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excessive in the circumstances, and to reduce them. This is a society in which the supreme authority has clearly indicated that severity of sentences is the approved policy in dealing with crimes of violence. This policy is discernible from those statutes which provide for mandatory minimum sentences. This court cannot ignore the policy of the government as described in its legislation. Severity of sentence is the means whereby the community is to be protected. Persons who use firearms in the circumstances in which this applicant used a firearm—he was found guilty of shooting with intent to murder—are to be kept away from the general public for as long as possible.

This court is not oblivious to the more liberal principles which relate to crime as a whole. The essential questions are: "Do the facilities exist in this country, and is there the climate for the carrying out of these liberal principles?" The questions answer themselves. In the circumstance of this particular case, at this particular time, we cannot say that the sentences are manifestly excessive. Consequently, the sentences shall remain. The application is refused.

SHELLEY, J.A.: Sentences to run from July 25, 1969.

Application refused.

JAMAICA PRE-MIX, LTD. *v.* MICHAEL MEIKLE

[COURT OF APPEAL (Shelley, Eccleston and Edun, JJ.A.), October 2, 1970]

Landlord and Tenant—Tenancy agreement—Agreement for six months—Agreement to terminate tenancy at the end of the second month—Tenant failing to hand over keys at the end of two months—Whether landlord entitled to rent for period during which tenant retained keys.

The respondent claimed against the appellant to recover monies due and owing for rental of a house in the following circumstances. The appellant rented a house from the respondent for a period of six months from April 1, 1967. The appellant never actually took physical possession but was let into possession by the respondent who handed over the keys for the house at the commencement of the tenancy on April 1. Some time in May, 1967, the respondent and the appellant agreed that the tenancy should come to an end on May 31, 1967. The appellant had made an initial payment covering the rental of the house for April and May, 1967. The appellant did not hand over the keys to the respondent at the end of May. Indeed, the respondent did not receive the keys until November 7, 1967. In a letter dated July 6, 1967 the respondent reminded the appellant that the keys had not yet been handed over and pointed out "that many people were interested in the house to rent it but from the mere fact that the keys are not in my possession I had to turn them down." There was no dispute as to the foregoing state of facts and the resident magistrate found in favour of the respondent and entered judgment in his favour for the full period of six months holding that the appellant was liable as a result of not having handed over the keys at the end of May. On appeal it was contended on behalf of the appellant that by reason of the agreement to terminate the tenancy at the end of May the retention of the keys by the appellant was a mere accident, and that there was no implied intention to continue the use and occupation of the house; further, there was no evidence that the return of the keys was a term of the agreement reached between the parties in May.

Held: that on the undisputed facts before the resident magistrate two questions arose, namely, did the parties agree to terminate the tenancy agreement at the end of May and

so terminate the tenancy, and, was the termination of the tenancy at the end of May conditioned upon the return of the keys by the appellant? The answer to the first question was clearly in the affirmative; and the letter of July 6, 1967, by the respondent to the appellant made it equally clear that the answer to the second question was that the respondent had at all material times regarded the tenancy as having come to an end on May 31, 1967. In these circumstances the resident magistrate was wrong in allowing the respondent's claim for rental for the full period of six months.

Appeal allowed. Judgment varied.

Cases referred to:

(1) *Morris* v. *Barron*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34.
(2) *Gray* v. *Bompas* (1862), 11 C.B.N.S. 520; 5 L.T. 841.
(3) *Wildbor* v. *Rainforth* (1828), 8 B. & C. 4.
(4) *Lacey* v. *Lear* (1802), Peake Add. Cas. 210.

Appeal from a decision of a resident magistrate for the Parish of Saint Elizabeth in an action for monies due and owing under a tenancy agreement.

H. G. Edwards, Q.C., and *H. D. Carberry* for the appellant.
H. Small and *J. Leo Rhynie* for the respondent.

SHELLEY, J.A.: The plaintiff's claim against the defendant was to recover the sum of £240 being monies due and owing for rental of premises situated at Goshen in the parish of St. Elizabeth for the period June 1, 1967, to November 30, 1967, at £40 per month. The action was tried by the learned resident magistrate for the parish of St. Elizabeth who gave judgment for the plaintiff for the full amount of the claim. From that judgment the defendant appeals.

The facts were never in issue. Mr. B. Ricketts, counsel for the plaintiff at the trial, stated the facts as follows:

"The plaintiff agreed to provide a house at Goshen in the parish of St. Elizabeth and to lease the same to the defendant as from 1st April 1967 and for a period of six months. The defendant agreed to lease the said house and actually executed a lease which I now produce and which, with the consent of the solicitor for the defendant, is tendered and admitted as exhibit 1. The lease is not signed by the defendant company but was signed by an agent for the defendant company and subsequently ratified by the defendant company. The defendant never actually took physical possession but were let into possession by the plaintiff's handing the keys over to them on the 1st of April 1967.

On a date in May 1967 there was a conversation between plaintiff and a Mr. Andrew Duncan, a director of the defendant company during which conversation the director suggested and the plaintiff agreed that the tenancy should terminate at the end of May 1967. The defendant company had made an initial payment of £80 covering rent for the period of April and May 1967 on 1st April, 1967. The plaintiff did not receive the keys at the end of May and, in fact, did not receive them until the 7th of November 1967 although they were demanded verbally from the defendant company and in a letter dated 6th July 1967. This is the letter produced by the defendant solicitor and tendered by counsel for the plaintiff as exhibit 2.

On the 7th November 1967 the keys were returned to the plaintiff and on that date the defendant authorised the plaintiff that if the keys which were handed to him were not the keys of the house, the plaintiff was to have a new set of keys made or new locks put on at the defendant company's expense. The letter from the defendant company to the plaintiff tendered by consent as exhibit 3. Rent was to be paid in advance."

The notes of evidence disclose that Mr. K. D. McPherson for the defendant company totally agreed with the facts as above stated by counsel for the plaintiff and stated there was no issue as to the facts.

Exhibit 2 is as follows:

6th July, 1967.

Jamaica Pre-Mix Ltd.,
31 Molynes Road,
Kingston 10.

Dear Sir:

Re: Rental of house at Goshen, St. Elizabeth.

I the undersigned would like to draw to your attention that the keys for the above house have not been handed over to me up to the present date.

You will realize, then, that since the keys are not in my possession you are wholly responsible for the rental that is past due. I would also like to point out to you that many people is interested in the house to rent it but from the mere fact that the keys are not in my possession I had to turn them down.

Could you please investigate the matter as I am anxiously awaiting an early reply.

I am, Yours truly,
Michael Meikle.

On that letter the following notes appear: "Received July 10, 1967, A. Duncan, Jr.," "Mrs. Kong please return keys. Thanks."

Exhibit 3 reads as follows:

Jamaica Pre-Mix Ltd.,
31 Molynes Road,
Kingston 10.
November 7, 1967.

Mr. Michael Meikle,
Butupt,
Watson's Hill P. O.

Dear Mr. Meikle:

This will confirm our discussion today with reference to your house at Goshen, St. Elizabeth.

You are hereby authorized to either have new keys made for your house which we lost or have new locks installed at our expense, whichever is the more practical.

Very truly yours,
Thomas A. Slattery.

P.S. Please advise us whether the ring containing 16 keys which I gave you today are in fact the ones to your house.

Mr. Edwards raised the doctrine *interesse termini*. In my view it does not apply for the simple reason that it operates where there is a lease and, as Mr. Small properly conceded, the document in this case—that is the agreement—is not a deed and, therefore, fails to have the legal effect of a lease, having regard to the provisions of s. 4 of Cap. 313, the Property (Transfer) Law.

Mr. Edwards further submitted that all we have in this case is an agreement in writing which is an agreement to execute a lease, a contract in writing which can be rescinded orally and which was, in fact, terminated by the agreement reached between the parties in May and so from that date no liability was fixed in the defendant under the original agreement, see *Morris* v. *Barron* (1).

As to the retention of the keys, Mr. Edwards argued that in this case both parties agreed that there was no actual possession of the premises and, as in *Gray* v. *Bompas* (2), the retention of the keys was a mere accident, that there was agreement to determine the contract in the instant case and that there was no implied intention to continue use and occupation; therefore the keeping of the keys cannot be evidence of intention to retain use and occupation and that there was no evidence that the return of the keys was a term of the agreement made in May.

He conceded that had the plaintiff within a reasonable time replaced the keys or the locks and the keys, if necessary, he could have recovered the price of the replacements from the defendant.

Mr. Small made it clear that whilst he would contend that the judgment was right he could not support the reasons given by the learned resident magistrate. He pointed out that the Property (Transfer) Law, Cap. 313, was not brought to the resident magistrate's attention. He submitted that whereas the document has not the legal effect of a lease, it certainly is an agreement to let the premises for a term of six months, the rental being computed on a monthly basis, it is an agreement to create a half-yearly tenancy. He contended that the facts stated by counsel for the plaintiff indicate that, pursuant to that agreement, the plaintiff let the defendant into possession and the parties, therefore, assumed a landlord and tenant relationship; that this being merely a tenancy agreement the only way the parties could terminate it was by rescission or by notice to quit, pursuant to provisions in the agreement. The parties subsequently entered into an agreement whereby the tenancy should be brought to an end and he contended that to bring the tenancy to an end the defendant must deliver up to the landlord that which he has tenanted and until he actually delivers up that which he has tenanted, all that they have done is agreed on conditions whereby the tenancy would be terminated. In order that there should be a rescission the parties must be put back into their previous position. Rescission operates to terminate the contractual obligation by which the parties have been bound. When the landlord handed over the keys to the tenant he was acting under the terms of the tenancy and the tenant was accepting the keys pursuant to his right to be in occupation for six months. If the agreement made in May was that the parties should rescind the contract, then in order for the tenant to put himself in a position where he could say he has done all that he was bound to do to allow the landlord to have back the right to occupation, the tenant must do so by returning the keys which he has received or by putting the landlord in a position where he can resume occupation.

Mr. Small contended that the letter, exhibit 2, and the reply thereto exhibit, 3 must be some guide in determining what was the agreement between the parties. The agreed facts, he says, did not make it clear whether the oral conversation was before or after that letter of July 6. This letter makes it clear, however, that after the end of May the plaintiff was treating the tenancy agreement as still being in force and was pointing out to the defendant that any oral agreement they had to rescind the written agreement only becomes effective if possession is delivered to the plaintiff. The plaintiff was saying in effect: Because you have not put me back into possession you continue to be liable under the tenancy which we had.

I cannot help wondering, if there was an agreement that the contract would remain in force if the keys were not delivered, why then did the plaintiff not exercise his right of re-entry under cl. 5, para. 2 of the contract, on the ground of rent remaining unpaid, instead of waiting until November 7 for the return of the keys. Clause 5, para. 2 states, *inter alia*: "If the rent hereby reserved or any part thereof shall remain unpaid for 15 days after it has become payable (whether formally demanded or not) . . . it shall be lawful for the landlord at any time thereafter to re-enter upon the house and thereupon this lease shall absolutely determine . . ." I shall return to this.

Mr. Small said that by using the phrase "You are hereby authorized" in his letter replying to the plaintiff's, the defendant is admitting that the tenancy agreement is still in force. Only on the basis of acceptance of the fact that the defendant continued to occupy under the tenancy agreement could he authorise the landlord to do anything.

Perhaps it is convenient here to say that Mr. Small also submitted that the agreement of May is not a legally enforceable agreement because it is not supported by consideration. But is the defendant trying to enforce the agreement? It is the plaintiff's counsel who has raised it in his statement of the facts as part of the facts which had to be stated. Be that as it may, some consideration did flow from the defendant in that the company was giving up its right to possession and occupation of the premises.

It seems to me that there are two questions to be answered. Firstly, did the parties

agree to terminate the written contract at the end of May and so terminate the tenancy? Clearly the answer to that question is yes. That is clearly stated in the agreed facts, where Mr. Ricketts said: "On a date in May 1967 there was a conversation between the plaintiff and a Mr. Duncan the director of the defendant company during which conversation the director suggested and the plaintiff agreed that the tenancy should terminate at the end of May 1967."

I therefore go on to the second question: was the termination of the tenancy at the end of May conditioned upon the return of the keys by the defendant? There is no specific statement on the point either in the agreed facts or in the exhibits tendered in evidence. But, as I said before, Mr. Small contended that this condition may be gleaned from the letter of the plaintiff of July 6, 1967 and the defendant company's reply of November 7, 1967. I, for my part, can see nothing in the plaintiff's letter of July 6 which would cause me to arrive at that conclusion. It is not a claim for rent due and owing, it is a complaint that the keys have not been returned. Indeed, the paragraph which runs: "I would also like to point out to you that many people is interested in the house to rent it but from the mere fact that the keys are not in my possession I have to turn them down", seems to indicate that the rental of the house was being canvassed by the plaintiff which, in my view, is an indication that he regarded the tenancy as being at an end.

I do not regard the defendant's letter of November 7, as saying: Since we are in possession of your premises we authorise you to have new keys made. The defendant, in my view, is merely saying: I am admitting liability for replacing your keys or locks, as the case may be. That admission is, of course, qualified by the postscript which asks that the company be informed whether the ring containing 16 keys handed over to the plaintiff that very day were, in fact, the keys for his house. I should have thought that had it been the intention of the parties that the agreement would only come to an end at the end of May if the keys were returned to the plaintiff the letter of July 6 would have been a clear demand for rent or at least a threat of re-entry by the landlord under the provisions of cl. 5. para. 2 of the agreement for non-payment of rent.

Upon this evidence, I do not think it possible to say that the return of the keys was a condition of the agreement. It seems to me that the first agreement was at an end and that the failure to return the keys was a mere lapse on the part of the defendant. Although I am unable to say that the return of the keys was a condition of the agreement to terminate the tenancy, clearly the plaintiff was entitled to have back his keys; it was the defendant's duty to return them to him. Because of the defendant's negligence in his failure to return them the plaintiff was deprived of the immediate use of his property, he suffered loss, he was unable to let it. What then, ought the plaintiff to have done in the circumstances? A landlord has a right to re-enter where the tenant has abandoned possession, (see *Wildbor* v. *Rainforth* (3), also *Lacey* v. *Lear* (4)) *a fortiori* where the tenancy has been terminated by mutual agreement. Once the tenant has no intention of returning—indeed in this case the tenant never did actually occupy—the landlord has a right, if he can peaceably do so, to enter and take possession of the premises. Once the tenancy has been brought to an end, as I hold it was in this case, the re-entry by the landlord would merely be the exercise of his right of property. It seems to me then, that the plaintiff in this case ought to have taken steps to enter and replace the locks and keys within a reasonable time after the end of May, 1967, and so mitigate his loss. Having done this he would have been entitled to recover from the defendant the cost of replacing the locks and keys. As it turned out, there was no need to replace them because the keys handed over by the defendant in November happened to have been the right keys. What then is the plaintiff entitled to? He was awarded the full claim of £240 on the basis of a continuation of the tenancy; both the amount and the ground of the award are, in my view, erroneous. Although the claim as set out in the first paragraph of this judgment was wrongly worded, justice must be done between the parties. I think the plaintiff is entitled to a sum equivalent to the rental lost over what would be a reasonable time, say one month, to do the following: make his request of the defendant for his keys, allow the defendant a reasonable time in which to produce

them, if not produced, take steps to replace them and get a tenant for his premises. I would allow the appeal and reduce the sum awarded to the plaintiff by the learned resident magistrate to the sum of $80 with the appropriate costs and I would allow the defendant costs of this appeal.

ECCLESTON, J.A.: I agree.

EDUN, J.A.: I agree.

SHELLEY, J.A.: The appeal is allowed, the judgment is set aside and judgment is ordered to be entered for the plaintiff for $80 with costs in the court below to be taxed or agreed; costs of this appeal $30 to the appellant.

Appeal allowed.

R. *v.* BARRETT

[COURT OF APPEAL (Shelley, Fox and Edun, JJ.A.), October 8, 9, 1970]

Criminal Law—Evidence—Statement given by witness to police—Whether defence counsel entitled to see statement.

Where there is no suggestion that there is any discrepancy between the evidence which a witness has given in court and a statement given to the police and counsel for the Crown does not make any offer of the statement to the defence the trial judge is entitled to assume that there are no discrepancies or inconsistencies therein and to refuse to order the production of the statement. If the defence is unable to accept the assumption which stems from the fact that a particular statement has not been made available to it by the prosecution, it will become the duty of counsel (for the defence) to invite the judge to exercise the discretionary power which is given him by the proviso to s. 18 of the Evidence Law, Cap. 118 [J.], by examining the statement himself and directing that it be used in such manner as the justice of the case demands.

Application refused.

Cases referred to:

(1) *R.* v. *Clarke* (1930), 22 Cr. App. Rep. 58, C.C.A.
(2) *R.* v. *Hall* (1958), 43 Cr. App. Rep. 29.
(3) *R.* v. *Purvis and Hughes* (1968), 13 W.I.R. 507.

Application for leave to appeal against conviction in the Home Circuit Court.

H. G. Edwards, Q.C., and *H. Harris* for the applicant.
P. Robinson for the Crown.

SHELLEY, J.A., delivered the judgment of the court: Six grounds have been argued in support of this application for leave to appeal from conviction in the Home Circuit Court on April 29, 1970, for robbery with aggravation and rape. We find no merit in any of them. We make a short comment on one of those grounds.

It was contended that the learned trial judge erred in refusing to allow counsel for the defence to see the statement of a witness who had identified the applicant at an identification parade held ten days after the commission of the