IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV02240

IN THE MATTER OF GARFIELD PEART

AND

IN THE MATTER OF INDICTMENT N0. 62 of 1988

AND

IN THE MATTER OF SECTION 29 (1) OF THE JUVENILES ACT (repealed)

AND

IN THE MATTER OF PART 75 OF THE CIVIL PROCEDURE RULES, 2002 (CPR) as amended (2006)

REGINA V. THE DIRECTOR OF CORRECTIONAL SERVICES, EXPARTE GARFIELD PEART

Mrs. Jacqueline Samuels- Brown and Mrs. Tameka Jordon for the Applicant

Ms. Sasha- Marie Smith for the Director of Public Prosecutions

HEARD: June 25 & July 9 & 24, 2009

Sentencing- murder- applicant a juvenile at time of commission of offence - detention at the court's pleasure - application for review of sentence- application for release - whether applicant should be released – factors to be taken into account -The Civil Procedure Rules (2002) (CPR) Part 75- The Juveniles Act, s 29(1) repealed, The Parole Act,.s7(7).

McDONALD-BISHOP, J

1. Garfield Peart, the applicant, is currently an inmate at the Tower Street Adult Correctional Centre. He is being held at the court's pleasure following on his conviction for murder in 1988 when he was a juvenile. He has made this application for his sentence to be reviewed by this court pursuant to Part 75 of the Civil Procedure Rules, 2002 (CPR) as amended on September 18, 2006.

2. By Notice of Application for Court Orders filed on April 30, 2009, he seeks the following orders:-

(1) That the Applicant be released unconditionally from custody; or alternatively

(2) That the Applicant be released from custody on such terms as the court deems fit.

3. This application for his release is based on several grounds to include as follows:-

(1) The Applicant was convicted of murder on June 16, 1998 when he was a minor;

(2) The Applicant has been detained at the Court's pleasure for over seven (7) years.

(3) Save and except for two attempts to initiate court proceedings in 2001 and again in 2008 which had both been adjourned without a date, the applicant has made no application for review in the six years or any other time.

(4) The Applicant has been in custody for nearly twenty-two years and has been sufficiently punished for the crime for which he was convicted

(5) The applicant has been rehabilitated and is not a danger to society.

THE BACKGROUND

4. An insight into the case brought against the applicant for murder may be gleaned from the unreported judgment of Carey, J.A. in **Regina v Garfield Peart** SCCA No. 146/88 delivered on behalf of the Court of Appeal on March 12, 1990. The deceased, Major John St. Dennis, was shot to death by one of three men who, prior to breaking into his home that he shared with his wife, fired a number of shots at the house one of which caught him in his groin. The applicant

was subsequently identified on an identification parade by the deceased's wife as being one of the three men who eventually entered the house and robbed her of a number of articles including her wedding ring. She said that she had handed the ring to the applicant. She also testified that the men were in the house for about two hours and during that time she was being marched all over the house.

5. The prosecution's case also rested on circumstantial evidence which placed the applicant and two other men in the vicinity of the crime shortly after the event. The evidence as to the applicant's presence within the vicinity was given by two witnesses who said they had known the applicant before and that they recognized him. The applicant's defence was an alibi and that he was a juvenile at the time, being fifteen years old.

6. The applicant was found guilty by a jury in the Home Circuit Court and on June 16, 1988, he was sentenced to be detained during the Governor - General's pleasure pursuant to the Juvenile Act, section 29 (1) (now repealed). His application for leave to appeal was refused by the Court of Appeal on February, 26, 1990.

7. On January 22, 2003, the Judicial Committee of the Privy Council in **Director of Public Prosecutions v Mollison (Kurt) (No. 2)** (2003) 62 W.I.R. 268 authoritatively declared as being unconstitutional and therefore unlawful the sentence of detention at the Governor- General's pleasure as prescribed by the Juveniles Act, s. 29 (1). Section 29 was held to have been incompatible with the doctrine of separation of powers on which our Constitution has been built. In particular, it was found to be incompatible with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive. The Board then modified section 29(1) and stated that instead of juvenile murder convicts being held at the Governor–General's pleasure those persons should be detained at the court's pleasure. Following on this decision, In September, 2006, the Supreme Court Rules Committee added part 75 to the CPR thereby establishing a regime for review of the sentences of inmates being detained at the court's pleasure.

8. In 2007, following petitions to the Governor-General from the Independent Council for Human Rights in respect of several inmates being held at the Governor-General's pleasure which

by now was ruled to have been unconstitutional, the Governor-General ordered that the appellants' cases, including that of the present applicant, should be referred to the Court of Appeal pursuant to section 29(1) of the Judicature (Appellate Jurisdiction) Act. Pursuant to this referral, on July 23, 2007, the applicant's sentence of detention at the Governor – General's pleasure was quashed by the Court of Appeal and the sentence of detention at the court's pleasure was then substituted in keeping with the Privy Council's ruling in **Mollison**.

THE APPLICATION

9. Part 75 prescribes the requirements for an application to be made for review of the sentence of an offender detained at the court's pleasure and the procedure to be followed by the judge conducting the review. The general rule is that an application shall not be made until 5 years had elapsed since the applicant was first detained at the Court's pleasure [r. 75.2 (3)]. Also, an application may not be made less than 2 years after the previous application by that applicant although the court may, in exceptional circumstances, consider applications made after a shorter time.

10. There is no issue taken in this case with respect to the propriety of the application. The applicant was convicted to be detained at the Governor- General's pleasure in 1988. The sentence was changed to detention at the court's pleasure in 2007. The fact that the detention during the court's pleasure was substituted roughly two years ago will not be used to affect the right of the applicant to approach the court for his sentence to be reviewed at this time. I am of the view that the years spent at the Governor- General's pleasure and in particular that period between 2003 and 2007 (being four years after **Kurt Mollison's** decision) should be taken into account in computing the minimum time within which the application may be brought. The applicant is, therefore, credited for time spent in detention prior to 2007 in computation of the time within which to make his application. I would hold that 5 years had elapsed since he is being held at the court's pleasure in satisfaction of the rules. This is also the first application made by the applicant under Part 75 and so in all material respects, I find that he is properly within the ambit of the rules for his application to be considered.

11. Part 75 also sets out the powers of the court upon review and it provides that the court may:

(1) Release the applicant unconditionally;

(2) Release the applicant, on parole, with conditions; or

(3) Dismiss the application with or without such recommendations as the court deems fit.

The applicant is asking that he be released unconditionally or in the alternative, be released on terms.

THE EVIDENCE

12. In determining the best course to adopt in all the circumstances, it now becomes necessary to review the case presented by the applicant. It must be indicated from the very outset, that the respondents have provided no evidence or any submissions in law, to counter the case being put forward by the applicant. Indeed, there has been no objection raised to the application. The question, therefore, is whether the court is satisfied on the evidence presented by the applicant that he is deserving of being released from custody as he now contends.

13. Firstly, I am guided by the provisions of the CPR, at r. 75. 2 (6), which provide that within 30 days of the filing of the application, the Superintendent of the relevant correctional centre should submit his report and a psychiatric report in respect of the applicant. In fulfillment of these requirements, Mrs. June Spence-Jarrett, acting Commissioner of Corrections, and Superintendent Winston Anderson, of the Tower Street Adult Correctional Centre and a psychiatrist, Dr. Myo Kyaw Oo, provided their reports that now stand as part of the records of these proceedings. Superintendent Anderson and Dr. Oo also attended in person and were duly examined by the court and by counsel for the applicant.

14. Upon hearing, Dr. Oo and having studied his report, I am satisfied that he does in fact understand that his duty is to the court to furnish an objective opinion on the mental status of the applicant. Having seen and heard him, I accept him as an expert whose opinion I can safely accept. Based on his assessment of the applicant, Dr. Oo arrived at the following conclusions:

(1) **Mr. Garfield Peart does not show any features of psychotic disorders.**

(2) **Mr. Peart seems to be adjusting well with his prison time. He is mature and literate and smart. His answers to questions are prompt and consistent.**

(3) **No manipulative behaviour was observed in answering questions asked.**

(4) **Based on the applicant's behaviour and conduct in prison, his maturity and knowledge gained and literacy status with skills learnt, the applicant had utilized his prison time quite effectively for his positive growth and achievement.**

Dr. Oo made his recommendations and for now I will just simply say that they are quite favourable to the applicant's application for cessation of his detention.

15. The report on the applicant from Superintendent Winston Anderson and his *viva voce* evidence given in the course of these proceedings are no less favourable to the applicant's application for release. This evidence indicates that the applicant is mannerly and shows respect to the staff of the correctional facility at all times. He is co-operative and hardworking and can work with little or no supervision. He gets along well with his peers. The Superintendent explained that while being incarcerated, Mr. Peart had taken up all the opportunities made available to him and he is now literate. He has gained skills in welding, craft work and as a tinsmith. He is involved in music and plays the drum, the guitar and the key board. According to the Superintendent, the applicant's behaviour has been exemplary during his incarceration.

16. Superintendent Anderson concluded that based on his observation of the applicant over the years he has known him (being approximately 13 years) and having taken into account the views of other correctional officers, he does not think that the applicant would be a threat to society. In his estimation, the applicant has reached maximum rehabilitation and as he put it: *"Had I had the power or authority, I would have signed that release years ago."*

17. No attempt was made by the respondent to discredit the Superintendent in his views and so his evidence stands before me as unchallenged to be utilized in my contemplation of the best

option to adopt in all the circumstances. He too has impressed me as an honest witness whose views are to be seriously taken into account in my deliberations.

18. The applicant gave evidence and he was subject to questioning by the court. I have had the opportunity not only to listen to him in giving his evidence but also to closely scrutinize him and to assess his demeanour. Mr. Peart is now 38 years old based on his mother's testimony that he was born on June 8, 1971. He stated that he was arrested when he was 15 years old and went to the General Penitentiary when he was 17 years old. He has been in custody for a little over 22 years. He stated that he learnt many beneficial things in prison that he did not know before. He has learnt to read and write. He ably demonstrated his literacy in court upon being asked to do so by the court. He stated that he has learnt to play musical instruments and actually plays in the Tower Street band providing music for church services and for musicians such as Jah Cure. He has confirmed the report of the Superintendent that he learnt certain skills and is now a multi-skilled artisan.

19. The applicant displayed an impressive demeanour in court. He appeared quite calm, pleasant and courteous. He appeared well groomed. He proved quite proficient in reading as he managed to read from a legal document with complex terms that was randomly selected by the court. Upon being asked about his smiling and pleasant disposition, he stated that he has spent so much time in prison so he has acquired that "spirit as it builds courage and hope."

20. On expressing his views on the issue of the prevalence of the illegal use of guns in the society upon being asked by the court, he stated that he would advise all persons with guns to return them because they only destroy persons. According to him, he does not support gangs. He has learnt that prison is a terrible place and he has seen where a lot of inmates had lost their lives because of prison. He said for that reason, if a person can do his best to avoid prison, he would advise that they do so.

21. His plan, if released, is to unite and live with his family in Trelawny, get a job, start a family and live honestly. He is willing to work with his parents and to accept the jobs that would be made available to him. He asserted that he would be able to assist his parents on the farm as he grew up doing farming and still remembers how to do it. He reported that he is confident that

he can make a positive contribution to society if released as he has strong family support and will be able to draw on his many acquired skills in order to assist him in making a living.

22. It was duly noted that reference is made in the psychiatric report of the applicant's assertion that he is innocent of the charge for which he was convicted. This, of course is a relevant factor to be taken into account in assessing his suitability for release. When asked about his feeling upon being incarcerated when he is claiming innocence, he indicated that he harbours no bitter feeling against anyone and that he has come to realize that perhaps, if he were not in prison, he might have lost his life being on the streets. His being incarcerated has brought some benefits. He is satisfied with the skills he had achieved in prison which might not have been possible had he not been there. He, however, maintains that prison is also 'bad'.

23. His vice, as recognized in the psychiatric report was the smoking of ganja which he claims, according to Dr, Oo's report, assisted him in remaining calm. Upon being asked in court about this habit, the applicant indicated that he has stopped smoking ganja and that if he is released he will continue to abstain from smoking. There is no evidence to confirm or to contradict his assertion that he has ceased the habit.

24. His mother, Mrs. Merline Peart, also gave evidence which remains unchallenged. The essential feature of her evidence is that the applicant is fully supported by his family and will continue to be supported if released. The court has noted that several of his family members were present at the hearing. Mrs. Reid lives with the applicant's father, her husband of 33 years. Both of them are farmers and she sells produce to other higglers as well as she sells in the Mandeville market. She also operates a small grocery shop close to their home. The applicant's father is currently ailing and she would like the applicant to come home to assist with their chicken farm, to assist in the shop and to otherwise help her around the home. She and her husband are prepared to have him work with them on the family farm and in the grocery shop. The applicant would live with her and his father along with his two younger siblings at their home in Trelawny. She is a member of the Jamaica Free Baptist Church and she is willing to work with the applicant in relation to his spiritual and moral life. She, along with the rest of the family, is willing, ready and able to receive him into their home and for him to live with them upon his release.

25. Mrs. Peart's pastor, Reverend Deventon Smith, also indicated his support for the applicant's release in his evidence adduced. He testified that in addition to his pastoral duties, he is also contracted as an internet installation technician and owns businesses in Mandeville. As an internet technician, he said he employs several workmen and through this medium he would be able to offer the applicant employment. He also employs several persons in his other businesses, and he is also prepared to offer Mr. Peart employment in any of those businesses. Reverend Smith has also indicated that his father and brother are masons and construction workers and he had discussed with them their offering of training to the applicant as a construction worker. They too have expressed their willingness to offer him both training and employment if he were released. He stated that in his capacity as a Minister of Religion, he is also prepared to give counseling and guidance to the applicant upon his release.

26. The information given by the mother as to the home environment and scope for employment in the family's business was verified by the probation office for Trelawny upon conducting a social enquiry at the request of the court. From the facts disclosed on the social enquiry report, it does appear that the home environment seems satisfactory and there is nothing to indicate that Mr. Peart will not be comfortably accommodated in terms of physical space and familial support. There is also scope for him to be gainfully occupied and earn a livelihood. The community members interviewed (the mature persons who are the ones who remember him) are reportedly of the view that he has been detained for a long time and could now be returned to open society. It is also expected by them, like his mother has indicated, that he could take over his sick father's farm and so provide a living for himself and assistance to his family. This report from Trelawny proves quite favourable to the applicant's application for release.

27. The social enquiry conducted in Kingston by the Kingston Probation Office is no less so. The officer who conducted the enquiry in Kingston opined that the applicant *"appears to be a positive individual who despite his long period of incarceration seems to have gravitated towards the positives that are offered in the institution. It is commendable that he has chosen to use his time constructively and learn several skills, unlike many persons who have found themselves in a similar situation."*

28. In the end, no witness or any other form of evidence has been brought to challenge anything said by the persons who testified on the applicant's behalf or to contradict the facts disclosed in the several reports submitted. The question, therefore, is whether the detention of the applicant should cease in all the circumstances.

ANALYSIS AND FINDINGS

29. In approaching the task at hand, I think it useful to first consider the type of sentence I am being called upon to review. What does this sentence of detention at the court's pleasure really means? In explaining what detention at her 'Majesty's pleasure' meant within the terms of provisions in similar U.K. legislation, the House of Lords categorically established in **Reg. v Secretary of State for the Home Department Ex Parte Venables and Thompson** [1998] A.C. 407 that such a sentence is not a life sentence but a wholly discretionary sentence.

30. As Lord Browne Wilkinson explained at page 498:

> **"...detention during her Majesty's pleasure is wholly indeterminate in duration: it lasts so long as her Majesty (i.e. The Secretary of State) considers appropriate. ...[It is] not a sentence of the same kind as the mandatory life sentence imposed on an adult murderer, the duration of which is determined by the court and is for life. In cases of detention during her Majesty's pleasure the duty of the Secretary of State is to decide how long that detention is to last, not to determine whether or not to release prematurely a person on whom the sentence of the court is life imprisonment."**
>
> Lord Steyn, for his part, opined:
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> **"Parliament differentiated between the two sentences. An order of detention during her Majesty's pleasure involves merely an authority to detain indefinitely. That means the Home Secretary must decide from time to time, taking into account the punitive element, whether detention is still justified. Life imprisonment involves an order for custody for life."**

31. In adding his voice to the issue, Lord Hobhouse, speaking on behalf of the Board in **Greene Browne v The Queen** Privy Council Appeal No. 3/ 1998 delivered May 6, 1999 (St. Christopher and Nevis), stated:

> **"But it was also expected that punishment was a part of the purpose of the sentence and therefore that the Secretary of State, in exercising his statutory discretion**

regarding the duration of the detention, should have regard to the need to punish the defendant."

32. I would posit the view that by substituting the court's pleasure for the Governor-General's pleasure (same as her Majesty's pleasure), the intrinsic nature and purpose of the sentence is not transformed. The fundamental requirement that there be a detention to satisfy the purpose of punishing the offender would remain the same. The only change is at whose pleasure or at whose discretion the offender is to be held. Now, in the aftermath of **Mollison**, it falls within the purview of the judiciary to determine how long the detention should last rather than for the executive to do so. So, in examining the foregoing dicta of their Lordships in **Ex Parte Venables a**nd **Greene Browne** one would only need to change the words *'Her Majesty'* or *'Secretary of State'* or *'Home Secretary'* wherever they appear to now read *'the court'* and the principles would apply with equal force to the sentence of detention at the court's pleasure.

33. It can be summarized, therefore, that the sentence under review is an indeterminate sentence that is wholly discretionary at the instance of the court. It is an authority of the court to detain the offender indefinitely having regard to the need for punishing him for the crime committed. It is to last as long as the court considers appropriate. So, being the reviewing court, it is within my discretion to determine how long the detention should last or in other words, it is for me to decide, after taking into account the punitive element of the sentence, whether continued detention of the applicant is still justified.

34. As Lord Diplock explained in **Hinds v The Queen** [1977] A.C. 195, *"the sense and purpose of the "concept during pleasure" is that it is not a once and for all assessment that is made at the time the defendant is first before the court after his conviction."* It enables the position of the defendant to be reviewed from time to time. It was, however, instructed by the Board in **Greene Browne**, after a review of **Venables** and **Hinds,** that after passing the sentence of detention during the court's pleasure, the court may consider that the stage has been reached in the applicant's rehabilitation and maturity and so an order pursuant to that sentence can be made by the court which will limit the length of his further detention.

35. Further, In looking at the sentence of detention *"at the court's pleasure"* and in determining the question as to how long the applicant's detention should last, I would be guided

by the words of the Board in **Greene Browne_** following on dicta of their Lordships in **Ex Parte Venables** that the policy underlying such approach is to maintain flexibility and to enable the duration of the applicant's detention to take into account (a) his welfare; (b) the desirability of re-integrating him into society; (c) his developing maturity through his formative years; as well as (d) the need to punish him.

36. It means then, that although this is the first opportunity presented for a review of the applicant's sentence, an order can be made limiting the length of his detention if, in all the circumstances, it does appear that he has been sufficiently punished and has attained an appreciable level of rehabilitation and maturity that would no longer make him a danger to society.

37. Against the background of these principles, the critical question now is: should the applicant be released as applied for? I have duly noted the helpful and thought –provoking submissions of Mrs. Samuels- Brown that the applicant should be released. She cited several bases for her contention which are all considered but will not be set out verbatim given the constraints of time and space. One of the main thrusts of her submission, however, is that there has been an abuse of process and a double breach of the applicant's constitutional rights. This arose as a result of his detention at the Governor - General's pleasure between 1988 and 2003 which was declared to be an unlawful sentence and thereafter (following **Mollison)** until 2009 when there was delay in having his sentence reviewed.

38. In support of her contention, Mrs. Samuels - Brown strongly argued that it is the responsibility of the state to bring before the court anyone being held unlawfully or without just cause. The right of the citizen to bring Habeas Corpus proceedings is subsidiary to and does not extinguish the duty of the state to do so. According to her, the state must take primary responsibility for the detention of the applicant without him being brought for re-sentencing until now. The delay, she argued, amounts to an abuse of the court's process and is, in any event, unjust and unreasonable. His constitutional right to a fair hearing within a reasonable time guaranteed to him by section 20(1) of the Constitution has been infringed. So, in light of the delay which is tantamount to an abuse of process and breaches of the applicant's constitutional rights, any sentence preliminarily contemplated by the court should be significantly reduced and

an order made for the applicant's immediate release. In support of her arguments, she relied on the **Attorney General's Reference H.L. No. 2 of 2001 [2004] 1 All E.R. 1049** and **Melanie Tapper and Winston McKenzie v R** RMCA no. 28/2007 delivered February 27, 2009.

39. I have given serious consideration to all that counsel has urged on the court and having considered the authorities cited, I am finding it difficult to conclude that there has been any abuse of process of the court or any breaches of the applicant's fundamental rights and freedoms that would warrant the court taking those into account to release him immediately or to reduce sentence. The fact that the Privy Council declared the sentence to have been unconstitutional does not mean that the applicant would have been entitled to an acquittal. The fact is that even if the sentence has breached the applicant's right to a fair hearing, he would be caught by section 26 (8) of the Constitution and so would not be entitled to the relief being sought as a result. The same argument was advanced on behalf of **Mollison** but as the Privy Council noted learned Queen's Counsel in that case would have to surmount section 26(8) in order to succeed on that ground and he could not. It is for that reason that he proceeded to argue infringement of the separation of powers doctrine.

40. For, while the Constitution does guarantee the right to a fair hearing as argued by Mrs. Samuels- Brown and even if the sentence or the delay in re-sentencing him had, in fact, breached that right, the applicant was being held by virtue of the provisions of the Juveniles Act. **Mollison** did not repeal s. 29 (1), it merely modified the provision. The Juveniles Act predated the Constitution and it is for that reason that section 26 (8) becomes relevant. Section 26 (8) provides that nothing contained in any law in force immediately before the Constitution came into effect shall be held inconsistent with any of the fundamental rights provisions to include section 20(1) and also that nothing done under the authority of any such law shall be held to be done in contravention of those fundamental rights provisions. Therefore, nothing done by virtue of and under the authority of the Juveniles Act can be held to have breached the applicant's rights to a fair hearing.

41. It is not that the applicant had even the slightest chance of an acquittal of which he was deprived when his detention continued. His continued detention was not in any way prejudicial to him. It was a necessary part of his punishment. He also had the right to make and pursue an

application before the Governor –General and later to the court for his release or for his sentence to be reviewed at any time he thought necessary. It is not proved by evidence that he had made such an application and for reasons due to the deliberate act or willful neglect of the agents of the state or due to perversion or deliberate and unlawful manipulation of the court's processes, he was deprived of a fair hearing and has been substantially prejudiced thereby.

42. Furthermore, we are dealing with a sentence where no minimum or maximum term is fixed by law. It is not a sentence of imprisonment, it is something entirely different. The applicant is merely being held wholly at the discretion of the court without a specified term being contemplated and it is for the court to determine when such detention should cease. There is no scope for a consideration of reduction in sentence in such circumstances. For all the foregoing reasons, I am unable to see how the failure of the state to bring up the applicant for re-sentencing can entitle him to a substantial discount in sentencing or to immediate release.

43. In considering the immediate task at hand, I will simply say that the nature of the sentence under review gives rise to the question as to whether the applicant is a fit person for his detention to now cease not whether he should be released prematurely. The ultimate question must be whether after taking into account the time the applicant has spent in custody, be it at the court's pleasure or the Governor - General's pleasure, the court can now find that the stage has been reached in his rehabilitation and maturity so that an order can be made that will limit the length of his further detention. The remedy counsel seeks as to reduction in sentence on the grounds of delay is not to my mind available in the context of this sort of sentencing.

44. In fact, I am fortified in my view by the fact that nowhere have I seen in those cases dealt with by the Privy Council in which the sentence of her Majesty's or Governor- General's pleasure was held unlawful, that their Lordships had declared that there had been a breach of the appellants' constitutional rights that would entitle them to immediate release. In fact, in **Browne Greene,** the appellant, through his counsel, had submitted before the Board that since the only prescribed sentence had been declared unlawful, no sentence could lawfully be passed and that the appellant should be released. This argument did not succeed. Lord Hobhouse, noted :

> **"It is the fact that the decision on the length of the sentence is entrusted to the Executive not to the Judiciary. It follows from this that what is required to make the**

provision comply with the Constitution is that the decision should be made by a court. If this is done the only objectionable part of the sentencing process is removed...

The sentence he should have received was detention during the court's pleasure and that is the sentence which must be substituted. However, in view of the passage of time between his conviction and the time that he will, pursuant to this judgment, return to be re-sentenced, it is to be recognised that, after having passed the sentence of detention during the court's pleasure, the court may consider that the stage has been reached in the appellant's rehabilitation and maturity where an order pursuant to that sentence can be made by the court which will limit the length of his further detention." (Emphasis added)

45. The Board did not say that given the unconstitutionality of the sentence, the appellant should have been released or granted a discount in sentence. Indeed, the ruling of the Board in **Mollison** that the sentence was unconstitutional also did not lead to a ruling that the offender should have been released forthwith as a result of any breach of his fundamental rights and freedom. In substituting the sentence to one at the court's pleasure, the Board said;

"It is not for the Board to prescribe how the sentence should be administered in order to give effect to the requirement that 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."

46. Part 75 is intended to be that 'suitable regime.' In the end, I see nowhere where the authorities cited by counsel can be of any assistance to her in successfully forging an argument for the applicant's release on constitutional grounds. In relation to the standing of the applicant as a person worthy of the exercise of the court's discretion in making an order limiting or ending his detention based on his penal record and the available evidence, I think counsel does stand on more solid footing on some aspects of her submissions.

47. Mrs. Samuels-Brown has submitted that the emphasis be placed on the applicant's rehabilitation over and above punishment even though the latter cannot be disregarded. She maintained that there is no place for sending a message in this procedure. The deterrent element is not a feature that should occupy the court's attention, she said. She continued that although the sentencing is coming at a time when the applicant has attained his majority, the principles

applicable to a minor must guide the court. In her view, where the interest of the child is concerned, it is always the case that their development supersedes the interest of third parties who are strangers to the matter. Third party concerns must be subsidiary to the rehabilitative aspect.

48. I do not agree that this approach could be proper in the review of a sentence of this nature. It must, of course, be taken into account that at the time of commission of the offence, the offender was a minor and so would have not attained his developmental milestone and maturity. So, it must be taken into consideration that he was a child when he committed the act. But this cannot supersede the other considerations that must be weighed in the equation in determining what the objects of sentencing should be. The interest or welfare of the applicant, while a relevant and important consideration, cannot be paramount because he was a child at the time he committed the offence.

49. We must not fail to recognize that the fundamental right of the deceased to life had been taken away intentionally and without any lawful justification. The applicant, even as a child, had committed the most serious offence of all. Apart from a sentence of death, the continued detention of the offender for life could be said to be the only other sentence that would be proportionate to the offence for which he has been convicted. However, notwithstanding that a person had been deprived of his right to live at the hand of the applicant , the law has seen it fit to provide him with an opportunity to retain his right to live and also his right to liberty.

50. However, before he can regain his liberty, the court must, of necessity, do a balancing act with all the objects of sentencing being weighed in the equation to see whether his release is justified. As indicated before, punishment of the applicant must be one of the purposes of the sentence. So, in exercising my discretion concerning the duration of the detention, I must have regard to the need to punish the applicant. I believe I must also take into account the need to ensure that the deterrent element in sentencing is realized from the duration of the detention. On the other hand, I am equally mindful that one cannot ignore the need to rehabilitate the applicant and to ensure that he is at a stage of development and maturity where he could properly be re-integrated into society. All this, of course, has to be considered while taking into account the need to protect society from the applicant.

51. In dealing with this question as to whether the applicant may be released, I have obtained valuable guidance on the principles applicable to the grant or refusal of parole from parole legislations and from several decided cases. For while the application is not, strictly speaking, one for parole, it is, indeed, an application for his release and the court does have the power to release him on parole under Part 75. A regime that would allow the release of the applicant on licence was expressly recognized as part of the administration of the sentence by the Privy Council in **Mollison.** I find, therefore, that this procedure under part 75 does bear some resemblance, in fundamental respects, to a parole hearing and as such should warrant similar considerations in determining whether the applicant should be released.

52. In considering whether the applicant is suitable for release, I have found to be a useful starting point on the question, Section 7 of the Parole Act of Jamaica which provides in subsection 7:

> **The Board shall grant parole to an applicant if the Board is satisfied that-**
>
> **(a) He has derived maximum benefit from imprisonment and he is, at the time of his application for parole, fit to be released from the Adult Correctional Centre on parole;**
>
> **(b) The reform and rehabilitation of the applicant will be aided by parole; and**
>
> **(c) The grant of parole to the applicant will not, in the opinion of the Board, constitute a danger to society.**

53. I have also found to be just as instructive, the Directions of the U.K. Secretary of State made in 1996 pursuant to section 32 (6) of the Criminal Justice Act, 1991 (U.K.) which states in part:

> **"In deciding whether or not to recommend release on licence, the Parole Board shall consider primarily the risk to the public of a further offence being committed at a time when the offender would otherwise be in prison and whether any such risk is acceptable. This must be balanced against the benefit, both to the public and to the offender, of early release back into the community. The Board shall take into account that safeguarding the public may often outweigh the benefits to the offender of early release."**

54. A study of relevant case law reveals that the courts have repeatedly established that before recommending early release on license, the Parole Board must consider whether the safety

of the public will be placed unacceptably at risk. The Board's first duty, it is said, is to assess the risk to the public that the prisoner might commit further offences if paroled. In assessing such a risk, the Board shall take into account such factors as the nature and circumstances of the original offence and whether the prisoner has chosen by his attitude and behaviour in custody that he is willing to address his offending behaviour. See for instance, **R v Secretary of State for the Home Department exparte Hepworth and others** (Unreported 26th March 1997; **Regina v The Parole Board exparte Oyston** 2000 Prison L.R. 45 April 17, 2000 (West law) also referred to by Campbell, J in **Gibson Bunting v The Queen** Claim No. 2008HCV657 delivered September 11, 2008.

55. Mrs. Samuels- Brown's submission that the rehabilitation of the offender and his welfare should supersede all else does not find any support in the cases I have reviewed and none was brought to my attention by her. In the end, I do not accept that as a rule the rehabilitation and the interest of the applicant must supersede all else. The safety of the public is the primary concern and so the interest of the offender to secure his liberty must give way to the need of the court to protect society from likely danger of him re-offending.

Has the applicant been sufficiently punished?

56. The seriousness of the offence for which the applicant is charged cannot be overlooked and is a material consideration to be weighed in the equation in contemplating his application. A purpose of the sentence is the need to punish the offender. The applicant is convicted for a shooting death. The facts do not disclose that at the material time, he was the one armed with the gun or that he fired any gun as pointed out by Mrs. Samuels- Brown. There is nothing to suggest that he was the 'trigger man' so to speak. Had he been convicted today, he would have been guilty of non - capital murder but the fact remains that he had participated in the commission of a rather grave offence that warrants condign punishment.

57. The question to be answered is what would be a sufficiently reasonable period for the elements of punishment and deterrence to be realized. Today, by virtue of the Child Care and Protection Act, s. 78, minors still cannot face the death penalty by virtue of age but they are liable to be imprisoned for life and a judge may stipulate a minimum period he should serve

before parole. A determinate sentence is now possible unlike under the Juvenile Act. Taking into account the applicant's age at the time of commission of the offence (15) and his role in the commission of the offence, I believe a period of incarceration for a period of 20 to 25 years would have been ample time for him to feel the consequences of his wrong doings and for him to be sufficiently punished. The period of his detention has, in my view, taken away a substantial part of his formative years. This should be sufficient to allow for adequate and effective punishment with a component for deterrence. He should be ale to recognize from the long restraint on his liberty that crime does not pay. I find, therefore, that the punitive and deterrent element would be satisfied by the duration of the applicant's detention being over 20 years.

Has the applicant derived maximum benefit from imprisonment?

58. In looking at all the evidence placed before me, I must say that the applicant has impressed me as an individual whose life has been transformed for the better over the years he has been behind bars. He was properly attired and appeared very courteous and pleasant, smart and intelligent before the court. I am satisfied that the applicant is now literate having entered prison illiterate. I am also satisfied that he has gained experience and knowledge in areas that can make him more readily adjustable to life if released. The applicant has seemed to have acquired an outlet for his expression through music which could be a medium for positive conduct. He has expressed a willingness to work and has indicated the type of jobs that he would be prepared to undertake if released.

59. Having seen and heard the applicant, I am prepared to accept Dr. Oo's conclusion that the applicant *"has utilized his prison time quite effectively for his positive growth and achievement."* Similar sentiments have been expressed by the probation officers who interviewed the applicant. They opined that he had used his time constructively and learn new skills and that there are indications that he has achieved a suitable level of rehabilitation and should therefore be able to play a positive role in society. In general, the applicant's psychiatric and penal records have established, to my satisfaction, that he has derived maximum benefit from his term of imprisonment.

The applicant's failure to admit guilt

60. The applicant has maintained his innocence to date. There is thus no expression of remorse in terms of accepting what he has done This is not at all immaterial in determining the risk to the public of him re- offending which is the primary concern. In **R. v Secretary of State for Home Department exparte Zulfikar** (The Times 26th July, 1995), Stuart- Smith, L.J. with whom Butterfield, J agreed had this to say:

> **"Where a prisoner either pleads guilty or after conviction later accepts his guilt, it is plain that he is in a position to address his offending in the sense that he can examine his underlying motivation, unreasonable reaction to stress or provocation ...and such like matters. But there may be a variety of reasons why a prisoner will not accept his guilt. He may have genuinely been wrongly convicted. Although, inwardly, he may know he is guilty he may be unwilling to accept that has lied in the past or confront loss of face in accepting what he has hitherto denied. Such a man may in all other respects be a model prisoner. He may have behaved impeccably in prison, occupied his time constructively and shown himself trustworthy and reliable with a settled background to which to return. Should he be denied parole solely because of his attitude to the offence? In the majority of cases, I think plainly not.. Each case will depend on its own circumstances."**

61. Along the same lines, Lord Bingham, C.J. in **Oyston** (supra) stated:

> **"Where there is no admission of guilt, it may be feared that a prisoner will lack any motivation to obey the law in the future. Even in such cases however, the task of the Parole Board is the same as in any other case to assess the risk that the particular prisoner if released on parole, will offend again... In almost any case the Board would be quite wrong to treat the prisoner's denial as irrelevant but also quite wrong to treat the prisoner's denial as necessarily conclusive against the grant of parole."**

62. Bearing all these principles in mind, I have considered the applicant's denial of guilt and will have to determine how much weight should be placed on it. I have assumed his guilt notwithstanding his denial and treat him accordingly albeit that he might well have a genuine reason for his denial. According to the psychiatric report and based on the answers to questions posed to the applicant by the court, the applicant has not displayed or indicated any residual bitterness or anger for his conviction and incarceration. He has, in fact, indicated that he has accepted the reality and that prison has not worked out badly as he had derived some benefits. He has expressed his desire and his plans to live an honest and productive life, He has

constructive family support and has an excellent penal record. Even in the face of his denial of guilt, I can see nothing to suggest that there is a real risk that he might offend again merely because of an absence of expression of remorse for the offence for which he has been convicted. The fact of his detention for such a long time and his exposure to the 'rough side of prison' could well serve as a strong deterrent even though there is no recorded admission of guilt.

Can the applicant's rehabilitation and reform be further fostered and secured

63. The applicant, from all indications, does not seem to lack the love and support of his family. Every report reveals that they have stood by him all through his detention and it is observed that they were with him throughout this hearing. His mother's pastor has also indicated his willingness to offer the applicant employment as well as counseling and guidance to assist in his re-integration into society. The community of Battersea is, reportedly, also supportive of his release. He has a strong support mechanism that could make his re-integration into society much easier.

64. The applicant seems to have the right outlook and the right attitude but given his removal from society from such a tender age and his admitted prior association with ganja, I endorse the recommendation of Dr. Oo that he needs to give up ganja "forever." The fact that he had abused ganja in the past cannot be ignored as a factor for consideration on the question of his continued reform and rehabilitation although he said he has stopped doing so. Given that there is no other anti- social tendencies recorded against him, I will view this past infraction as something that could be aided by counseling and supervision, if he were to be released. There is nothing to indicate that he has been adversely affected in his mental status by this habit so it does not seem to pose a material risk at this time but one cannot predict the future.

65. Mrs. Samuels-Brown has said that this is not a case in which the resources of the state should be tied up in supervising the applicant if released. I do not agree. I believe that given the length of time he has been removed from society (before he had become an adult) and given the many changes that have taken place in society over all these years not least of which is the spiraling crime rate in the western end of the island, I believe his proper integration would be better achieved with proper guidance and supervision.

Would the applicant's release constitute a danger to society?

66. Although there are many things that one will never be able to predict and the future conduct of a person is one of them, one nevertheless has to determine what is likely to happen in the future. According to all the reports the applicant had displayed no history of violence since being incarcerated. Dr. Oo in his professional opinion stated that he does not believe that the applicant will be a danger to society. Superintendent Anderson stated that he too does not see the applicant as a potential threat to society. The fact that the incident did not take place in the district in which the applicant is returning is something I have considered in determining whether he will be at risk of danger himself or whether he will placed others at risk if he were to be released to reside in Trelawny as being recommended. I have not discerned such a risk.

Conclusion: should the applicant's detention cease?

67. In looking at the case for the applicant in its totality including the nature of the offence for which he has been convicted, the circumstances surrounding its commission and the involvement of the applicant, his age at the time, his penal records, his psychiatric evaluation and the length of his incarceration, I am satisfied that he has been adequately penalized for the wrong he had committed when he was a child. He seems to have attained that level of maturity and effective rehabilitation that I think would not justify any longer detention. Also, and even more importantly, he does not seem likely to pose any threat or danger to society. It would appear that no greater benefit would be derived from his continued detention and so effort could be made to re-integrate him into society with professional guidance.

68. Since the question is how long his detention should last, I am minded to say anywhere between 20 -25 years would have been a reasonable period of sentence had it been determinate. I have taken into account that the applicant had spent approximately a year or so in custody before his conviction thereby making his entire stay in custody approximately 22 years. I weigh heavily on the evaluation and opinion of Dr. Oo and I accept his opinion that the applicant could be released with a possibility for parole. I would hold that the applicant could be released on parole for a period of 3 years and upon successful termination, he should be released from detention at the court's pleasure unconditionally thereafter. Accordingly, I now make the following orders.

ORDER

1. The applicant Garfield Peart, having been detained at the Court's pleasure since 1988 is ordered to be released on parole for a period of three (3) years from July 31, 2009 to July 31, 2012 and to be subject to the following special conditions:

   (i) He shall report without delay (and in any event not more than 7 days after release) to the parole officer.

   (ii) He shall place himself under the supervision of the parole officer for the parish of Trelawny and shall keep in touch with that officer in accordance with that officer's instructions.

   (iii) He shall reside in the parish of Trelawny during the period of parole and shall not change his parish of residence without obtaining the prior permission of the Parole Board.

   (iv) He shall, if his parole officer so requires, receives visits from that officer at his place of residence.

   (v) He shall be of good behaviour and lead an honest and industrious life

   (vi) He shall advise the parole officer, if arrested or questioned by the police regarding any offence.

2. The Parole Board is empowered to see to the proper enforcement of this Order pursuant to the Parole Act and the Rules made thereunder and may vary or revoke any of the special conditions prescribed at paragraph (i) to (iv) herein as it shall see fit.

3. Any breach of this Order or any decision made by the Board to revoke parole must be notified in writing to the court without delay.

Marva McDonald- Bishop, J

July 24, 2009