THE JAMAICA LAW REPORTS

VOLUME 25

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

1997

he did not know before, and whom he testified at the trial was the applicant was about 1 foot from him. The applicant said to him "come out boy". As he emerged, the gun was pointed in his face. The applicant asked him for 'the money' and to the reply 'what money' said, "give me the money before I kill you". In response to the threat that he might be killed, the complainant revealed that he had money in the 'pocket' of the van. At this point he saw two other men jump from the bank at the side of the road. Those men went into the van, searched the glove compartment of the van while the complainant was being held by the applicant with the gun pointed to the back of his neck. This done, the two men made their escape. The complainant was then ordered back into the van after which the applicant also made his escape. The complainant then discovered that US$1,040.00 had been taken from the glove compartment.

He went to the Stony Hill Police Station and made a report. He afterwards went to the house of his employer, made a report to his employer, who returned with him to the Stony Hill Police Station. He subsequently went with Ag. Cpl. Mellis in search of his assailants. This took them to a home which Mr. Randall entered. On entering the home, he saw his cousin Rennie Randall (who had been with him at the time of the robbery) together with another man and in a spontaneous reaction he said the following words, "Jesus Christ, this is the man that just rob me". As he said so, the applicant who was the man to whom he was referring, ran and held Ag. Cpl. Mellis and said "Jesus Christ, no kill me sir, I will tell you how it go". The applicant was then taken into custody, and subsequently arrested and charged for the offenses.

Mr. Chuck also advanced arguments to support the application for leave to appeal against sentence. He submitted that the sentence of ten years passed on the applicant in relation to Count 1 (illegal possession of firearm) was manifestly excessive and not in conformity with the sentence of 5 years which he maintained is the usual sentence passed by other judges for the same offence. The court cannot agree that predetermined sentences should be set for particular offenses, as an appropriate sentence must relate to the circumstances of the offence and also have regard to the antecedents of the accused. The court must therefore look to see if the sentence imposed comes within the usual range which relates to a particular offence.

We find that in this case, the circumstances are such that the sentence imposed by the learned trial judge far from being manifestly excessive, was indeed reasonable. Therefore we are not disposed to interfere with it. For these reasons, the application for leave to appeal is refused. The court orders however that the sentence should run from the date of conviction.

PROPERTY MANAGEMENT AND SERVICES LTD. *v.* NICKI VALENTINE AND JOHN ELLIOTT

[COURT OF APPEAL (Carey, P. (Ag.), Forte and Morgan, JJ.A.) September 29, 1988]

Landlord and Tenant – Premises rented – Whether inclusive of water rate – Transfer of landord'sliability to tenant – Alteration of rental – Rent Restriction Act, s. 20(2).

Both respondents rented premises from the appellant. The appellant claimed that the tenancy agreement between himself and his tenants excluded water rates, while they on the other hand said that this was not so. The respondents said that they were told by the appellant that the National Water Commission had increased the rate and that they should pay an extra

$20.00 per month for water but they had refused to. The Resident Magistrate found that there was no agreement that the rent excluded an amount for water rates and gave judgment in favour of the respondents. The landlord appealed.

Held: (i) that section 20(2) of the Rent Restriction Act provides in effect that the transfer to the tenant of a liability hitherto borne by the landlord should be treated as an alteration of the rental if less favourable to the tenant and is deemed to be an increase of rent;

(ii) that the issue of whether or not the rent excluded an amount for water was a question of fact for the Resident Magistrate and his findings that it was a liability hitherto borne by the landlord and was to be deemed to be an increase of rent is consistent with the evidence.

Appeal dismissed.

No case referred to.

Appeal against the judgment of the Resident Magistrate dismissing landlord's claim for tenant to pay water rates.

Gerald Whyte, Managing Director for defendant/appellants.

No appearance for 1st respondent.

Lance Hylton for 2nd respondent.

MORGAN, J.A.: This is an appeal against the judgement of the Resident Magistrate, St. Andrew on the 20th of January, 1988. The plaintiff's claim was in respect of water rates due from both defendants for the period January 1986 to May 1987. Very briefly, the facts are, that both defendants rented premises from the plaintiff, one in July, the other in August 1985 for $500.00 and $450.00 per month respectively. Both said that the rental included water rates. The plaintiff said that that was not so. Inasmuch as their rentals commenced in 1985, it is observed that they have been sued for arrears commencing only from January 1986. The defendants said that they were told by the plaintiff that the National Water Commission had increased the rate as at January and that they should pay an extra $20.00 per month for water. They refused.

Section 20(2) of the Rent Restriction Act says in effect that the transfer to the tenant of a liability hitherto borne by the landlord shall be treated as an alteration of the rental if less favourable to the tenant and is deemed to be an increase of rent. The learned Resident Magistrate found that there was no agreement that the rent excluded an amount for water.

The issue was a question of fact for the learned Resident Magistrate and his findings that it was a liability hitherto borne by the landlord and was deemed to be an increase of rent is consistent with the evidence. In these circumstances, I would dismiss the appeal.

FORTE, J.A.: I listened to the judgement of my learned sister and I agree with her reasoning and the conclusions that she has arrived at. I have nothing further to add.

CAREY, P. (Ag.): I propose to add a postscript mainly because the appellant in this case chose to appear without legal representation and it appears that this is the beginning of a series of trials which involve the same point. The notes of the Resident Magistrate show -

> "Plaintiff and defendants agreed that these two cases should be test cases and will abide by outcome of these two trials."

Morgan, J.A., has made it quite clear that this whole matter is one of fact, that is, for the learned Resident Magistrate to consider very carefully the demeanor of the persons who gave evidence before him. As was pointed out, on one hand the landlord was saying that the tenancy agreement between himself and his tenants excluded water rates while they on the other hand were saying the rental which they were required to pay, included water rates. That conflict was resolved in one way and this Court, in the light of the evidence before us and bearing in

mind that we must give full effect to the fact that the Resident Magistrate both heard and saw the witnesses, I have no reason to disagree with the conclusion at which the learned Resident Magistrate arrived.

Insofar as Section 20(2) of the Act is concerned, I agree entirely with what my Lady has said and I have nothing further to add.

In the result, the appeal is dismissed, the judgement of the Court below is affirmed, and the costs of the appeal will be fixed at $250.00.

MANTECA WAREHOUSE LIMITED *v.* ANTHONY CHIN-QUE, EDNA CHANNER, ALLAN LOGAN, OWEN NELSON AND ADOLPH SILVERA

[COURT OF APPEAL (Carey, P., (Ag.), Forte and Downer, JJ.A.) October 3, 1988]

Civil Procedure – Striking out defence for failure to comply with time constraint – Whether proper exercise of discretion.

In an action for water rates, the Master made an interlocutory order that the appellant deliver an affidavit of documents and for inspection. An application by the appellant for extension of time was granted but only on condition that he paid $14,000.00 into court. The appellant failed to comply with the order of the Master who directed, inter alia, that the defence be struck out for disobedience of the order of the court. The appellant's summons to vacate the order was also dismissed by the Master. On appeal:

Held: (i) that basis on which the court can interfere with the order of the Master, is where the court is of the view that the order could result in an injustice;

(ii) no attempt has ever been made to have the defence struck out which is positive proof that there is a serious issue to be tried;

(iii) in order that a litigant should be driven from the judgment seat, some very good reason should be shown to allow that to take place. Delay by itself is not enough;

(iv) it would be a manifest injustice if the defendant who had paid money into court pursuant to the claim as costs should not be allowed to have his day in court.

Appeal allowed. Order of master set aside.

No case referred to.

D. M. Muirhead, Q.C. and *J. Kirlew, Q.C.* for the appellant.

Gordon Robinson for the respondent.

CAREY, P. (Ag.): This is an appeal from an order made by Master Vanderpump on the 8th of May, 1987 whereby she dismissed a Summons filed on behalf of the defendant to vacate an order which she herself had made by default some time previously. In that default order she directed inter alia that the defence filed be struck out for disobedience of the order of the Court. There had been an order for delivery of an affidavit of documents and for inspection made under the Summons for Directions.

It was argued before us by Mr. Muirhead that the basis on which this Court could interfere with the order of the learned Master was, where the Court was of the view that the order made, would result in an injustice. Mr. Gordon Robinson did not dissent from that view of the law which I think to be right.

Mr. Gordon Robinson gave a procedural history of the matters filed in the action. What that history demonstrated was, that there was a great deal of delay in prosecuting the defence over time. It also showed that there was a failure on the part of the defendant to comply with orders of the Court made to speed up the trial and, indeed, there were occasions when the defence was required to pray for extensions of time which in the event were granted but with stringent conditions. I think I should mention one of these. It required payment of large sums of money for water rates which was the subject of the action and we understand this morning that some $14,000 had been paid into Court by the defendant.

What has impressed me in this matter, in favour of interfering with the Master's order, is that no attempt has ever been made to have the defence struck out, which is proof positive that there is a serious issue to be tried. In order that a litigant should be driven from the judgement seat, some very good reasons should be shown to allow that to take place. Delay by itself, and that has been demonstrated here, is not in my judgement, enough. Speaking entirely for myself, it would be a manifest injustice if this defendant who has, albeit belatedly and under constraint, paid money into Court pursuant to the claim as costs should not be allowed to have his day in Court.

For myself, I would be disposed to order that the appeal be allowed and the order of the Master set aside. In my view, she did not, in the proper exercise of her discretion, balance against the undoubted delay, the payment of $14,000 as costs into court.

FORTE, J.A.: I too would allow the appeal for the reasons so succinctly stated by the learned President (acting).

I add only the opinion that where the issues raised by the defendant in his defence is a prima facie valid defence to the action, then careful scrutiny ought to be applied to the exercise of the discretion to strike out the action for some procedural wrong.

I agree that in this case an injustice would occur if the order was allowed to stand. For these reasons, as I said before, I would also allow the appeal.

DOWNER, J.A.: The important issue to be tried in this case is who is to pay the water rates. The Master made an Order, which would result in shutting out the defendants from adducing their defence and Mr. Gordon Robinson in support of that Order by the Master gave the detailed account of the dilatory tactics of the defendant. But this is a civil case and one very important fact which was not mentioned by Mr. Gordon Robinson, for the respondents was that the defendant had paid some $14,000 into Court and this was a very good indication that the defendant took the case seriously and was interested in the outcome of the hearing on merits.

Consequently, I would interfere with the Master's discretion on the grounds that it would be a manifest injustice if the defendant were not to have his day in Court. I therefore concur that the Master's Order should be set aside.

CAREY, P. (Ag.): It is ordered that the defendant file an affidavit of documents relating to the issues raised in defence and answer to further and better particulars within seven (7) days hereof and it is further ordered that there be inspection of documents within seven days of the delivery of the affidavit documents. It is further ordered that the case be restored to the Cause List and there will be an Order for speedy trial of the action.

The respondents are entitled to the costs of this appeal to be taxed if not agreed.