Judgment Book

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 29/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA

VS.

PROBYN AITKEN

Richard Small for Appellant

Glen Andrade Q.C., Director of Public Prosecutions and Mrs. Carolyn Reid for Crown

July 9, 10; September 24, 1990

ROWE P.:

The appellant pleaded guilty to the offence of conspiracy to defraud in that on divers days between 1st September, 1981 and August 11, 1989 in the parish of Kingston he conspired with James Smith, Hector's River Limited and other persons to defraud the Government of Jamaica by fraudently utilising funds held by the Jamaica Liaison Service and the West Indies Central Labour Organization on behalf of the said Government of Jamaica for their own benefit or purposes. For this offence he was sentenced to serve nine (9) months imprisonment at hard labour. He appealed on the ground that on the circumstances

of this case and of the appellant if a custodial sentence was appropriate, such sentence ought to have been suspended under Section 6 of the Criminal Justice (Reform) Act 1978 or a Community Service Order ought to have been made under Section 10 of that Act. We dismissed the appeal and promised to supplement our oral reasons with a more detailed judgment later. This we now do.

Character evidence before the Magistrate disclosed that the appellant was an outstanding scholar, who by dint of extra-ordinary courage and perservance obtained the degree of Bachelor of Arts and qualified as a Barrister-at-Law. He attained the office of Permanent Secretary in the Ministry of Labour, was diligent in voluntary social projects and was recognized with the National Honour of Commander of the Order of Distinction. He was a Justice of the Peace, a person of hitherto unblemished character and one who had shown humanitarian concern for the plight of some Jamaicans who elected to reap sugar-cane in parts of Florida, U.S.A. Shortly before his arrest, the appellant held the position of Chief Liaison Officer of the Regional Labour Board and was stationed in Washington.

Farm-workers from Jamaica who laboured in Canada were subject to a compulsory deduction of 20% of their gross earnings. A portion of this compulsory deduction was retained by the Government of Jamaica to offset the operational costs of the programme and the balance was remitted to Jamaica as compulsory savings for the farm-workers. On his admission the appellant, at the insistence of the then responsible Minister of Government, withdrew large sums of money from the portion of the funds withheld for operational purposes, and used these sums to purchase motor vehicles including two

Land Cruisers and a Mercedez Benz, a Computer System, and a Motorola Communication System, which were all delivered to the Minister. In addition the appellant admitted that he made several large cash disbursements to the Minister and to himself. So extensive were the manipulations with the funds, that when the fraud was discovered the appellant caused the sum of $552,308.43 U.S. to be transferred from his personal account in Miami to the former official account in Toronto. As outlined by the prosecution, the appellant admitted that he converted U.S. $60,000.00 to his own benefit from this fund. Full restitution was made by the appellant.

In passing sentence the learned Resident Magistrate took into consideration:

(a) the gravity of the offence;

(b) the position of the appellant as a Senior Civil Servant occupying a position of public trust in relation to public funds;

(c) the length of time over which the offence was committed;

(d) the fact that the appellant was of previous good character, had surrendered his National Honours Award, had resigned as a Justice of the Peace and could forfeit his pension rights;

(e) his guilty plea;

(f) his co-operation with the Police in their investigations;

and concluded that in all the circumstances the offence merited an immediate custodial sentence. As to the length of the sentence, the learned Magistrate assessed that in the absence of the special mitigating circumstances, a sentence of three years would be appropriate for so serious an offence. She rejected the appellant's counsel's plea that the sentence

should be suspended and ordered that the appellant serve an immediate custodial sentence of nine months.

The learned Resident Magistrate proceeded on the principle that the Court had a duty to the society to deter others occupying similar positions from committing similar offences. Before us Mr. Small did not challenge this principle as one of the legitimate aims of sentencing. He conceded that the sentence of nine months imprisonment was neither harsh nor unconscionable nor was it manifestly excessive. Mr. Small, however, submitted five bases on which this Court could review the sentence viz.:

(a) that the Resident Magistrate made an error in law in ordering an immediate custodial sentence;

(b) that she failed to consider relevant facts;

(c) that she misapplied relevant facts;

(d) that this Court should interfere if it concluded that the sentence was not right;

(e) that this Court should review the sentence on humanitarian grounds.

The classical principles of sentencing were summed up by Lawton L.J. in R. v. Sargeant [1974] 60 Cr. App. R. 74 in four words: retribution, deterrence, prevention and rehabilitation. Of the principle of deterrence he said:

> "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 in both. Deterrent sentences may 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."

It cannot be gainsaid that the appellant's offence was premeditated that it was perpetrated in numerous transactions and continued for several years.

In 1960, Lord Lane, Lord Chief Justice gave some guidance to sentencing Judges as to the general approach to be followed in imposing sentence - R. v. Bibi [1960] 71 Cr. App. R. 368. He said:

> "..... this case opens up wider horizons because it is no secret that our prisons at the moment are dangerously overcrowded. So much so, that sentencing courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal.
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> Many offenders can be dealt with equally justly and effectively by a sentence of six or nine months' imprisonment as by one of 18 months or three years. We have in mind not only the obvious case of the first offender for whom any prison sentence, however short, may be an adequate punishment and deterrent, but other types of cases as well.
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> The less serious types of factory or shop-breaking; the minor cases of sexual indecency; the more petty frauds where small amounts of money are involved; the fringe participant in more serious crime: all these are examples of cases where the shorter sentence would be appropriate.

> "There are on the other hand, some offences for which, generally speaking, only the medium or longer sentences will be appropriate. For example, most robberies, most offences involving serious, violence; use of a weapon to wound; burglary of private dwelling houses; planned crime for wholesale profit; active large scale trafficking in dangerous drugs. These are only examples. It would be impossible to set out a catalogue of those offences which do and those which do not merit more severe treatment. So much will, obviously, depend upon the circumstances of each individual offender and each individual offence.
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> What the court can do is to ask itself whether there is any compelling reason why a short sentence should not be passed. We are not aiming at uniformity of sentence; that would be impossible. We are aiming at uniformity of approach."

Without being as explicit as the English Court, this Court has for many years endeavoured to keep custodial sentences as short as possible and for similar reasons as those expressed by the Lord Chief Justice in Bibi's case. Where serious fraud is concerned the Court has consistently upheld immediate custodial sentences ranging from 18 months to five years. In the main these cases have involved very serious breaches of trust especially by persons employed in financial institutions, accountants and the like. On his own admission, the appellant was engaged in a massive fraud against the interests of his employers and a significant section of the Jamaican public. We said in our oral judgment that the Resident Magistrate was accurate in her assessment that the appellant's offence warranted a sentence of three years imprisonment as it fell well within Lord Lane's category of offences which ought to attract long range terms of imprisonment.

The burden of Mr. Small's submission was that the Resident Magistrate having decided that in all the circumstances a custodial sentence was appropriate, should in the special circumstances affecting this appellant have suspended that sentence. Power to suspend a sentence of imprisonment was introduced into the law of Jamaica by the Criminal Justice (Reform) Act 1978. Section 6 of that Act provides, inter alia:

> "6 (1) A Court which passes a sentence of imprisonment on any offender for a term of not more than three years for any offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than three years from the date of the order (hereinafter referred to as the 'operational period'), the offender commits in Jamaica another offence punishable with imprisonment for a period exceeding six months (hereafter in this section and sections 7 and 8 referred to as a 'subsequent offence') and thereafter a court having power to do so orders under section 7 that the original sentence shall take effect:
>
> Provided that the above provisions of this subsection shall not apply where the offence involved the use, or the illegal possession of, a firearm or imitation firearm.
>
> (2) A court shall not deal with an offender by means of a suspended sentence unless the case appears to the court to be one in respect of which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence by an order under sub-section (1)."

Many common law countries have introduced similar provisions which appear to be well known in civil law countries.

Nigel Walker in his book "Sentencing, Theory, Law and Practice" states the rationale for the suspended sentence in this way:

> "9.32: The theoretical reason given by English proponents of this continental sentence was that it constitutes a more specific threat of a penalty than does probation or a conditional discharge, and would thus deter more effectively. It also appealed to 'denouncers' who thought that in some cases it was sufficient for the sentence to sound severe enough to declare society's disapproval of the offence, without actually being suffered by the offender."

Boyle and Allen in their book "Sentencing Law and Practice" give a similar explanation for the suspended sentence. At page 112:

> "As the objective of the suspended sentence is to keep the offender out of prison, it might equally be considered under the heading of non-custodial measures since its distinctive feature is that a sentence of imprisonment is imposed on conviction but not put into immediate effect. The suspended sentence is intended as a deterrent measure and differs from a conditional discharge in that with the latter there is no specified sentence hanging over the offender which will be put into effect on the commission of a further offence."

In the early days of the operation of the suspended sentence in England there was indecision among sentencers as to the situations most appropriate for the use of the suspended sentence. Lord Parker referred to this phenomenon in R. v. O'Keefe [1969] 1 All E.R. 426 when he said at 427H:

> "This court has found many instances where suspended sentences are being given as what one might call a 'soft option', when the court is not quite certain what to do, and in particular they have come across many cases when suspended sentences have been given when the proper order was a probation order."

Lord Parker condemned the practice of imposing a suspended sentence instead of a probation order and emphasized the distinction between the two sanctions. He said:

> "After all, a suspended sentence is a sentence of imprisonment. Further, whether the sentence comes into effect or not, it ranks as a conviction, unlike the case where a probation order is made, or a conditional discharge given."

In O'Keefe's case, Lord Parker explained the process by which the sentencer should proceed. He said:

> "..... it seems to the court that before one gets to a suspended sentence at all, the court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fines and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, is immediate imprisonment required, or can I give a suspended sentence?"

As the statute law in England stood in 1968 when O'Keefe's case was decided, the sentencing tribunal was not obliged to determine that a custodial sentence was warranted before it could impose a suspended sentence. An amendment introduced in the Powers of Criminal Courts Act 1973 gave effect to the decision in O'Keefe's case. Section 6(2) of the Criminal Justice Reform Act (Jamaica) quoted above is in similar terms.

The English Court has held that a thief who had several previous convictions for dishonesty ought not to be given a suspended sentence on conviction for stealing a fairly moderate sum of money - R. v. Mah-Wing [1983] 5 Cr. App. R. (S.) 347. A man who was fined £50 five years earlier for cultivating and possessing canabis, upon his further conviction for possession of 3.2 grammes of canabis resin was given a suspended sentence of three months imprisonment. The Court of Appeal held that a sentence of imprisonment for that latter offence was wrong in principle and that a fine was more appropriate. Consequently the suspended sentence was set aside. R. v. Jones [1981] 3 Cr. App. R. (S.) 51.

Public perception of the value of the suspended sentence was tested in an experiment by Walker-Marsh and is reported by Nigel Walker at p. 70 of his work "Sentencing, Theory, Law and Practice". Of seven stipulated forms of sentencing, the suspended sentence ranked as the least severe. The Walker-Marsh table of severity of sentences is recorded below with the "toughest" being ranked first and the "mildest" seventh:

Imprisonment for	-	12 months	-	1st
Imprisonment for	-	6 months	-	2nd
A fine of	-	£100	-	3rd
A fine of	-	£ 40	-	4th
Community Service			-	5th
Probation			-	6th
Suspended Sentence			-	7th.

Walker's experiment was carried out in 1984 whereas the comments of Lord Parker C.J. in O'Keefe were made in 1968 the year after the suspended sentence was introduced.

Mr. Small, helpfully referred us to the decision in R. v. Lowe [1978] 66 Cr. App. R. 122 and R. v. Turner and Others [1975] 61 Cr. App. R. 67 in support of his submission that the appellant had rendered great public service to Jamaica by co-operating with the police in the prosecution of co-conspirators and actually giving evidence for the prosecution when he was under no obligation whatsoever to do so.

There will be cases where the Director of Public Prosecutions will be minded to exercise his constitutional discretion not to prosecute an accomplice to serious crime in return for the full and frank co-operation of that accomplice in the investigation and prosecution of the offences. It is abundantly clear that the Director was not moved to such action towards the appellant and on the material outlined by him to the Resident Magistrate there could have been no basis for his extending any special clemency to the appellant.

After his plea of guilty and the imposition of an immediate custodial sentence, the appellant went on to give the evidence which was foreshadowed by his counsel before sentence. We fully accept the persuasive authority of R. v. Lowe (supra) that in a proper case such a new development can be taken into consideration upon a review of the sentence in the Court of Appeal but only to the extent that it was not and could not have been taken into account by the Resident Magistrate. We accept without reservation the opinion of Roskill L.J. that an accomplice through whose revelations insidious criminals can be brought to justice

deserves favourable treatment at the hands of the sentencing tribunal. It is notorious that a "supergrass" is an abomination in the underworld and risks hostile reception from fellow prisoners, but by itself that is not reason enough for a non-custodial sentence, but rather a consideration for the correctional authorities in the allocation of facilities to inmates. But Roskill L.J. was careful to say in R. v. Lowe that "crimes of this gravity must receive proper punishment" and the Court reduced sentences of ten years and eight years to five years. In the end Lowe received a sentence which was about one-half of the normal sentence for such offences because of his confession and his co-operation.

Every point made before us was canvassed before the learned Resident Magistrate except the fact that the appellant had in fact given evidence for the prosecution in a subsequent trial. A suspended sentence, although ranking as a custodial one, is publicly perceived as a very mild penalty as Walker's survey shows and this was an alternative much pressed upon the Resident Magistrate before she passed sentence. We have shown that this Court can interfere even when there is no complaint that the sentence is manifestly excessive but we concluded that on the evidence there was no error in principle in the sentence imposed. As Dillon L.J. said in R. v. Terry DeHavilland [1983] 5 Cr. App. R. (S.) 109 at 114:

> "Apart from the statutory maxima and certain other statutory restrictions, for example, those on the sentencing of young offenders, the appropriate sentence is a matter for the discretion of the sentencing judge."

[Emphasis added]

This was not a case of a petty theft; or of a conspirator on the fringe of the criminal activity; or a crime of passion where the injury although substantial, was contributed to by overt provocation; or where the domestic life of the convicted person had exceptionally unusual features; or where the age or state of health of the person was such that on humanitarian grounds an immediate custodial sentence would be wholly inappropriate. In any of these cases one would not be surprised if the sentencing tribunal preferred to impose a suspended sentence, rather than an immediate custodial one. These examples are all far removed from the instant appeal.

It is essential that there be uniformity of approach in sentencing and it is essential that this Court should not by the use of its review powers give the impression that white collar crimes will be treated less severely than ordinary street crimes, where in each case, the harm to the public can be measured. With these considerations in mind, we saw no reason to disturb the sentence imposed by the learned Resident Magistrate and consequently we dismissed the appeal.