JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 88/94

COR: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

REGINA

VS.

ERROL PRYCE

D. V. Daly, Q.C. and C. J. Mitchell for applicant

Miss Paula Llewellyn, Deputy Director of Public Prosecutions for Crown

November 30; December 1 and 12, 1994

CAREY P. (AG.):

On 8th August 1994 in the Home Circuit Court, this applicant pleaded guilty to the offence of wounding with intent and was sentenced to four years imprisonment and in addition to be once privately whipped by the imposition of six strokes of a rod of tamarind switches.

He now applies for leave to appeal that sentence on the ground that the sentence was manifestly excessive in all the circumstances of the case.

Before dealing with the submissions deployed by Mr. Dennis Daly, Q.C. we set out the circumstances from which the charge arose. On June 24, 1992 the applicant for reasons which were not vouchsafed to the trial judge, after some fuss grabbed his commonlaw wife and ordered her to come 'round. When she demurred, he removed her blouse and held her in her bra. At this

point, she called out to her mother, the victim Rosetta Cameron. The latter came up, enquired what was happening and told her daughter to replace her blouse. It appears that she then struck the applicant with a stone so that he released his hold on his common-law wife. Doubtless, incensed by this assault, he retaliated by thumping her in her belly. When she fell to the ground, he plunged an ice-pick into her neck. She is now crippled.

The learned judge described the applicant's act in these words (p. 12):

> "... not only did you hit her in her stomach but, I am a country man and I know what it is to poll a cow and that was exactly what you did with this woman."

He continued:

> "What you have done is so reprehensible."

This was by any reckoning, appalling conduct. It was callous, cold, brutish and plainly called for condign punishment. Learned counsel for the applicant did not dissent to the view expressed by a member of the Court during the exchanges that a custodial sentence was warranted.

We begin this part of the judgment by making it abundantly clear that we are not in this appeal concerned with the constitutionality or legality of the sentence of whipping. Corporal Punishment is permissible by virtue of the Crime (Prevention of) Act. This Act was in force before Independence and is therefore preserved by Section 26(8) of the Constitution. Learned counsel for the applicant did not attempt to argue either the constitutionality or legality of the sentence. That fact removes from debate considerations of whether flogging is barbaric, or degrading. He did essay an argument along those lines but he did not, we think advance it with particular enthusiasm. Learned Queen's Counsel did submit however, that the Court should be

loath to impose a sentence which a Government appointed Commission had recommended should be repealed. But it is sufficient to say that Parliament did not repeal and has not repealed the relevant legislation. He also said that a Constitutional Committee has recommended the repeal of Section 26(8) of the Constitution. We would observe that the judge's function is to do right by all manner of men according to the laws of the country i.e. the Court administers the laws which are in force in the country. "Judicis est jus dicere, non dare" - (a judge should administer the law as he finds it, not make it).

Mr. Daly next argued that the sentence of whipping had been in abeyance for twenty-five years and before it was imposed, the Court should have invited counsel to address on that question. That sentence, he said, took everyone by surprise.

Miss Llewellyn quite candidly conceded that fairness did require some such invitation by a trial judge.

This Court in reviewing sentences, can interfere only where a sentence is manifestly excessive or if the sentence is wrong in principle. In the recent case of R. v. Earl Simpson (unreported) S.C.C.A. 54/93 this Court called attention to the situation where a judge was minded to impose a discretionary life imprisonment, that he should inform counsel and allow him to deal with the matter specifically. The reason for this course is to enable counsel to bring the judge's mind to all relevant factors that bear on the matter. The result of that assistance is that the judge will be better able to balance all the factors necessary to advise himself.

Having said that however, it is right to point out that in R. v. Morgan [1987] 9 Cr. App. R. (S) 201, where the Court of Appeal in England held that a judge should not impose a discretionary life sentence without first informing counsel for the defendant what he has in mind, and inviting submissions on the matter, it did not set aside the sentence imposed. The Court

contented itself in observing that it was unfortunate that the judge had not informed counsel in advance. Indeed the same course was followed in R. v. MacDougall [1983] C.A.R. (S) 78 where the Court held that it was extremely desirable that a judge should adopt such a course. By upholding the sentence of life imprisonment imposed, it was clear that the Court was holding that the sentence was appropriate and therefore could not be considered manifestly excessive.

It seems to us therefore that although it would have been desirable for the judge to have invited counsel that he was minded to invoke the provisions of the Crime (Prevention of) Act, that omission cannot result in that sentence being set aside if the sentence or combination of sentences is not otherwise manifestly excessive.

We can therefore now deal with the factors personal to the applicant which were brought to our attention but which were also considered by the learned trial judge. Mr. Daly Q.C. pointed to the fact that the applicant pleaded guilty, was aged 23 years, was gainfully employed, took care of his children and had no previous conviction. The learned judge was addressed on these matters and therefore had them in mind but it was clear that the principle he prayed in aid, was that of deterrence. He wished to send a message regarding the endemic violence in the society which he recognized. He said this at p. 12:

> "Today it seems to me that at the drop of a hat injury must be inflicted on somebody. I cannot understand why you had to arm yourself with an ice-pick that night. You have a quarrel with your girlfriend, you are telling me that she has children for you, and you arm yourself with an ice-pick? Why? The mother, as any good mother would, spoke to her daughter and invited her to come to the house the night."

This Court is well aware of the high incidence of violent crime in the society particularly against women. It matters not whether individual members of the Court might or might not invoke that treatment which is provided by Parliament, and is therefore a lawful sentence. The high incidence of crime, in our view, justifies punishment of more than usual severity. We conclude therefore, that the sentence is not manifestly excessive.

In the result the application for leave to appeal is refused. Sentence will commence on 8th November, 1994.