In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: NO. 11

JS
(a child)

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

REASONS FOR DECISION
(In Court)[1]

Date of Hearing: June 6, 2012
Date of Judgment: June 13, 2012

Mr. Saul Dismont, Christopher's, for the Appellant

Mr. Geoffrey Faiella, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. By Notice of Appeal dated February 3, 2012, the Appellant appealed against a sentence of corrective training imposed for an indeterminate period for various offences by the Family Court (Worshipful Tyrone Chin and Panel) on January 25, 2012. The record was filed in the Supreme Court on or about May 10, 2012 and the appeal listed for effective hearing just over four weeks later.

2. The principal ground of appeal was that as the Appellant was only 14 years of age at the date of sentence, the Court below had no power to impose any period of corrective training. Subsidiary points were that the Learned Magistrate erred in law in concluding that the Bail Act applied to a child at all and refusing bail on statutory grounds.

[1] The Judgment was handed down without a hearing as indicated at the end of the appeal hearing.

3. After hearing well-argued submissions from both counsel and also after hearing Mr. Alfred Maybury (Director of Child and Family Services, who very helpfully attended Court at short notice), I made the following decisions:

    (a) the sentence of corrective training was set aside and substituted with an order that the Appellant be placed in the care of the Director, for a period to be determined at a review hearing on December 5, 2012;

    (b) a determination was made that the Bail Act did apply to applications to detain children pending trial under section 41 of the Young Offenders Act 1950[2].

4. I now give reasons for that decision.

Unlawfulness of corrective training sentence

5. It was common ground that the sentence of corrective training imposed by the Family Court was not a lawful sentence and must be set aside. Section 16 of the Young Offenders Act 1950 provides as follows:

> "***Powers on conviction***
>
> *16.* ***Subject to section 5 and sections 17 to 41, where a child is convicted of offence by a Family Court or (as the case may be) before the Supreme Court, the court may deal with the child as hereinafter provided and in no other way***—
>
> *(a) the court may make an order for the absolute discharge of the child;*
>
> *(b) the court may make an order for the conditional discharge of the child;*
>
> *(c) if the offence is punishable with imprisonment, the court may make a probation order in respect of the child;*
>
> *(d) where, in the case of a person other than a child, a court might under the Criminal Code [title 8 item 31] order the payment of damages for injury or compensation for loss, the court may order the child to pay such damages or compensation; and section 70I of the Criminal Code shall have effect in relation to such an order:*
>
> *Provided that the damages and compensation together shall not exceed $240;*
>
> *(e) where, in the case of a person other than a child, a court might order the payment of costs, the court may order the child to pay costs;*
>
> ***(f) if the offence is punishable with imprisonment, the court may by order commit the child to the care of the Director, or to the care of a fit person (whether a relative of the child or not) who is willing to undertake the care***

[2] I discharged the Family Court order imposing bail conditions on the Appellant in an unrelated matter so that he could spend one night with his family before entering residential care pursuant to a care order he consented to despite his having been unlawfully detained for over four months.

***of the child**;*

(g) the court may sentence the child to pay a fine, not exceeding $168 or not exceeding such amount as would be imposable for the offence in the case of an offender other than a child, whichever is the lesser amount;

(h) [Deleted by 1999:51]

(i) [Deleted by 1982:47]

(j) where the child is convicted before the Supreme Court of attempted murder, or of manslaughter or (in the case of a girl) of infanticide, and the court is of the opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the child to be detained for such period as may be specified in the sentence; and thereupon the child shall be liable to be detained in such place and under such conditions as the Governor acting in his discretion may direct."[emphasis added]

6. Section 16 provides that subject to sections 5 and 17 to 41, it provides the sole means of punishing a child convicted by the Family Court or the Supreme Court. Section 16(f) contemplates that where a child is convicted of an offence punishable by imprisonment, they may either be placed in the care of the Director or some other person. Section 2(1) of the Act provides: "*'child' means a person under the age of sixteen years*" and it is common ground that all material times the Appellant was and remains today under the age of sixteen years.

7. The policy of the Act in prohibiting the imprisonment of children is made even clearer by sections 5 and 6. Section 5 provides that a child convicted of murder may "*be detained in a secure facility during Her Majesty's pleasure*"; this is mirrored by section 16(j) in relation to children convicted of attempted murder or manslaughter. Section 6(1) provides: "*No court shall impose imprisonment on a child.*"

8. Moreover, there is nothing in sections 17 to 41 which empowers the Court to order the detention of a child by way of sentence for an offence in circumstances to which section 5 or 16(j) do not apply. The only other obvious qualifications to the general prohibition on imprisonment does not relate to sentencing at all. Section 38 merely creates the power for children subject to probation or conditional discharge orders to be arrested on a warrant and detained in custody until they can be brought before an appropriate court. And section 41 permits detention in the senior training school or a prison pending trial, in exceptional circumstances, of children no younger than 15. Section 41 will be considered in further detail below in relation to the Bail Act issue.

9. Finally, "*Child Offenders*" are dealt with in Part II (sections 7 to 41). "*Young Offenders Convicted of Offences*" are dealt with in Part III (sections 42 to 49). Section 43 (1) provides: "*(1) Where a young person is convicted of an offence punishable with imprisonment, the court may sentence him to undergo corrective training.*"*Section 2(1) provides: "'young person' means a person who has attained the age of sixteen years but is under the age of eighteen years.*"

10. In my judgment it could not be clearer that corrective training is a punishment which cannot be imposed on a child under the Act in any circumstances.

11. Mr. Dismont, who appeared below, placed a careful written submission before the Family Court on sentence. He accurately explained the sentencing options available, correctly submitting that corrective training was not legally applicable to a child and sought a probation order. Mr. Faiella, who also appeared below, is not recorded in the Magistrate's notes as disagreeing that corrective training was not an option. Rather, based what I considered to be a sensible analysis of the circumstances of the offence, the Appellant and the Social Inquiry Report, counsel concluded that a community-based sentence was inappropriate. Accordingly, the Prosecution sought an order placing the Appellant in the Director's care, the only form of 'custodial' sentence which was legally permissible.

12. Against this background the imposition of a sentence of corrective training on a 14 year old child by what is supposed to be a specialist child-centred tribunal is wholly inexplicable. No reasons for this astonishing sentence were recorded in the Magistrate's notes; nor were any comments added three months later when the record was being completed.

13. However, it is also difficult to understand why counsel (who were seemingly agreed on January 25, 2012 that the sentence imposed was not a lawful-or at least not an appropriate-one) waited until the appeal record was prepared and the appeal was listed in the ordinary course to bring the Appellant's unlawful detention to an end. Even in the absence of agreement, an application could have been made on the Appellant's behalf to this Court without a record on the grounds of urgency to set aside the custodial order that was plainly and obviously made in excess of the jurisdiction of the Magistrates' Court.

14. One can only hope that the Appellant came to no harm during his nearly 5 months' detention in a place the law deems to be unsuitable for a child. I indicated to the still only 15 year old child at the end of the hearing (perhaps inappropriately) that it was to be hoped that his illicit detention may bring home to him the sort of future that lies ahead if he does not avail himself of the assistance that he needs to tackle the problems which have contributed to his perturbing pattern of offending. These problems, as identified in a comprehensive report, prompted me to accept Mr. Faiella's renewed plea for a care order.

15. I was impressed that, after it was confirmed by the Director that he could be taken into care with a tailor-made plan developed after an overseas assessment, the Appellant agreed that such an order should be made.

16. Nevertheless, the possibility that children may be diverted from the path of criminality by the "short, sharp shock" of incarceration can never justify their detention in violation of statutory protections enacted for their welfare. Sentencing courts must exercise constant care to ensure that no person accused or convicted of a criminal offence is unlawfully detained. If an unlawful sentence is believed by counsel involved in a case to have been imposed, prompt action must be taken to bring the unlawful detention to an end.

Must the term of corrective training be specified?

17. Although this point did not strictly need to be decided, it was fully argued and is incidental to the central attack on the corrective training ordered. The point was initially contentious, with Mr. Dismont contending an indeterminate sentence was unlawful and Mr. Faiella contending that it was sufficient if the maximum period of corrective training was implied. However after some vigorous verbal jousting with the Bench, Mr. Faiella conceded that the following form of sentence could not be legally justified: "*The Court sentences* [JS] *to a period of corrective training*". This was all that the Magistrate's notes signified.

18. However, the warrant of commitment read as follows:

> "*…he should be detained in the Senior Training School CORRECTIVE TRAINING AT THE CO-ED FACILITY TO OBTAIN THE FOLLOWING-HE IS TO BE ENROLLED INTO THE GED PROGRAMME*".

19. The aim of this form of sentence seems clear. It is designed to encourage the offender to obtain a qualification with an incentive to complete the specified programme as quickly as possible to procure an early release. Alternatively, if the GED programme has a predetermined 'run-time' it is designed to sentence the young offender to remain in custody for the duration of that programme's term. To my mind the term of the sentence is on the face of the warrant of commitment unclear.

20. It is obvious from the scheme of the Young Offenders Act that a sentence of corrective training is a custodial penalty akin to imprisonment. It is the function of the courts to specify what the maximum duration of a custodial term should be and this function cannot be assumed by the Executive nor delegated to any other public authority. In addition it is an inherent requirement of any form of sentence that there be sufficient certainty as to what the scope of the penalty is. This requirement applies as much in the case of conditional discharges, fines, probation orders and community service order as it does to custodial terms. Section 61 of the Act prescribes three years as the maximum period of corrective training. It does so in the following terms:

> "**Period of corrective training**
>
> *61 (1) Subject to section 59(2), a person sentenced to undergo corrective training shall, unless sooner released under section 62, be detained in a senior training school for a period not extending beyond 3 years after the date of his sentence; and such period, in relation to a person sentenced to undergo corrective training, is in this Part referred to as his 'maximum period of corrective training'.*
>
> *(2) A person, upon the expiration of his maximum period of corrective training, shall, subject to section 62, be released.*"

21. Section 61(1) expressly requires the sentencing court, when sentencing a young offender under section 43 "*to undergo corrective training*", to specify "*a period not extending beyond three years*". Section 62 deals with release on parole, possible after nine months from the date of sentence.

22. Although it may well be useful to mandate the pursuit of certain types of training, in my judgment the statute requires any sentence of corrective training to specify the "*maximum period of corrective training*" the court is requiring the young offender to serve. Any sentence of corrective training should on its face specify what the maximum period of corrective training is.

The Bail Act and pre-trial detention

23. Mr. Dismont made the interesting submission that the Bail Act had no operation to children. Although he conceded that section 41 of the Young Offenders Act permitted pre-trial detention of children, he sought to establish that the regime of bail had no application to children according to the Bail Act's terms. This argument had some attraction if one looked at the Bail Act in isolation from the Young Offender's Act, or took the latter Act as the starting point for the analysis. But that interpretative approach requires looking at the issue through the wrong end of the telescope.

24. Section 41 of the 1950 Act provides as follows:

> "***Detention of child pending determination of charge***
> *41. Where at any stage of any criminal proceedings taken against a child he is committed to custody pending the determination of the charge preferred against him, he shall not be detained in a prison but where practicable he shall be detained in a residential home operated under the Children Act 1998 [title 27 item 6] and where it is not practicable to detain him in such place he shall be detained in a police station:*
>
> *Provided that where it appears to a magistrate or other authority by whom the child is committed to custody—*
>
> *(a) that the child is a male and is not under fifteen years of age; and*
>
> *(b) that the child is charged with a serious offence involving violence to the person; and*
>
> *(c) that it is inexpedient in the circumstances that the child should be detained in a residential home operated under the Children Act 1998 [title 27 item 26] or in a police station,*
>
> *then the court or other authority may order the child to be detained in a senior training school or in a prison.*"

25. Section 41 gives any court dealing with a child what on its face appears to be an unfettered discretion to order the detention of the child pending the determination of the relevant criminal charge against him. In the case of a child who is under 15 years of age (such as the Appellant at the date of his sentence), such detention may in no circumstances take place in a senior training school or a prison. Section 41 contemplates pre-trial detention for children in a way which impacts on their liberty in a broadly equivalent way to the remand of adult criminal defendants pending trial.

26. Prior to the Bail Act 2005, now repealed section 471 of the Criminal Code regulated in a far more abbreviated fashion the circumstances in which the Supreme Court could and could not grant bail "*to any person*". Although this point was not directly canvassed in argument, I was aware of no pre-2005 authority to the effect that the former bail regime did not apply to children. The power to grant bail in the Magistrates' Court was also dealt with in now-repealed provisions of the Summary Jurisdiction Act. Counsel did not have the temerity to submit that prior to 2005 the regime of bail did not apply to children and cited no authority in support of this proposition.

27. An important aspect of the Bail Act 2005 is to create a positive general right to bail while the manifest object of the Young Offenders Act is to minimize the circumstances in which a child accused or convicted of a criminal offence is detained. The starting assumption must be that the following provisions of the Act apply as much to children as to any other person:

> "*6 (1) A person to whom this section applies shall be granted bail except as provided in Schedule 1.*
>
> *(2) This section applies to a person who is accused of an offence when-*
>
> *(a) he appears or is brought before the Magistrates Court or the Supreme Court in the course of or in connection with proceedings for the offence; or*
>
> (b) *he applies to a court for bail or for a variation of the conditions of bail in connection with the proceedings...*"

28. I ultimately agreed with Mr. Faiella for the Crown that the reference in paragraph 1 of Schedule 1 (which defines the categories of offences to which the exceptions to bail apply) to offences "*punishable with imprisonment*" must sensibly be read as a reference to offences which by their definition are punishable with imprisonment. This is entirely consistent with the Young Offenders Act itself, section 7 of which provides:

> "*'punishable with imprisonment', in relation to an offence committed by a child, means an offence which (in the case of an offender other than a child) is punishable only with imprisonment otherwise than in default of payment of a sum of money or for failing to do or abstain from doing anything required to be done or to be left undone.*"

29. I found no convincing basis for concluding that children were intended to be deprived of the protections for liberty set out in modern codified form in the Bail Act 2005.

Conclusions

30. For these reasons on June 6, 2012, I allowed the Appellant's appeal.

Dated this 13th day of June, 2012 _____
IAN RC KAWALEY CJ