JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 175 of 1973

BEFORE: The Hon. Mr. Justice Edun J.A. (Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.

R. v. Kenneth Deans
Derrick Roberts

Mr. H. Hamilton for the applicant, Kenneth Deans.

Mr. G. Andrade for the Crown.

October 4, December 6, 1974

EDUN, J.A.:

Attorney for the applicant Deans stated that he was not arguing the application for leave to appeal against convictions. We have examined the summing-up carefully and are of the view that no arguments could successfully be urged against the convictions of the applicants. Leave to appeal against conviction is therefore refused in each case.

However, as regards the sentences, attorney for the applicant Deans, submitted that they were harsh and manifestly excessive. Deans was found guilty of two armed robberies and Roberts of three such robberies, committed on the 26th and 27th June 1973. The trial judge sentenced Deans on Counts 2 and 3, to 20 years at hard labour and in addition to receive 15 lashes on each count; sentences to run consecutively. He sentenced Roberts on Count 1, to 10 years at hard labour; on Count 2, to 20 years at hard labour and to receive 15 lashes, those two sentences to run concurrently; on Count 3, to serve 20 years at hard labour and to receive 15 lashes, sentences on Count 3 to run consecutively to Counts 1 and 2. In effect, Deans and Roberts have been ordered to serve terms of 40 years at hard labour and to receive 30 lashes each.

By section 3 of the Flogging Regulations Law Ch.131 in any combined sentences awarded by a Court, an adult prisoner shall not receive more than 24 strokes.

It is obvious to us on the facts of the case that both Deans and Roberts had planned and executed those robberies deliberately and caused great distress and instilled horror in the minds of their victims, though they were not injured physically. Nevertheless, it is against those depredations that members of the public must be protected. But has the trial judge approached the problem of punishment in those cases properly? To consider only the question of deterrence, and thus to be harsh is wrong in principle and to order the receiving of 30 lashes in each case is wrong in law. However, to resolve the problem, we prefer to be guided by precedents in locally decided cases.

In R. v. Ira Johnson (1966) Gl. L.R. p.180, the applicant was convicted on four counts of an indictment charging him with two counts of burglary, robbery with aggravation and wounding with intent. Sentences on counts 1 and 2 were made concurrent; sentences on counts 3 and 4 were also concurrent but were made to run consecutively to counts 1 and 2. In effect, the applicant was sentenced to 14 years at hard labour and ordered to receive 14 lashes. The Court of Appeal affirmed the sentences of 14 years but reduced the lashes to six.

In R. v. Lascelles Archer (1967) 5 Gl. L.R. 94, the appellant was convicted of assault with intent to rob with aggravation and sentenced to 15 years at hard labour and ordered to receive three lashes. He had six previous convictions, five of which were in the Resident Magistrate's Court and his sixth conviction was in the Circuit court when he received a sentence of two years at hard labour. The Court of Appeal said:

> "So far as the question of sentence is concerned, that has given the court some anxious consideration. The appellant is a fairly young man and he was convicted of what was undoubtedly a very serious offence and unfortunately an offence which is far too prevalent in our society today, that is to say he joined a gang of men some of whom were armed with revolvers and it was alleged he had armed himself with a stick and they proceeded to rob this shopkeeper .....
> Although he was found to be guilty of this serious offence, nevertheless, we feel that on a consideration of all the circumstances that the sentence of fifteen years at hard labour can be said to be excessive. The Court therefore,

reduces the sentence from fifteen years at hard labour to one of ten years at hard labour and, in addition, to receive three lashes."

In the instant case, neither Deans nor Roberts had any previous convictions. At the date when the offences were committed, Deans was 18 years old and Roberts 21 years old. We have no doubt that there have been sentences imposed by judges of the Supreme Court, exceeding 20 years and with lashes, in cases similar to the ones now under consideration. In our view, in meting out sentences, there should be some consistency; each case should be considered on its merits without dealing solely with the question of deterrence.

In sentencing both Deans and Roberts the trial judge had this to say:

"You are fortunate that this offence was committed before the new law came into force because there is only one kind of sentence for young men who will behave in this way and that is to remove them completely from society, but the law as it stood when you committed the offences gives you a chance to come back, but I am not giving you a sentence which will allow you to come back too quickly."

Only death should remove a prisoner completely from society and if the new legislation referred to by the trial judge authorises life imprisonment or indefinite detention, in any particular cases, even in those instances, the Executive or a Board of Review in their discretion could well release a prisoner before the end of ten or fifteen years or even earlier depending upon the circumstances.

For the reasons we have given, we vary the sentences of imprisonment of both Deans and Roberts to run concurrently instead of consecutively. In addition, each will receive six lashes, instead of 30, which number is forbidden in law. In other words, both Deans and Roberts will serve a term of 20 years each, at hard labour and will each receive six lashes.