sentenced to 2 years imprisonment at hard labour, despite the provisions of section 29(2) of the Juveniles Law, Cap.189 and section 20(7) of the Constitution. There is no doubt that at the date of the commission of the offences, the appellant was a juvenile. In Jamaica, where at the time of

the commission of an offence, the offender is a juvenile and if tried and convicted when he is over 17 years old, the hands of a trial judge are literally tied, but nevertheless the youthful offender can be dealt with under the Probation of Offenders Law, Ch.310 and S.57(3) of the Larceny Law, Ch.212: See also R. v. Brown (1964-5) 17 W.I.R. 65.

I do not recognise the argument as valid that because a youthful offender can be dealt with in a limited way or that the legislature has lagged in providing appropriate measures in dealing with youthful offenders between the ages of 17 and 21 years, the unambiguous provision of S.20(7) of the Constitution does not effect any change in the construction of sections 29(2) and (3) of the Juveniles Law, Cap.189. I have no doubt that within recent years not only in Jamaica but in other parts of the world, among youths, crimes have become organised business ventures or have been committed "just for kicks". But it is not the answer for those who administer justice to act revengefully and vindictively and pass illegal sentences. The solution to the problem lies with the legislators. It has never been the function of interpreters of the law to enact or repeal legislation. In my view, R. v. Ronald Williams (supra) seeks to abrogate the fundamental right of the individual juvenile offender as granted him by the Constitution.

For the reasons given, I would allow the appeal, set aside the sentences passed and as best we can, impose such penalties as are warranted in law.