THE JAMAICA LAW REPORTS

VOLUME 17

THE JAMAICAN BAR ASSOCIATION
in association with
THE CARIBBEAN LAW PUBLISHING COMPANY LIMITED
under the auspices of the USAID/Jamaican Bar Association
Sustainable Justice Reform Project

KINGSTON

1996

and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.

I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crimes, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence. The weapons which the courts have at their disposal for doing so are few. We are satisfied that in most cases fines are not sufficient punishment for senseless violence. The time has come, in the opinion of this Court, when those who indulge in the kind of violence with which we are concerned in this case must expect custodial sentences.

But we are also satisfied that although society expects the courts to impose punishment for violence which really hurts, it does not expect the courts to go on hurting for a long time, which is what this sentence is likely to do. We agree with the trial judge that the kind of violence which occurred in this case called for a custodial sentence. This young man has had a custodial sentence. Despite his good character, despite the excellent background from which he comes, very deservedly he has had the humiliation of hearing prison gates closing behind him. We take the view that for men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time.

I turn now to the element of deterrence, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences. We think it unlikely that deterrence would be of any value in this case.

We come now to the element of prevention. Unfortunately, it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period. This case does not call for a preventive sentence.

Finally, there is the principle of rehabilitation. Some 20 - 25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging of prison gates which is likely to keep him from crime in the future."

These were two very young and inexperienced men of fair intelligence who were each learning a trade. Neither had previously run foul of the law. There was nothing to suggest that they had developed anti-social habits that they were beyond redemption. No medical evidence was available to the effect that either man was suffering from some mental disorder which would render him a danger to the community for the foreseeable future. Heinous as were these acts of rape committed upon the young ladies in their bedroom and in earshot of their aunt, by a group of armed men, we are of the view that a determinate sentence of imprisonment would meet the justice of the case. None of the extravagant acts of aggravation referred to by Mr. Ballantine are present, although his list is not to taken to be too exhaustive. We consider that the imprisonment should be for an extensive period demonstrating, as we must, the Court's utter abhorrence for gang rape. These young men have by their own violent and senseless acts deprived themselves of the enjoyment as free persons of the greater portion of their twenties but they will be left with the hope that skills which they will learn while in prison can one day be turned by them to their own account, free from the restriction of prison bars and prison discipline.

It was for these reasons that we set aside the sentence of imprisonment for life at hard labour on counts 2 and 4 and substituted a sentence of twelve years imprisonment at hard labour to commence on January 1, 1980 and to run concurrently with sentence on count 1.

MARJORIE E.R. BROWN-YOUNG *v.* DAHLIA CODNER

[COURT OF APPEAL (Melville and Rowe, JJ.A. and White J.A. (Ag.))
June 13 and July 25, 1980]

Landlord and Tenant—Rent restriction—Valuation of premises under Rent Restriction Act—Valuation based on costs one year ago—landlord seeking adjournment of hearing in order to call valuator—Board's valuators report only made available on day of hearing—Rent Restriction Act, section 14—Rent Restriction Rules, rules 5 and 11.

At the instance of the tenant, by application dated November 15, 1977 the Rent Assessment Board required the landlord/appellant to make an application to the Board for the determination of the standard rent of her premises. She compiled. In June 1978, the Board convened to hear the application. The Board's valuator gave evidence of his valuation based upon a replacement value as at 1977 although he had visited the premises for the purpose of making his valuation on May 29, 1978. The appellant argued that the valuation ought to be based on costs as at 1978 instead. The appellant also objected to the valuation on the ground that she was being made aware of it for the first time on the morning of the Board's hearing. The chairman overruled her objection and ruled against her application for an adjournment so that the appellant's valuator could be called to give evidence, holding that it was the Board's practice that the valuator gives his evidence on the morning of the hearing. The Board confirmed the valuator's assessment. The appellant appealed.

Held: That a valuator called to give evidence by virtue of the Act was not a member of the Board and his evidence, however expert he may be, was subject to assessment and valuation by the Board; the Board should never appear to be abdicating its functions to

decide in favour of its valuator; if it is proposing to rely on the evidence of a valuation as one of the prime sources of fact upon which to determine the standard rent, then it was only fair that the opportunity to familiarize themselves with such evidence and to come before the Board prepared to accept or challenge the valuation; in the instant case, the application for an adjournment in order to bring additional evidence ought to have been granted by the Board, firstly, because the valuator had acted upon patently wrong principles in arriving at his valuation and secondly because natural justice demanded that the landlord be given a reasonable opportunity to present her case.

Per curiam: This court thinks that justice can only be done between the parties who have an interest in proceedings for the determination of the standard rent of controlled premises by a Rent Assessment Board under the Rent Restriction Act, if the parties are *supplied by the Board* with a copy of every inspector's or valuator's report which the Board proposes to make use of in determining such standard rent. Such report should be issued along with the notice of hearing of the application as provided for in Rule 5 of the Rent Assessment Rules.

Appeal allowed. New hearing ordered.

Case referred to:

(1) *E.A. McCaffrie v. Tenants* 16 J.L.R.

R.N.A. Henriques Q.C. and *Norman Wright* for appellant.

ROWE, J.A.: On June 13, 1980, at the conclusion of the arguments we allowed the appeal and ordered that there be a new hearing. We decided further that as the question of procedure raised on the appeal was one of general importance we could put our reasons in writing and this we now do.

At the instant of the tenant, by application dated November 15, 1977, the Rent Assessment Board of the Corporate Area required the landlord/appellant to make an application to the Board for the determination of standard rent of premises 4 Acorn Place, Kingston 8. She complied.

On June 5, 1978, the Board convened to hear the application. The appellant herself an attorney at law, appeared in person. The record discloses that after the appellant was sworn, the Chairman of the Board read her the Inspector's report and asked her questions in relation to that Report. When the appellant completed her testimony, Mr. Cooke, a Realtor for 20 years and a duly appointed valuator for the Rent Assessment Board was called. He gave evidence of his valuation based upon a replacement value as at 1977 although he had visited the premises for purposes of making his valuation on May 29, 1978. There was a dispute between the appellant and the valuator as to the date on which the replacement value should be calculated. In the finally analysis, the valuator did some arithmetic and came up with some figures which surprisingly the Board accepted and acted upon and literally rubber-stamped for the purposes of fixing the standard rent.

Before things got to that sorry pass, the appellant had objected to the method by which the valuator had proceeded and was proceeding to value her premises. She said to the Board:

> "Any valuation which is to take effect for the next five years must take into consideration the result of devaluation, the present cost of cement, paint, steel and other building materials. It is the practice of the Board to present the Inspector's report on the morning of the hearing. Mr. Chairman, I wish to object on that ground because it impedes me in preparing my case for today. I had to seek advice in preparing my valuation."

To this the Chairman replied:

> "It is the practice of the Board that the valuator gives his evidence on the morning of the report. Landlords are allowed to bring their own valuators before the Board to give their own evidence. You being a lawyer, I think you should know that."

The dialogue continued thus:

> "Mrs. Young: I think the valuation should be based on today's value. The valuation I would like to have here, is not available today. I am asking that the matter be adjourned part-heard so that I could call my own valuator.
>
> Chairman: No, I am sorry. I would think that the valuator of this Board is in the position of an expert witness and I wonder if you can tell me of a case of an expert witness who puts his evidence in writing before the matter is heard."

The Rules of Procedure by which Rent Assessment Boards operate were established in 1944 by the Rent Restriction Rules, 1944 published in the Jamaica Gazette Supplement on November 23, 1944.

Rule 11 provides:

> "Subject to the provisions of this Law and these rules the practice and the procedure in an action in the Resident Magistrate's Court shall with the necessary modification apply to proceedings under the Rent Restriction Law, 1944."

Proceedings between party and party in the Resident Magistrate's Court are adversary proceedings in which the Resident Magistrate is given no statutory authority to call witnesses of his own motion to establish facts in support of the cause of one or other party. Amendments to the Rent Restriction Act and especially the provision which now appears in section 14 (1) of the Act appear to modify the similarity between the procedure in the Resident Magistrate's Court and that before the Rent Assessment Board by directing that the valuation officer appointed for the purposes of the Rent Restriction Act and who has carried out investigations as to the value of controlled premises:

> "Shall give, before a Board, evidence in relation to the value of any controlled premises in respect of which the Board wishes to determine the standard rent."

In Miscellaneous Appeal 9/79 *E.A. McCaffrie, landlord of 1A Lincoln Road, Kingston 5*, in which judgement was given by the Court of Appeal on November 2, 1979, the Court proceeded on the basis that the Rent Assessment Board had power of its own motion to call the valuator to give evidence of his valuation. Robinson, P. said:

> "To assist a Board in this aspect of its tasks provision is made for the appointment of valuation officers whose functions shall be, inter alia, to give evidence before a Board in relation to the value of any controlled premises in respect of which the Board wishes to determine the standard rent. See section 14 (1)."

Counsel for the appellant mentioned en passant that there are several pending appeals where it will be argued that the Rent Assessment Boards have no power of their own motion to call valuators to give evidence. This point was not argued before us and as at present advised, we are prepared to follow the attitude adopted by the Court in McCaffries case, supra.

A valuator called to give evidence by virtue of section 14 (1) of the Act is not a member of the Board and his evidence, however expert he may be, is subject to assessment and evaluation by the Board. The Board should never appear to be abdicating its functions to decide in favour of its valuator. If the Board is proposing to rely upon the evidence of the

valuator as one of the prime sources of fact upon which to determine standard rent, then it would seem only fair that the persons who might be affected by that evidence should have a full and adequate opportunity to familiarize themselves with such evidence and to come before the Board prepared to accept or to challenge the valuation.

A landlord who is hearing the quantum of the valuation and the basis of that valuation for the very first time when the valuator goes into the witness box is at a serious disadvantage and should be afforded every opportunity by the Board to cross-examine and to adduce contradictory evidence if he so chooses. In the instant case, the appellant applied for an adjournment to bring additional evidence before the Board. The adjournment ought to have been granted, firstly, because the valuator had acted upon patently wrong principles in arriving at his valuation and secondly because natural justice demand that the landlord be given a reasonable opportunity to present her case.

This Court considers that justice can only be done between the parties who have an interest in proceedings for the determination of the standard rent of controlled premises by a Rent Assessment Board under the Rent Restriction Act , if the parties are *supplied by the Board* with a copy of every inspector's or valuator's report which the Board proposes to make use of in determining such standard rent. Such reports should be issued along with the notice of hearing of the application as provided for in rule 5 of the Rent Assessment Rules, 1944.

MORRIS BURKE *v.* THE COMMISSIONER OF INCOME TAX

[COURT OF APPEAL (Melville, J.A. and Carey and White, JJ.A. (Ag.)) June 23 and 24 and July 31, 1980]

Revenue Law—Income Tax—landlord leasing premises and performing functions of landlord—landlord being landowner—whether leasing of premises constitutes carrying on of business—Income Tax Act, s. 13—Court of Appeal Rules, r. 12.

The taxpayer and his wife owned certain premises in the parish of St. Andrew. The premises were acquired in 1965 and from then until 1977 were let furnished to several tenants. The premises were the subject of several lettings during the years of assessment, which were from 1967 to 1970, inclusive. In 1971 the premises were let on long lease to the University Hospital of the West Indies. During the period of the tenancies the taxpayer was responsible for the maintenance and repairs of the premises, collection of rental and payment of the necessary outgoings. His wife from time to time inspected the premises to effect repairs and to view the state of furniture and grounds. The taxpayer, in computing the chargeable income for the relevant years, claimed an allowance in respect of wear and tear under section 13 of the Income Tax Act on the basis that the parties were carrying on the business of renting premises. The Commissioner of Income Tax refused the claims for depreciation allowance and the taxpayers appeal to the Revenue Court was dismissed, the judge holding that a person performing the ordinary functions of a landlord in respect of premises owned by him was not carrying on a business so as to be entitled to deduction for wear and tear.

On appeal,

Held: that the judge below fell into error when he held that he was bound to follow the case *Hendriks v. Income Tax Assessment Committee* 4 J.L.R. 60 a decision of the former Court of Appeal; it is not enough to say that the letting of one's own property does not amount to carrying on business because what was done was looking after an investment; all the circumstances must be considered and at the end of the day the Court must decide whether the acts performed may fairly be said to be carrying on of a business; a landlord is invariably both a landowner and a landlord; as a landlord, he is involved in a commercial exercise; as a landowner he is concerned with the maintenance and upkeep of his property, whether or not it was let; the relationship of landlord and tenant creates legal obligations vis-à-vis both the tenant and the property; in the instant case, the only inference which could reasonably be drawn from the facts was that the taxpayer was carrying on the business of letting the property and there is no legal principle that a landlord who lets his property is not carrying on business.

Appeal allowed. Claim upheld.

Cases referred to:

(1) *Hendriks v. Income Tax Assessment Committee* 4 (1941) J.L.R. 60

(2) *Hanover Agencies v. Income Tax Commissioner* (1964) 7 W.I.R. 200, (1964) 9 J.L.R. 29.

(3) *American Leaf Blending Co. SDN. BHD. v. Director-General of Inland Revenue* [1979] A.C. 676; [1978] 3 W.L.R. 985; [1978] 3 All E.R. 1185.

Dr. L.G. Barnett for the appellant.

H. Hamilton and *L. Brown* for the respondent.

CAREY, J.A. (Ag.): This is a taxpayer's appeal against a judgement of Marsh J. in the Revenue Court dated 28th July 1977 whereby he upheld a decision of the Commissioner of Income Tax refusing claims for depreciation allowances under the Income Tax Act in respect of years of assessment 1967-70 inclusive.

The facts which were not disputed in the court below, can be shortly stated. The taxpayer and his wife owned certain premises at 12 Violet Avenue, Mona, St. Andrew. The premises had been acquired in 1965 and from that time until 1971 were let furnished to several tenants. In that year, a lease agreement was concluded with U.H.W.I. so that the premises have since been used as a residence for doctors on the staff of that hospital. The taxpayer during the period of the tenancy was responsible for the maintenance and repairs of the premises, collected rental and paid the necessary outgoings. His wife from time to time inspected the premises to effect repairs and to view the state of furniture and grounds. The taxpayer in compiling the chargeable income for the relevant years, claimed an allowance in respect of wear and tear under section 13 (1) (n) of the Income Tax Act on the basis that the parties were carrying on the business of renting premises.

It was argued on behalf of the taxpayer that the learned judge by holding that where a person is performing the ordinary functions of a landlord, he is by virtue of that fact, not carrying on a business or trade within the meaning of section 13 (1) (n) of the Act, erred in law and that the only reasonable inference from the facts was that the appellant's wife was carrying on a business.

The learned judge, who is, of course, very experienced in these matters came to the conclusion that the formulation as appears in the head note to *Hendriks v. IT Assessment Committee* 4 J.L.R. 60 that: "a person performing the ordinary functions of a landlord in respect of premises owned by him is not carrying on a business in respect of those premises so as to be entitled to a deduction for wear and tear under section 9 (3) of Cap. 201 as amended by section 5 of Law 55 of 1939" must be accepted as good law and as an