NMLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CRIMINAL APPEAL NO: 55/2001

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH J.A. (Ag.)

REGINA V EVRALD DUNKLEY

Miss Marsha Smith instructed by Messrs E. A. Smith and Company for the appellant

Lambert Johnson and Miss Jenice Neathly for Crown

May 27, and July 5, 2002

HARRISON, J.A:

This is an appeal against a sentence of twelve months imprisonment at hard labour imposed on the appellant by Her Honour Mrs Carol DaCosta, Resident Magistrate, at the Resident Magistrate's Court held at Ocho Rios in the parish of St Ann, on the 17th day of September 2001, for the offence of obtaining money by false pretences. The appellant had pleaded guilty to the charge.

We heard the arguments and allowed the appeal. We set aside the sentence of twelve months' imprisonment and varied it so that the

appellant, having been in custody for a period of eight (8) months, would be released on May 28, 2002. These are our reasons in writing.

The facts are that in August 2000, in Ocho Rios, St Ann, the appellant told the complainant, the owner of a private motor car, which she was then operating illegally as a public passenger vehicle, that he could obtain for her from the Transport Authority in Kingston, a public passenger vehicle licence (PPV) for the said motor car. She paid the appellant $17,000.00 at his request to obtain the said licence. Not having received any such licence, and after several excuses from the appellant, the complainant made a report to the police in July 2001. On September 14 2001, the appellant was arrested by the police, on a warrant and after he was cautioned he said, "Officer mi have part of the money it never have fi reach so far". The appellant pleaded guilty on his first appearance in court and was sentenced as stated above.

Counsel for the appellant argued that the learned Resident Magistrate failed to enquire into the antecedents of the appellant prior to sentencing him, ought not to have imprisoned him without the option of a fine, he having made full restitution, or could have given him the benefit of a suspended sentence. In all the circumstances, the sentence was "harsh and unreasonable".

Sentencing is the process by which the ultimate decision of punishment is reached, and then the sentencer declares the nature of the

punishment, after conviction for an offence. The principles which govern the method by which that ultimate goal is achieved, have been well formulated and generally accepted. The aim of the sentence is to satisfy, the goals of:

(a) Retribution;
(b) Deterrence;
(c) reformation and
(d) protection of the society

or any one or a combination of such goals, depending on the circumstances of the particular case.

The sentencer commences this process after conviction by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first considers whether a non-custodial sentence is appropriate, including a community service order. If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment. This is the approach adopted in England, and generally employed in Jamaica, as a useful guide to sentencing and outlined in the case of ***R*** v ***Linda Clarke*** [1982] 4 Cr. App. R(S.) 197. That case recommended that after having considered the above options, the sentencer may consider:

> "If a partially suspended sentence is inappropriate, what is the best possible total sentence which can be imposed bearing in mind the circumstances of the case and the record of the offender". (Emphasis added)

If therefore the sentencer considers that the "best possible sentence" is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:

(a) pleaded guilty;
(b) made restitution or
(c) has any previous conviction.

These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed.

A plea of guilty is an indication of repentance and a resignation to the treatment of the court. This act of pleading guilty must be a prime consideration in favour of the offender, who has admitted his wrong on the first opportunity to do so before the court. There ought to be some degree of discounting, that is in a reduction of sentence. (***R*** v ***Delroy Scott*** (1989) 26 JLR 409).

Restitution of property is also an expression of remorse and is an act of the offender which is also deserving of a further discount in sentence.

The authors of ***Archbold Criminal Pleading Evidence & Practice*** (1992) paragraph 5, 153, correctly pointed out:

> "The extent of the "discount" to be allowed in recognition of a plea of Guilty has never been fixed, but cases in which reductions of sentence have been made by the Court of Appeal on this ground suggest that it is normally between one-fifth and one-third of the sentence which would be imposed on a conviction by a jury. In determining the amount of the discount in a particular case, the court may have regard to the strength of the case against the offender: an offender who pleads Guilty in the face of overwhelming evidence may not receive the same discount as one who has a plausible defence".

The Resident Magistrate in her "Statement of Reasons for Sentence," correctly commented, at page 13 of the record:

> "In determining the appropriate period of incarceration, the court discounted forty-eight months from the maximum possible sentence, for the reason that the prisoner pleaded guilty at the first opportunity and repaid the money".

By discounting the sentence by a two-thirds proportion of the "maximum possible sentence" and arriving at a period of imprisonment of "twelve months .. at hard labour", the Resident Magistrate was thereby declaring that the "best possible sentence" for the said offence of obtaining $17,000.00 by false pretences was three (3) years imprisonment at hard labour. That sentence of three years is the absolute maximum sentence which a Resident Magistrate is empowered to impose for such offences (section 268 of the Judicature (Resident Magistrate's Act). If the Resident Magistrate is correct, the question arises. What sentence would the Resident Magistrate's Court consider appropriate to be imposed on the

professional person, including an attorney-at-law, who deprives his client of millions of dollars by false pretences or the trustee or some one in the nature of a trustee who commits similar offences? The comparisons are too odious for further comment.

The authors in ***Archbold*** (supra) at paragraph 5-115 said:

> "The principle that the maximum sentence provided by law for an offence should normally be reserved for the most serious examples of the offence has been stated in numerous cases: for example, see ***R*** v ***Byrne*** (1975) 62 Cr. App. R. 159, CSP A1. 2(a), where the court referred to " the general sentencing principle that the maximum sentence provided for by statute should be reserved for the most serious type of case".

We are of the view that the appellant in this particular case did not qualify to be classified as deserving the maximum sentence of three (3) years discounted by the mitigating factors, to arrive at the sentence of twelve (12) months that was imposed. The offence with which this appellant was charged could never be described as "... the most serious example" of that offence. The learned Resident Magistrate was obviously mistaken. For that reason alone we found the sentence to be manifestly excessive and unreasonable.

Furthermore, even if one assumes, with which assumption we do not agree, that the sentence imposed on the appellant was appropriate, it was an incorrect sentence, for the reason that the Resident Magistrate failed to take into consideration further, the good record of the appellant

who had no previous convictions. In ***R*** v ***Glen Thompson*** (1988) 25 JLR 369, the appellant pleaded guilty to a charge of unlawful wounding by the chopping of his common-law wife of 12 years and who bore him 4 children. She was injured and hospitalized for months. He was sentenced to three (3) years imprisonment at hard labour. His appeal against sentence was allowed. The sentence was reduced to eighteen (18) months. Carey, P. (Ag.) said, at page 370:

> "We note that the learned Resident Magistrate imposed the maximum sentence. Now, although the injuries were manifestly of a very serious nature, the appellant did show contrition by pleading guilty. This was a domestic fracas, the motive for which was not apparent. We think that the learned Resident Magistrate should have discounted the maximum sentence by bearing in mind the absence of any past criminal record and the relationship between the parties".
>
> (Emphasis added)

A further discounting of the sentence, in favour of the appellant, for his evident good character, should have been effected by the learned Resident Magistrate. In so far as she did not state that she did so, it has to be assumed that she failed to do so and was also again in error. For that further reason we were of the view that the sentence of twelve (12) months was manifestly excessive.

We note that there was no antecedent of the appellant presented to the Court. The appellant was sentenced without the learned Resident Magistrate having any knowledge of his character. This is undesirable and

must not be followed. He must accordingly, be taken to have had no previous conviction.

Every man's good character must be of some value.

The learned Resident Magistrate in her statement said, at page 12:

> "The court formed the opinion that although the prisoner pleaded guilty at the first opportunity, he (the prisoner) seemed not to appreciate the detrimental and injurious nature of his act. It seemed to the court that the prisoner was of the view that the repayment of the money cured the defect of his act; the prisoner showed no remorse and thus the court was not convinced that the prisoner would not repeat this offence".
>
> (Emphasis added)

In so far as the learned Resident Magistrate was of the opinion that the prisoner "... seemed not to appreciate the detrimental and injurious nature of his act ...," that is a reference to the appellant's state of mind, but there is nothing on the record to support such an adverse view. On the other hand, if that comment is a reference to the offence of obtaining money by false pretence it is misconceived. The offence of obtaining money by false pretence, is an offence against property. It is contained in the Larceny Act. The essence of the offence is the obtaining of the property of another by a falsity, that is, a lie. It is because of the fact that the pretence of the appellant is an obvious and accepted lie, that the said offence is regarded as committed. The law is not directed to the punishment for the lie, but for the taking of the property, namely, the $17,000.00, hence the offence being one under the Larceny Act. The

false pretence, that is, the lie, serves to nullify any contention that there was a voluntary handing-over of the goods of the owner. Neither is the act of the appellant "detrimental and injurious ..." to the victim because the owner of the motor car who sought the PPV licence was well aware that she was dealing with the appellant in a less than lawful course. The learned Resident Magistrate herself found that the "complainant was also a participant in the unlawful activity".

Still further, to maintain that:

> "... the court was not convinced that the prisoner would not repeat his offence"

and that the sentence:

> "... is sufficient to cure the prisoner of his propensity for deception". (Emphasis added)

the learned Resident Magistrate was thereby expressing her views of the character of the appellant. There is no support for those views from any such facts on the record. The court must sentence an offender on existing facts and on facts most favourable to such an offender (***R*** v ***Pearlina Wright*** (1988) 25 JLR 221). Those are further reasons why we concluded that the sentence was imposed on an entirely incorrect basis.

Every Resident Magistrate is fully aware of the accepted principles of sentencing. In the instant case they were wrongly applied.

We must also emphasize, that even in the event of a guilty plea being offered, Resident Magistrates must make a record of the

proceedings including the facts as related by the Clerks of Courts, showing the order for indictment by the Resident Magistrate, as the basis for the acceptance of the said plea of guilty. None of this was done in this case. Resident Magistrates and Clerks of Courts must give attention to these important details especially in a criminal case where the liberty of the subject is at stake. The police statements and memorandum of the arresting officer to his sub-officer is quite out of place in the record to the Court of Appeal, as was done in this case. For all the above reasons we were of the view that, in all the circumstances, the appellant was entitled to be sentenced to a term of imprisonment not in excess of six (6) months. Accordingly, we allowed the appeal and made the order earlier stated.