JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 173 & 174 of 1979

BEFORE: The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.

R. v. SYDNEY BECKFORD & DAVID LEWIS

Mr. T. Ballentine for Appellants.

Miss Hyacinth Walker for Crown.

May 15, July 25, 1980

ROWE J.A.

The applicants were each convicted before Theobalds J. and a jury in the St. Catherine Circuit Court on October 1, 1979 on one count of an indictment charging them together with burglary and larceny and on separate counts charging each of them with rape. They were each sentenced on the burglary count to seven years imprisonment at hard labour and on the count for rape to imprisonment for life at hard labour. The single judge refused leave to appeal against conviction but granted leave in respect of the sentence on the rape counts. At the hearing of the appeal, Mr. Ballentine did not seek to impugn any of the convictions and restricted his arguments to the question of sentence.

In passing sentence the learned trial judge termed the act of rape a heinous one and posed this question to himself,

> "Where must young girls go in order to consider themselves safe? These girls were not on the street at the time. They were in the safety and privacy of their own bedroom. One can only recall the vivid words of the aunt, that the screams of the girls pierced her heart."

He felt compelled to impose the maximum sentence permitted by law for these offences.

Put shortly, the Crown's case was that the appellants and another man sometime after 8 p.m. on the night of August 9, 1978 broke and entered a dwelling house in St. Catherine in which were a 71 year old woman and her two young nieces asleep in their beds. The burglars were armed with a machete, a knife and a screw driver. First, they got hold of the old lady, then they led her through the house as they stole sundry articles. Then they chanced upon the bedroom in which the two young girls were sleeping. One man held the aunt hostage while each of the other two attacked the young ladies threatening them with the machete and the knives. One girl had her underwear cut off with the knife. Thereafter one girl was raped by two men at knife point and the other who had no previous sexual experience by the third man, also at knife point.

The evidence as to the identification of the rapists was quite overwhelming and understandably, Mr. Ballentine could not argue against correctness of the convictions.

When the learned trial judge came to pass sentence he did not have a Comprehensive Social Report on each of the appellants of the type which is prepared by Probation Officers. Information tendered in respect of the applicant Beckford was that he was born

in Spanish Town on December 18, 1959 and therefore had not attained his 19th birthday at the date of the offence. Since leaving school he had been working as an apprentice carpenter with his father earning ten dollars per day. He had no dependents and no previous conviction. The police considered Beckford to be a fairly intelligent person and his father was known to the police to be a decent citizen.

David Lewis was even younger than Beckford. He was born in Spanish Town on April 15, 1961 and was thus marginally over 17 years of age at the time of the commission of the offence. For two years he had been an apprentice plumber earning eight dollars per day. He had no dependents and no previous conviction.

It is worth mentioning that the third rapist with whom we are not here concerned did not have any previous convictions.

Mr. Ballentine argued before us that in the instant circumstances a sentence of life imprisonment is wrong in principle. He invited the Court to say that where violence beyond the actual rape itself is used e.g. - a beating of the complainant or where some permanent injury both mental and physical is incurred by the complainant or where the actual rape is accompanied by other violent crimes such as buggery or oral sex or where the applicant is a habitual rapist or where the rape is committed by a gang of men, these are all circumstances which might attract heavier punishment and in extreme cases the maximum. He stressed that the age of the victim as well as the age and mental capacity of the assailant are

relevant factors to be taken into account.

There is no scientific scale by which to measure punishment, yet a trial judge must in the face of mounting violence in the community impose a sentence to fit the offender and at the same time to fit the crime. Lawton L.J. in R. v. Sergeant (1975) 60 Cr. App. 74 at p. 77, reminded judges of the four classical principles which they must have in mind and apply when passing sentence. We make no apology for the extensive quotation:

> "What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.
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> "I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crimes, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence. The weapons which the courts have at their disposal for doing so are few. We are satisfied that in most cases fines are not sufficient punishment for senseless violence. The time has come, in the opinion of this Court, when those who indulge in the kind of violence which we are concerned in this case must expect custodial sentences.

But we are also satisfied that, although society expects the court to impose punishment for violence which really hurts, it does not expect the courts to go on hurting for a long time, which is what this sentence is likely to do. We agree with the trial judge that the kind of violence which occurred in this case called for a custodial sentence. This young man has had a custodial sentence. Despite his good character, despite the excellent background from which he comes, very deservedly he has had the humiliation of hearing prison gates closing behind him. We take the view that for men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time.

I turn now to the element of deterrence, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences. We think it unlikely that deterrence would be of any value in this case.

We come now to the element of prevention. Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period. This case does not call for a preventive sentence.

> Finally, there is the principle of rehabilitation. Some 20 to 25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging of prison gates which is likely to keep him from crime in the future."

These were two very young and inexperienced men of fair intelligence who were each learning a trade. Neither had previously run foul of the law. There was nothing to suggest that they had developed such anti-social habits that they were beyond redemption. No medical evidence was available to the effect that either man was suffering from some mental disorder which would render him a danger to the community for the forseeable future. Heinous as were these acts of rape, committed upon the young ladies in their bedroom and in earshot of their aunt, by a group of armed men, we are of the view that a determinate sentence of imprisonment would meet the justice of the case. None of the extravagant acts of aggravation referred to by Mr. Ballentine are present, although his list is not to be taken to be exhaustive. We consider that the imprisonment should be for an extensive period demonstrating, as we must, the Court's utter abhorrence for gang rape. These young men have by their own violent and senseless acts deprived themselves of the enjoyment as free persons of the greater portion of their twenties but they will be left with the hope that skills which they will learn while in prison can one day be turned by them to their own account, free from the restriction of prison bars and prison discipline.

It was for these reasons that we set aside the sentence of imprisonment for life at hard labour on Counts 2 and 4 and

substituted a sentence of twelve years imprisonemtn at hard labour to commence on January 1, 1980 and to run concurrently with sentence on Count 1.