J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 80/71

BEFORE: The Honourable Mr. Justice Fox - Presiding
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Hercules

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R E G I N A vs. LINTON ROWE

Mr. Enoch Blake for the Appellant

Mr. W. L. Morris for the Crown

28th February, 1973

**FOX**, J.A.,

This appellant was convicted at the Circuit Court in Black River on the 22nd of July, 1971, for wounding Silvan Whitely with intent to do him grievous bodily harm. His application for leave to appeal against this conviction was refused by a single judge on the 11th of January, 1973; this was two days after the record was received in the Registry of this Court.

The appellant was not sentenced on the day of his conviction; sentence was postponed to the 29th July, 1971. The appellant was sentenced to imprisonment with hard labour for ten years. Leave to appeal against this sentence was granted by the single judge on the 11th of January, 1973.

We have considered the submissions in support of the application for leave to appeal against conviction. They are without merit. A simple question of fact was involved. The complainant said that whilst he was on the road at Southfield in St. Elizabeth on the 28th of December, 1970, he saw the appellant throw a stone at him. The stone struck him over his left eye. As a result of this blow complainant lost the use of that eye. The defence was a denial that the stone had been thrown by the appellant and an allegation that several stones were being flung at the complainant at the relevant time. The jury resolved a simple question of fact adversely to the

appellant after entirely satisfactory directions by the learned judge. There is no ground upon which their decision can be disturbed.

The substantial matter which has required the consideration of this court is the complaint that the sentence is both manifestly excessive and wrong in principle. We uphold the complaint that the sentence is manifestly excessive. The appellant is a young man of whom the police reported that he had no previous conviction; he was of quiet behaviour, and hardworking. The stone was thrown in the course of a fracas involving the complainant and his friends on one side and the appellant and his friends on the other. They were all returning from a picnic which had been held on 28th of December, 1970, at Mayfield in St. Elizabeth. The conduct of the appellant was probably the result of release of inhibitions following upon the jollification of a picnic in the country among rural people at a time of festivities. The offence can be regarded as having occurred at a moment of indiscipline. The risk of repetition is not serious. Consequently, although we share the learned trial judge's abhorrence of the result of the appellant's act, we think the sentence passed upon him out of all proportion to the amount of punishment necessary as a deterrent to others, as well as for the achievement of a retributive effect.

The complaint that in sentencing the appellant, the judge proceeded on a wrong principle arises in this way. After the police officer had given the usual evidence as to character, the judge asked questions of the complainant as a result of which the complainant said that he would accept $2,000 as compensation for the loss of his eye, that if he received this sum he would use the money to buy livestock and in this way secure a start in life, and that if he wer e offered a choice of the accused being sent to jail and being paid the money, he would prefer payment of the money. The learned trial judge expressed his agreement with this choice and turning to Counsel for the appellant indicated that '...in view of all the circumstances and in view of what is passing through my mind....' he would postpone sentence. The learned trial judge then

went on to say:

> 'Mr. Curtis (Attorney for the Defence) I am not making any promises to anybody but a Judge in assessing sentence has to think of a lot of things. One thing that sometimes he has to think about is if any kind of compensation or something to go to the complainant to help the complainant who is really injured. Sending the man to jail leaving the complainant to fight for himself if he can. Has to see if he can get something, as in this case. Judge may very well think - doesn't say that is what he is going to do. Well in a case like this having regard to the Jury's verdict only wise sentence is possibly to send him away for life or so many years. Old man by the time he gets out. During this time the man still has his one eye and don't know where to start. Well those who may wish the young man well in the district may throw up together and let us see having regard to what the Judge is saying something can come forward and perhaps, don't know what may happen later. Perhaps you may very well advise the accused man and his parents, having regard to what this man has said and what he believes to be reasonable having regard to the figure he has quoted, come up with something tangible and substantial and if that is given to the complainant to make a start then, perhaps, a certain course may be adopted. I don't know yet.'

Mr. Curtis promised to pass on this suggestion of the learned judge to the parents of the appellant. The court then adjourned. This was the afternoon of the 22nd July.

When the Court resumed on the morning of the 29th of July, Mr. Curtis informed the learned Judge that his suggestion had not borne fruit and that there was no hope of getting any money to pay compensation to the complainant. In the course of passing sentence, the learned trial judge indicated that in his view the offence was a very serious one and continued:

> ' When the Jury convicted you last week I then intimated, having questioned the complainant himself that perhaps if some compensation was brought forward to this man who said that he would have to start life afresh and he needed something to start him afresh, perhaps a certain course would have been adopted. It was not a matter of bargaining, it was a case where I was trying to see if I could assist you, also assist him. When I asked Whiteley what would be a reasonable compensation he would think for this serious injury to him and with the result that he lost one of his eyes he put a figure of $2,000.00. I think it was on the high side. Nevertheless that suggestion having been made it seems that your father did everything that he could and the sentence was postponed so many days so that an opportunity could be given. Whether your father has changed his mind I know not. But you see what has happened to you, maybe this bad company has brought you to do it and there is nobody to come to your rescue now! You have to stand it alone.'

After further relevant observations relating to the character of the accused and the gravity of the offence and the prevalence of crime in the parish, the learned trial judge concluded:

> 'I am sorry I cannot help you any further and I cannot be of any more assistance to the complainant. I was trying to see if I could put both of you on a course. He would get some help with something, you would have got a chance to put yourself under discipline and moral vocation, no doubt to repay what help might have been forthcoming. The complainant says that you have nothing from which he could even get a cent for what you have done to him. The sentence of the court is that you be imprisoned and kept at hard labour for 10 years.'

Learned Attorney for the appellant submitted that from these observations it was clear that the learned judge was minded to put the appellant on probation if a money payment for compensation was forthcoming and that, since no payment was being made, the appellant should not receive the benefit of a probation order but should instead be sentenced to a term of imprisonment with hard labour. Learned Attorney contended that not only were the considerations wrong in principle, but also that the approach of the learned judge was capable of giving an impression to the public that if wrong was done, the wrong-doer could pay for such wrong and in that way avoid being sent to prison. This impression, it was said, gave support to those cynics in the society who maintained that there was one justice for the rich and another more harsh justice for the poor.

We do not fail to see that the learned judge was attempting to grapple with what may be described as deficiencies in our legal system relating to the payment of compensation to victims of a criminal offence in the proceedings dealing with that offence. Unfortunately, observations which he made in considering that problem do support the substance of the complaint. The willingness of an offender to make amends for damage occasioned by his wrong, and the sincerity of his efforts in this respect, may be taken into account in determining his sentence. But it is not permissible to determine the question whether probation should be allowed or withheld upon an offender's ability to pay, or upon the success or failure of efforts by him, or in his behalf, to acquire the means of payment.

The learned judge specifically eschewed any attempt at bargaining, but this clear impression is inescapable from what he did in fact say. Probation was being considered and would have been ordered if some compensation had in fact been made. A probation order should not be made dependent upon the payment of compensation. Where from all the circumstances a probation order is appropriate, it would be wrong in principle to withhold such an order on the ground that compensation was not forthcoming.

We have been invited by the Attorney for the appellant to make a probation order in this case. In our view, such an order is not appropriate in all the circumstances of the case. But we think the sentence too heavy. We set it aside. This offence was committed on the 28th of December, 1970. Sentence was passed on the 29th of July, 1971. The record is extremely short. It was received in the Registry of this Court on the 9th and was dealt with by a single judge on the 11th of January, 1973. The matter now comes before us to be disposed of - one year and seven months after the appellant was convicted. During this period he has languished in prison. There is no explanation for the delay in sending the papers to this court. We think the proper sentence to be passed in this case is three years imprisonment with hard labour. This sentence is substituted for the sentence of ten years hard labour which was inflicted on the appellant, and will commence on the 1st of December, 1971.