JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE E BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 36/2012

MOTION NO COA2021MT00002

ANDREW THOMAS v R

Ms Nancy Anderson for the applicant

Ms Maxine Jackson for the Crown

27 and 29 October 2021

EDWARDS JA

[1] The applicant, Mr Andrew Thomas, filed a notice of motion for leave to appeal to Her Majesty in Council as of right, pursuant to section 110(1)(c) of the Constitution of Jamaica, against certain findings of this court in relation to his appeal against his conviction and sentence for murder. He also prays in aid section 110(2)(a) of the Constitution in asserting that the questions framed for the consideration of the Privy Council raise great issues of general and public importance.

The facts

[2] The facts in this case hold no relevance, save and except for the fact that at the time the applicant committed the murder for which he was convicted, he was 16 years old. Under our law, he was a child, and was legally required to be treated as such, according to the relevant legal provisions.

[3] The applicant was sentenced in accordance with the provisions set out in section 78 of the Child Care and Protection Act ('the CCPA'). The relevant provisions in the section are as follows: -

> "78--(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that **at the time when the offence was committed** he was under the age of eighteen years, but in place thereof such person **shall be liable to be imprisoned for life**.
>
> (2) A person sentenced under subsection (1) shall, notwithstanding anything in the other provisions of this Act, **be liable to be detained in such place including, save in the case of a child who has not attained the age of fourteen years, an adult correctional centre,** and under such conditions as the Minister may direct, and while so detained, shall be deemed to be in legal custody.
>
> (3) Notwithstanding the provisions of the Parole Act, on sentencing any child under subsection (1), the court may specify a period which that child serve before becoming eligible for parole." (Emphasis added)

[4] Ms Nancy Anderson, in her submissions in support of the application, maintains that that section is unconstitutional. She contends that, in this application, the following questions on the interpretation of that section meet the strict criterion of section 110(1)(c) of the Constitution. The questions she proposes to raise for the consideration of the Privy Council are as follows:

"(a) whether section 78 of the Child Care and Protection Act and the Applicant's sentence is in contravention of his fundamental rights, which are guaranteed by the Charter of Fundamental Rights and Freedoms to:

(i) equitable and humane treatment (s.13 (3)(h)),

(ii) the right as a child to such means of protection as are required by virtue of his status of being at the relevant time a minor as a part of society and the State (s.13(3)(k)(i) [sic]),

(iii) the right to protection from inhumane or degrading punishment of treatment (s. 12(3)(o) [sic]);

(iv) the right to be treated humanely and with respect to the dignity of a person, (s.14. (5) [sic]).

(b) whether the delay in the hearing of the trial (3 years and seven months from incident to trial) and the appeal (nearly 7 years from sentencing date) are breaches of the Applicant's Constitutional right to a fair trial within a reasonable time - section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter III of the Constitution."

[5] At the start of her submissions, Ms Anderson readily admitted that the second question with regard to the issue of delay, is one which has already been dealt with time and time again and indicated, therefore, that her application was more firmly anchored on section 13(3) of the Constitution.

[6] It should also be noted that the Attorney General's Chambers, through its Director of State Proceedings, Ms Althea Jarrett QC, filed submissions in the applicant's substantive appeal before this court which supported the position taken by Ms Anderson. Those submissions were relied on, by Ms Anderson, in this application. The position taken by both Ms Anderson and Ms Jarrett is that any legislative framework concerned with the treatment of child offenders should reflect an appreciation of the

age and vulnerability of children, and should demonstrate a consideration of the paramountcy of the welfare and interest of children. In that regard, they hold the considered view that the sentencing regime for child offenders must be different from that of adults. This court is inclined to agree with that view.

[7] The main contention is that section 78 of the CCPA does not allow for a child convicted of murder to be sentenced at the court's pleasure, so that periodic reviews can be made. The basis of this submission by counsel and the Director of State Proceedings is grounded in human rights law, the various conventions to which Jamaica is a party, and case law, all of which hold the protection of the interest and welfare of child offenders as paramount.

[8] Miss Jackson, for the Crown, submits that section 78 of the CCPA was not unconstitutional and furthermore that the section has been saved by section 13(7) of the Constitution. She maintains that section 78 is clear and unambiguous and reflects the intention of Parliament "to provide a separate and distinct sentencing regime for children charged with the offence of murder". With this change made by Parliament, she says, detention at the court's pleasure in respect of child offenders is no longer the law.

[9] She agrees that the question of delay has repeatedly been adjudicated on by the court and the Privy Council.

Analysis and Disposition

[10] The CCPA came into existence before the Charter of Fundamental Rights and Freedoms ('the Charter'). The CCPA has, in its numerous provisions, adopted a reformulated regime (different from that which had obtained under the Juveniles Act, which it replaced), to deal with the treatment of children (persons under 18) who come into conflict with the law. Included in that is a varied sentencing regime, which is based on the age of the offender and the offence.

[11] The Constitution is supreme law and Parliament shall pass no other law which is inconsistent with it. Any law passed by Parliament which is inconsistent with the Constitution is liable to be struck down as being invalid, to the extent of its inconsistency. The Constitution, however, recognises that laws encapsulating the rights of citizens may have existed before the passing of the constitutional provisions. In recognition of this fact, the Constitution of Jamaica, as do the Constitutions of most common law jurisdictions, all provide for existing laws to be saved from invalidation.

[12] The Charter came into force in 2011, seven years after the CCPA. Section 13(7) of the Charter states:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (6) to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011."

[13] This is what is known, generally as a 'savings law clause'. This clause in the Constitution is a full answer to the claim raised by Ms Anderson that section 78 breaches a child offender's rights under the Charter, in so far as that claim is an attack on the constitutionality of the section. The guidance provided on how to interpret the effect of savings clauses on existing law, in such cases as **Tafari Morrison v R** [2020] JMCA Crim 34, relying on **Director of Public Prosecutions v Patrick Nasralla** [1967] 2 AC 238; **Lambert Watson v R** [2004] UKPC 34 at paragraph 54; **The Director of Public Prosecutions v Mollison (Kurt)** [2003] UKPC 6 at paragraphs 14 and 15; and **Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago** [2012] UKPC 4, at paragraph 28, have proven invaluable.

[14] All these authorities agree that an existing law in force before the promulgation of the relevant constitutional provisions, cannot be held to be inconsistent or incompatible with any of the provisions in the Constitution. In **Seepersad**, the Privy

Council said that the key to understanding the savings clause, is to appreciate what is being protected from challenge. What is protected is any existing law, especially with respect to what that law says and what "is to be taken to be the effect of the words used in them". In **DPP v Nasralla**, the Privy Council, speaking of Chapter III of the Constitution, as it was then formulated, opined that Chapter III proceeded on the assumption that the fundamental rights of the people of Jamaica were already protected by existing law. These existing laws (in force before the relevant constitutional provisions), the Privy Council said, were "not to be subjected to scrutiny in order to see whether or not they conform to precise terms of the protective provisions" (see page 248). In **Lambert Watson**, the Privy Council said that the true effect of the savings law clause was to exclude existing laws "from the constitutional guarantees as it preserves them from any inconsistency" (see paragraph 54).

[15] The objective of the Charter is to ensure that no future laws passed by Parliament derogate from the rights enshrined in it. The challenge to section 78 is that it is unconstitutional because it does not provide for an indeterminate sentence and for periodic review. The fact that Parliament, as is within its prerogative, has chosen to implement a different sentencing regime, cannot be a basis for challenging the provisions of the section as it stands, which was in existence before the Charter came into force. The effect of section 13(7) is to save the provisions in section 78 of the CCPA from constitutional challenge.

[16] In the result, the application for leave to appeal to the Privy Council as of right under section 110(1)(c) of the Constitution must be refused.

Do the questions raise any point of law of 'great general or public importance or otherwise' that, in the opinion of this Court, ought to be submitted to Her Majesty in Council for further consideration?

[17] The applicant, who had been tried and convicted with three others, appealed his conviction and sentence to this court in the case of **Germaine Smith, Daniel Edwards, Andrew Thomas and Jimmy Ellis v R** [2021] JMCA Crim 1. The

applicant's appeal against his conviction was dismissed, and his appeal against sentence was allowed in part. His sentence of life imprisonment was affirmed, but the period stipulated for him to serve before being eligible for parole of 25 years was set aside, and substituted therefor, was the stipulation that he serve 16 years and eight months before being eligible for parole.

[18] The issue of the constitutionality of section 78 was also raised in the appeal against sentence and it was held, relying on **Tafari Morrison v R** and this Court's interpretation of the effect of section 13(7), that section 78 was not unconstitutional. Brooks JA (as he then was), took note of the fact that section 78 does not mandate a sentence of imprisonment for life, but rather, "establishes it as the maximum penalty that may be inflicted on a child (see paragraph [118])".

[19] Whilst the court acknowledged that delay could result in a breach of constitutional rights, it held that no redress was called for in this case.

[20] In our view the proposed questions raise no great issue of general and public importance. A careful reading of section 78 shows that:

(i) It provides for a sentence of imprisonment by a court of law of competent jurisdiction of which life imprisonment is the maximum penalty;

(ii) It provides for a child offender to be detained at a place inclusive of, but not limited to, an adult correctional centre;

(iii) The Minister has the power to review the conditions of the detention of the child;

(iv) Notwithstanding the Parole Act, a child sentenced under the provision may have a period of parole specified.

[21] The section, therefore, provides for judicial oversight in the setting of the sentence, where the age, maturity, background, family support, external influences, education, and psychological maturity of the child may all be considered before the sentence is passed and the period for parole is indicated, if any.

[22] It is the Minister who is then responsible for the conditions under which the child is held until he is paroled. The section is clear as to who is to decide on the measure of punishment the child offender should receive. Parliament, in its wisdom, determined that these provisions are preferable to a sentence of indeterminate duration at the courts pleasure and there is no basis for agreeing with Ms Anderson that the section is unconstitutional because it does not provide for periodic review.

[23] A sentence of imprisonment on a child is not a novel concept. As was pointed out in the case of **DPP v Mollison**, which was decided under the now repealed Juveniles Act, section 29(3) of that Act had provided for a young person convicted of murder to be detained for a specified period. Section 29(1) of that Act had also provided for the detention of a child offender at the Governor General's pleasure, at an adult correctional centre, under such conditions as the Minister could have directed. Subsection 4 provided for the Governor General to release on licence any person so detained. As a result of the decision in **DPP v Mollison**, the child offender became liable to be kept at the Court's Pleasure. The procedure for determination of their release has been provided for under part 75 of the Civil Procedure Rules.

[24] With the repeal of the Juveniles Act, under the CCPA, it is still the judge who determines the sentence to be imposed on a child offender and where it is to be served. The Minister has oversight of the conditions in which the child is to be detained and it is now the parole board which grants parole instead of the Governor General granting a licence. There is nothing to suggest that this approach is unconstitutional or otherwise objectionable.

[25] None of the authorities cited by Ms Anderson or relied on by Ms Jackson suggest that an approach other than an indeterminate sentence, with periodic review, is unconstitutional or objectionable. Neither is there any hint of a suggestion in any of the cases, that the failure to provide for periodic reviews during a period of sentence, other than an indeterminate sentence, would be a breach of any of the guaranteed rights of a child under the constitution.

[26] In all the authorities cited by counsel on both sides, it has been noted that the need for periodic review is due to the nature of the indeterminate sentence. In **DPP v Mollison**, at paragraph 5, it was said that a key feature of the sentence is its indeterminacy. It is because it is indeterminate that account has to be taken of the "youthful detainee's progress and development as he or she matures, by means of periodic reviews". In **R (on the application of Smith) v Secretary of State for the Home Department** [2005] UKHL 51, which was cited in **Seepersad**, the House of Lords was of a similar view. At various points in his judgment in that case, Lord Bingham of Cornhill, in referring to the sentence of detention at Her Majesty's Pleasure, noted that continuing review was an "intrinsic", and an "important and distinct" feature of "this unique" sentence (see paragraphs 10, 11 and 12). At paragraph 15 he said that it was "true that no continuing duty of review applies to other sentences imposed on young offenders because other sentences do not have the special features of HMP detention." In the case of **Seepersad**, it was also recognised that review was an intrinsic feature of the indeterminate sentence (see paragraph 13).

[27] In **R v Secretary of State for the Home Department ex parte Venables and R v Secretary of State for the Home Department ex parte Thompson** [1997] 3 All ER 97, Lord Goff noted that the policy of fixing a penal element which has to be served before release for adult prisoners was recognised by the House of Lords to be unobjectionable. He also pointed out that Lord Woolf MR in his dissenting judgment in the Court of Appeal, in the said case, noted that that there could be no legal objection to the same approach being taken to young offenders. Lord Goff, at page

108, quoted Lord Woolf from that decision (reported at [1997] 1 All ER 327 at 348, as saying:

> "This is because it allows a young offender to know the period during which he is unlikely to be released and when he should prepare himself to put forward representations. The objection which is most often made by those subject to an indeterminate sentence is its uncertainty. They need a target date."

[28] Lord Goff referred to the fixing of such a period as a benefit available to young offenders sentenced to detention for life under section 53(2) (which was equivalent to section 29(3) of the Juveniles Act). Lord Hope in distinguishing the sentence of detention at Her Majesty's Pleasure from sentences imposed on children for determinate periods or for life, noted that the latter sentences were ones selected by judges who must take certain factors into account.

[29] In the case of section 78 of the CCPA, the judge has the discretion to determine the length of the sentence and where it is to be served, based on the age of the child and other relevant factors. Ms Anderson's concern that young offenders will be imprisoned with adults in adult correctional institutions is baseless. It is no more expected that a 15-year-old will be sent to an adult correctional institution such as the Tower Street Adult Correctional Centre, than one would expect a person of the age the applicant was at the time of his sentence (20 years old), to be sent to a juvenile detention centre.

[30] As a result, and for all these reasons, the application for leave to appeal to Her Majesty in Council under section 110(2) is refused.