JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 92/72

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

REGINA vs. CLIVE GORDON

Mrs. Ruby Walcott for the Crown.

Mr. Patrick Atkinson for the Applicant.

Heard 25th October, 1972
10th November, 1972

FOX, J.A.

At the hearing of this application for leave to appeal against conviction, Mr. Atkinson admitted that in the light of the summing up which he had read with care, the conviction of the applicant for robbery with aggravation was not open to objection. We agree. Mr. Atkinson then asked for and was granted leave to appeal against the sentence of imprisonment with hard labour for five years, with flogging, which was passed upon the applicant.

This is the minimum mandatory sentence provided by law for the offence of robbery with aggravation vide Section 34(1)(a) of the Larceny Law, Cap. 212, as amended by the schedule to Sec.2 of the Prevention of Crime (Special Provisions) Act, 1963 Act 42 of 1963.

The complaint on appeal

Mr. Atkinson submitted that the sentence was wrong in principle on two grounds namely;

(a) in the circumstances of the case, it was manifestly excessive,

(b) the delay of sixteen months in bringing the applicant to trial after he was arrested, and the consequences of that delay, had not been given proper effect.

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The facts

The applicant was one of six men who had held up a super-market with guns. The offence was committed on 24th December, 1970. On that date the applicant was 15 years and 11 months old, having been born on 29th January, 1955. He was arrested on 14th January, 1971. He was tried on 16th and 17th May, 1972, and was convicted and sentenced on the latter date. With the assistance of counsel for the crown, we have investigated the circumstance surrounding the delay in bringing the applicant to trial. As a result, the following further facts have emerged. The preliminary enquiry was completed in September, 1971. The papers were received in the office of the Director of Public Prosecutions on 16th September, 1971, the opening date of the Michaelmas term in 1971. The indictment was signed on 27th October, 1971. The applicant was arraigned on 29th November, 1971. The Michaelmas term ended on 20th December, 1971. The case was not brought on for trial during that term, but was traversed to the commencement of the Hilary term on 7th January, 1972. At the end of that term on March 24th, 1972, the case had still not been tried. It was again traversed to the commencement of the Easter term on 5th April, 1972, and was disposed of during that term. It will be observed that the applicant was not yet sixteen years old at the time of his arrest. He was a juvenile. If he had been tried whilst he was still a juvenile, he would not have been exposed to the harsh penalties of a minimum mandatory sentence of five years with flogging, but would have been dealt with in accordance with the much milder provisions of the Juveniles Law, Cap.189, sections 27 and 29(3). As a consequence of the delay in bringing him to trial he had been imprisoned for sixteen months prior to this conviction, and had been removed from the category of a juvenile at the time of his arrest into the category of an adult at the time of his trial. We were informed that the reason for the delay was in connection with the difficulty in arranging the assignment of legal aid for the applicant. It is neither appropriate nor possible to investigate in this judgment the details of this difficulty. This is a matter for action by the proper administrative authorities with a view to the necessary remedial measures being taken. It is sufficient to state that we have been assured by the learned Director of Public Prosecutions himself, that this is a very real difficulty, and the frequent cause of delay in fixing cases for trial.

The law

(a) In relation to the first ground of complaint.

A person who has been convicted of an offence under the larceny law for which a mandatory sentence has been prescribed by that law, must be given the minimum mandatory sentence unless the judge is satisfied that the offender does not merit punishment to that extent. If the judge is so satisfied, he must deal with the offender in accordance with the provisions of section 57(3) of the larceny law by fining him, or requiring him to enter into recognizances to keep the peace and be of good behaviour, or by both fine and recognizances. This is so even if the judge should also be of the view that the offender deserved a more severe punishment than that described in section 57(3). The legislature allowed no other alternative, and where the minimum mandatory sentence is too severe, and the sentence under section 57(3) too light, the only proper course left open to the judge is as indicated in section 57(3). R. v. Trevor Smith 6 Gl. L. R. p.186. Those provisions of the larceny law which established mandatory sentences and flogging have been repealed (vide the Law Reform (Mandatory Santences) Act, 1972) which came into effect on 11th August, 1972, but not retroactively. The contentions in this appeal must therefore be answered by the law as it stood before the repealing Act came into force.

(b) In relation to the second ground of complaint.

The provisions of the Juveniles Law setting out the methods of dealing with juvenile offenders, including the provisions of section 29 placing restrictions on the punishment of juveniles, apply to persons who are juveniles on the date of conviction. R. v. Ronald Williams Cr. App. No.113 of 1969. In that case the position was succinctly stated by Shelley J.A.

> "For purposes of the Juveniles law the decisive date is the date of conviction, not the date of the offence. The fact that a person is under 17 years at the date of the offence does not entitle him to any advantages offered by the provisions of the juveniles law to convicted juveniles."

Subsequently, at a sitting of this court, en banc, this reasoning of Shelley J.A. was approved as impeccable, and the ratio of Ronald Williams was upheld. (R. v. Martin Wright, Cr. App. 1971 - 4th February 1972 - Luckhoo, Fox, Smith, Graham-Perkins, J.J.A; Edun J.A. dissenting).

Is the sentence manifestly excessive?

The proper approach to a consideration of a complaint that a sentence is wrong was stated by Hilbery J. in R. v. Ball, 35 Cr. App. Reports, 164

> "It appears to us appropriate that we should re-state the principles which must guide a Court in deciding what is the right sentence to pass on a person. In the first place, this Court does not alter a sentence which is the subject of appeal merely because members of the Court might have passed a different sentence.
> The trial judge has seen the person and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

The test is objective. There must be an error in principle. One such error is where the sentence is manifestly excessive in view of the circumstances of the case. These circumstances include:-

(a) The nature of the offence,

(b) the manner in which it was committed,

and (c) the character of the accused.

Where the offence is one for which a minimum mandatory sentence has been prescribed, as indicated above, the offender must be given at least that minimum sentence unless extenuating circumstances show that punishment to that extent is not merited. These extenuating circumstances are personal to the offender. They consist of his behaviour at the time of the commission of the offence, and his character. In this case it is possible to conclude from the obedience of the applicant to the commands of one of the robbers at the scene of the robbery, and from his statement when he was arrested that, "me go de but a Mass Hugh carry me go de," that he was not the ring leader of the gang. He was nevertheless a dauntless follower, and nothing really extenuating can be extracted from the subordinate role he was apparently willing to play in the robbery. Neither is the information concerning his character of any assistance in this respect. He had no previous conviction. In the usual case, this fact is allowed great scope. It is just and intelligent that a first offender should be given a chance to make good. But for the purpose of displacing a mandatory sentence this fact of a first offence

is of little weight. What is required is information of the background and the antecedents of the applicant which show that if leniency were extended there would be a reasonable chance of his reform. Such information existed in R. v. Trevor Smith (ibid). It enabled the Court to conclude that the interest of that applicant as well as the interest of the public would be best served if the applicant was given an opportunity to rehabilitate himself. The only way in which that opportunity could be offered was by setting aside the mandatory sentence which had been imposed, and ordering recognizances under section 57(3)(b) of the Larceny Law. In the instant case the situation is otherwise. Nothing of a positive nature was said in favour of the applicant which rendered it appropriate to apply the provisions of section 57(3). Consequently, we are unable to say that the sentence was manifestly excessive.

Was the delay in bringing the applicant to trial given proper effect?

In passing sentence the learned trial judge said,-

> "Now it has been urged on me that you are only 17 years. In fact when the offence was committed you were (under) 17 years of age, then a juvenile. But you are now over the age of 17, that is, at the date of conviction you are over the age of 17. The court cannot treat you as a juvenile. That is how I propose to treat you in passing sentence."

This approach accords with the law as laid down in R. v. Martin Wright. But does it accord with justice? As a general rule law and justice pursue parallel courses. Sometimes, however, their courses conflict. This happens when the law has been misconceived or was ill-considered. The law must then be allowed to prevail unless the particular subject admits of a discretion. In such a case, the discretion of the court may be exercised so as to enable justice to override the rigidities of the law. Sentencing an offender is one such subject in which exercise of a wise, and a wide, and a humane discretion is permissible. There are many cases in the books which illustrate this position. The closest for the purpose of finding the correct answer to the particular question which is now being considered in this appeal, are those cases in which the court has strongly discouraged the practice of delaying the bringing of a prisoner for trial till after he has served the term of imprisonment imposed for some other offence. A reference to one such case

only is sufficient to show how justice was allowed to take precedence over the law. In R. v. John Sullivan 6 Cr. App. Reports p.4, the appellant was convicted of an offence on 5th July, 1909, and was sentenced to fifteen months imprisonment with hard labour. At the time of this conviction, the police had information connecting the appellant with an offence committed on 5th February, 1909. But for some reason which was not identified, the trial of that offence did not take place until 20th October, 1910. On that date the appellant had completed his sentence of fifteen months. The sentence passed upon the appellant at the trial in October 1910 was three years penal servitude, which thus followed upon a sentence of fifteen months' imprisonment with hard labour. There was no doubt that a reason that operated with the judge in passing a sentence of penal servitude was the fact of the previous conviction in July 1909. In allowing the appeal against the sentence of three years penal servitude, the court said that it was not right to have kept that charge hanging over the appellant's head, and to have proceeded with it only after the sentence on the first conviction had expired. Justice was done by reducing the sentence of penal servitude to one of nine months imprisonment with hard labour.

In this case, inordinate delay in bringing the applicant to trial is obvious. He has been in custody since his arrest, and can in no way be held responsible for failure in the prompt disposal of the case. In the light of what has been stated above, it is beyond question that as a consequence of this inordinate delay, a manifest injustice has been done to the applicant. It is the duty of this court to ensure by its decision that delay of this nature, whether caused by design, or negligence, or the sheer inertia of the system, does not offend against what is right and just. This duty can be discharged only by resort to the provisions of section 57(3)(b) of the larceny law. We hold therefore that the question posed above must be answered in the negative, and that, on this ground, the appeal as to sentence must succeed.

The application as to conviction is refused. The application as to sentence is granted, and is treated as an appeal. The appeal as

to sentence is allowed. The sentence of five years imprisonment with hard labour and flogging is set aside and in substitution therefor the appellant is required to enter into recognizance in the sum of $100 with one or two sureties in like sum, to keep the peace and be of good behaviour for the period of three years.