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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 113 of 1969

BEFORE: The Hon. Mr. Justice Shelley (presiding)
The Hon. Mr. Justice Eccleston
The Hon. Mr. Justice Fox

27th and 28th May, 1st and
4th June, 1970

R. v. RONALD WILLIAMS

Mr. Richard Small appeared for the appellant.
Mrs. R. Walcott for the Crown.

SHELLEY, J.A. :

The appellant was convicted of robbery with aggravation in the Home Circuit Court on the 3rd of October, 1969. He was sentenced to five years' imprisonment, the minimum provided by Law 42 of 1963, and four lashes. He was granted leave to appeal against sentence.

One Pauline Rainford was going home from her work in the early evening of the 20th of September, 1968. As she reached a bridge in the area of Rousseau Road, St.Andrew, six boys came from the bridge, surrounded her, menaced her with knives and took away her handbag. Five of the boys went away but the sixth, the appellant, stayed on and was violent to the girl. The fact that he stayed on to use violence to her gave her an opportunity to be able to identify him later on. She went home, made a report to her father and described the appellant; her father went out with a car, fetched him back and she immediately identified him as one of the six and the one who had used violence to her.

Mr. Richard Small, for the appellant, has contended

that the sentence imposed was manifestly excessive in all the circumstances of the case. There are two limbs to his argument. The first is based upon section 29, sub-section 2 of Cap.189, the Juveniles Law which provides :

> " A Juvenile shall not be sentenced to penal servitude or to imprisonment whether with or without hard labour for any offence or be committed to prison in default of payment of any fine, damages or costs."

together with section 20 sub-section 7 of the Jamaica Constitution Order in Council 1962, Second Schedule, which provides :

> " No person shall be held to be guilty of a criminal offence on account of any act or omission which did not at the time it took place constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed."

The appellant was born on the 14th of February, 1952; the date of the offence, as I said before, was the 20th of September, 1968, so that at that time the appellant was 16 years and 7 months old. Following the ratio decidendi in Maloney Gordon v. R., Privy Council Appeal No. 15 of 1969, delivered on the 1st of December, 1969, Mr. Small has submitted that at the time when this offence was committed the appellant was a juvenile, i.e. under the age of 17 years (S.2, Cap.189), and could not then have been sentenced to imprisonment and lashes; imprisonment and lashes are severer in degree and description than the maximum penalty which might have been imposed for that offence under the Juveniles Law at the time when the offence was committed.

Maloney Gordon was convicted of murder and was sentenced to death. Section 29(1) of the Juveniles Law, Cap.189, provides that :

"Sentence of death shall not be pronounced on or recorded against a person under the age of 18 years...."

Lord Hodson in delivering the reasons for report of the Lords of the Judicial Committee of the Privy Council quoted section 29(1), Cap. 189, and also section 20(7) of the Jamaica Constitution Order in Council, 1962,Second Schedule, and went on to make a statement that "there was thus no jurisdiction in the court to pass sentence of death upon the accused if he was under 18 years at the time of the commission of the offence". There is no reasoning to support that statement. The learned judge who presided at the trial seemed to have taken that view. The learned Director of Public Prosecutions seemed to have assumed that view to be correct and it seems not to have been challenged anywhere. With the greatest of respect for the opinion of the noble and learned lords, we doubt the correctness of it. The maximum penalty which might have been imposed for the offence of robbery with aggravation at the time when the appellant committed his offence was 21 years imprisonment and flogging. The provisions of the Juveniles Law setting out methods of dealing with juvenile offenders apply to persons who are juveniles when they are convicted, so do the provisions of section 29 placing restrictions on punishment of juveniles. For purposes of the Juveniles Law the decisive date is the date of conviction, not the date of offence. The fact that a person is under 17 years at the date of offence does not entitle him to any advantages offered by the provisions of the Juveniles Law to convicted juveniles. We do not think that the provisions of section 20(7) of the Second Schedule of the Jamaica Constitution Order quoted above, are in any way related to the age of the

offender at the time when the offence is committed. The section in our view deals with the penalty for the offence and is not in any way affected by the provisions of section 29(2) of the Juveniles Law, Cap.189.

The second limb of Mr. Small's argument rests on the provisions of section 57(3) of Cap.212 of the Larceny Law, which provides that :

> " on conviction of a felony or misdemeanour punishable under this law, the court instead of or in addition to any other punishment which may lawfully be imposed for the offence -
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> (a) may fine the offender; or
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> (b) may require the offender to enter into his own recognizances, with or without sureties, for keeping the peace and being of good behaviour."

Mr. Small contends that the suitable sentence in the circumstances of this case is not imprisonment for five years as prescribed by the amendment to section 34(1) of the Larceny Law by the Prevention of Crimes (Special Provisions) Act, 1963, but that the suitable sentence would be a sentence under the provisions of section 57(3) of the Larceny Law, Cap. 212.

In R. v. Brown, 7 WIR (47) the Court of Appeal held that the provisions of section 57(3) of the Larceny Law, Cap.212, are not affected by the amendment to section 34(1). Either of the alternatives authorised by section 57(3) may be ordered in lieu of or in addition to the sentence authorised by section 34(1), thus the court may order the offender to pay a fine or enter into recognizances to keep the peace in addition to the punishment which it imposed under section 34(1) or it may refrain from imposing any punishment under section 34(1) and make an order under section 57(3).

At page 49 Lewis, J.A., said -

" In its consideration of this problem the Court has borne in mind that it is now well established that the object of punishment is not only to deter but to reform. The provisions of section 57(3) of the Larceny Law and the Probation of Offenders Law were enacted by the Legislature with the purpose of ameliorating the harsher penalty prescribed in earlier laws in the light of the modern concept that wherever possible offenders should be given an opportunity to make good. They give effect to the view that degrading forms of punishment such as long terms of imprisonment with hard labour and flogging, may have a detrimental effect on the character of prisoners far exceeding its deterrent effect and should as far as possible be avoided in the case of first offenders."

In the instant case the learned trial judge had before him evidence of the antecedents of the appellant given by a policeman. We have had the further advantage of a report and evidence by a trained Probation Officer. The appellant is illiterate. He lives with a mother, who according to the Probation Officer, lacks the discipline and responsibility to offer the type of guidance he needs. His father's whereabouts are unknown. His mother appears to live in deplorably poor conditions. The area where she lives is untidy and insanitary, and her home appears to be inadequate for a fairly young mother and an adolescent son. The lad is unemployed. He has no strength of character and is easily swayed. This is his first conviction.

It seems clear to us that in this case imprisonment with hard labour and flogging may have a detrimental effect upon the character of the appellant, far exceeding any deterrent effect.

We have elected not to follow the decision in the Maloney Gordon case, but we feel nevertheless that this is an appropriate case for treatment under section 57(3) of the Larceny Law, Cap.212. His conduct was in the learned trial judge's view abominable, but this is not surprising having regard to his background - one must not expect a silken purse from a sow's ear. We think that the society which permitted him to develop the sort of character from which his present predicament has resulted, ought not, even at this late stage, to miss an opportunity to direct him in the right way rather than to destroy him with a long term of imprisonment amongst hardened criminals, and to debase his body by beating him. We are in no position to say whether a ~~maximum~~ minimum sentence of imprisonment fixed by law can be said to be manifestly excessive, because we have not heard arguments in that regard. We do feel, however, that in the particular circumstances of this case the sentence is not right and that justice would be done by applying the provisions of section 57(3) of Cap.212. We therefore allowed the appeal against sentence, set aside the sentence and ordered the appellant to enter into recognizances in his own surety in the sum of twenty dollars, to be of good behaviour and to keep the peace for a period of three years and to come up for sentence of the court if and when called upon so to do.