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IN THE COURT OF APPEAL

CIRCUIT COURT CRIMINAL APPEAL NO. 203/65

BEFORE: The Hon. Mr. Justice Duffus, President
 The Hon. Mr. Justice Waddington
 The Hon. Mr. Justice Shelley (Acting)

R. vs L E O P O L D B U R R E L L

Mr. C.F.B. Orr for the Crown

Appellant appeared in person.

10th February, 1966.

DUFFUS, P.,

On the papers being submitted to a single judge, the matter was considered and leave was refused in respect of the conviction, but leave was granted in respect of the appellant's sentence.

The appellant has come before this Court today, asking for leave to appeal against his conviction, and the Court has given consideration to the matter and finds that there is no merit in that application. In so far as the conviction is concerned, the application is refused but a strange state of affairs appears with relation to the sentence.

The transcript of the papers before us shows that after the verdict of the jury had been taken, Corporal Adam Anglin of the police, gave evidence as to the antecedents of the appellant, and on oath he informed the learned Chief Justice, who was the trial judge, that the appellant had ten previous convictions recorded against him, the last conviction being in the Circuit Court, Kingston, on the 22nd of September, 1965, for larceny, on which he had been sentenced to three years imprisonment with hard labour, which sentence he was then serving, whereupon the learned Chief Justice sentenced the appellant as follows: and I quote from the transcript:

"The sentence.....

" The sentence of the Court is that you be imprisoned and kept to hard labour for five (5) years, to commence at the expiration of the sentence you are now serving and in addition to be flogged by the infliction of eight (8) lashes of the rod approved."

Now it appears that this sentence is in order and is one authorised by law, and the learned Chief Justice acted quite properly in our view, in ordering that sentence to commence at the expiration of the sentence which this prisoner was then serving, namely, the sentence imposed on the 22nd of September, 1965.

Well, the indictment shows that that sentence was written on the back thereof and signed by the learned Chief Justice, and then there appears pasted on and over this sentence, a bit of paper with a different sentence, and this is what the bit of type-written paper says:

" Sentence: Imprisonment at hard labour for five (5) years to run consecutive to the total period of imprisonment to which he is already subject, and in addition to be followed by receiving eight (8) lashes;"

and that likewise has been signed by the learned Chief Justice.

It is possible to see the previous sentence which is underneath this record, and it does not appear that that had ever been cancelled by the Chief Justice - it simply had this bit of paper pasted over. Well, it seems that this latter sentence gave some concern to the prison authorities as the appellant had been given another sentence on the 21st of October, 1965, and the prison authorities referred the matter, quite correctly, to the Director of Public Prosecutions. The appellant originally had appealed against his conviction only,

and not against...

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and not against his sentence, but on this matter coming to the attention of the Director of Public Prosecutions, the prison authorities were communicated with, and the appellant was then advised to appeal against his sentence - which he proceeded to do - and the matter came before this Court yesterday.

At the adjournment, I decided that I should refer to the learned Chief Justice, to see whether there was any explanation for this strange state of affairs. The learned Chief Justice gave the matter his consideration and said that, unfortunately, he had no clear recollection of the matter, but that undoubtedly, we would be bound by the transcript of the proceedings. He is unable to say, how or when this type-written bit of paper which bears his signature came on to the record, and he does not know whether in the course of signing many of these papers in a day, he may inadvertently have attached his signature without making enquiry.

Well, fortunately, this Court is in a position to remedy what might otherwise have caused an injustice to the appellant, for I gather it was the intention of the Chief Justice that the sentence he should serve, would be the sentence which the transcript showed he did in fact order in Court. It would seem that had the Chief Justice been minded to alter the sentence which he had imposed on the appellant this could have been done, but for that to have been done, it would have been necessary for evidence to have been given before the learned Chief Justice of the subsequent conviction which the appellant had received on the 21st of October, 1965, of which no evidence was given to the Chief Justice by the police Corporal on the 7th of December, and of course the appellant would have had the right to cross-examine the police constable as to the authenticity or otherwise of this conviction, and he would have been asked whether or not he

Admitted this...

admitted this conviction, but no such thing appears on the transcript.

It does seem from an examination of the indictment and the transcript of the proceedings before the Court on the 21st of October, that the appellant was in fact convicted and sentenced on that date to two years imprisonment with hard labour, and that sentence had been ordered to run consecutive to the sentence he was serving and is still serving - imposed on the 22nd of September, 1965. The effect, therefore, if the record were to be allowed to stand with the type-written alteration to the original sentence imposed by the Chief Justice on the 7th December, is that the prisoner would have to serve three sentences, the first imposed on the 22nd of September, 1965, for 3 years, and at the expiration of that sentence, a sentence of 2 years, and then at the expiration of that sentence of two years, the third sentence which was imposed on 7th December of five (5) years, amounting to a total imprisonment of ten years, whereas if the true position is, that the correct sentence is what the transcript shows he was given, it would mean that at the expiration of the sentence imposed on 22nd of September, 1965, of three years, he would commence serving the second sentence imposed on the 21st of October, 1965, of two years, and at the same time, he would commence serving the third sentence of five (5) years which was imposed on the 7th of December, 1965, thus giving a total period of actual imprisonment of eight (8) years, and such sentences would be quite in order.

This Court therefore, proposes to set right what appears to be an obvious error, which was permitted to appear on the indictment and which ought not to have been there, by restoring the original sentence, or what in fact appears to be the only sentence imposed in Court by the Chief Justice, namely, imprisonment with hard labour for five (5) years to commence at the expiration of the sentence imposed on the

22nd of.....

22nd of September, 1965, of three (3) years, and in order to put it beyond all doubt, this sentence will of course run concurrently with the sentence which was imposed on the 21st of October, 1965, of two years. The effect of this will be that when the sentence imposed on the 21st of October, 1965, that is, the second sentence expires, the prisoner will, nonetheless, remain in custody and continue serving out the unexpired portion of the five-year sentence imposed on the 7th of December, 1965, which would be running concurrently with the October sentence.

The Court is extremely alarmed that such a state of affairs should have occurred, and no doubt it arose because the police records were not brought up-to-date, and wrong information appears to have been given to the learned Chief Justice. The Court desires to make it clear that the order for lashes remains.

APPROVED AND FORWARDED: [Signature]
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