IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CRIMINAL APPEAL NO. 24 OF 2005

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
AND	
SHERWOOD WADE	**Respondent**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Kirk Anderson, Director of Public Prosecutions, for appellant.
Mr. Simeon Sampson S.C. for respondent.

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29 July & 27 October 2006

CAREY, JA

1. This is an application by the Director of Public Prosecutions for leave to appeal the sentence of a fine of $4,000 to be paid by 6 October 2006, in default to be recovered by distress.

2. Details of the trial and the facts and circumstances of the case are fully set out in the judgment of the court in Criminal Appeal 25/05, R. v. Sherwood Wade delivered on the same date as this judgment. It will suffice to provide only the briefest of details. The appellant was convicted of manslaughter by negligence and sentenced to pay the fine indicated above. The ground of appeal is that the sentence imposed by Arana J. was unduly lenient and it was objected that the direction that the fine be recoverable by distress was not authorized by the Indictable Procedure Act, Cap 96. Mr. Sampson, S.C. conceded the ground but asked that in all the circumstances, a custodial sentence should not be imposed. He did not challenge the objection made by the Director as to the sanction ordered by the judge.

3. With respect to the latter matter, our attention was drawn to the Indictable Procedure Act, Cap. 96 section 165(1)(e) which provides as follows:

> "165(1) Subject to this section, where a fine is imposed by, or a recognizance is forfeited before the court, an order may be made in accordance with this section:-
> (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered;"

This provision is clear that in default of payment of a fine, the sanction and the only sanction permitted is a term of imprisonment. The judge was plainly mistaken when she ordered that the fine was recoverable by distress in default of payment. It is however a matter of regret that this provision was not brought to her attention promptly. At the same time, we would suggest to trial judges that in

preparing a case for trial, a little time be employed in assuring themselves of the limit and extent of the sentence which the particular offence in the case allows under law. The order made was a nullity and must be set aside. We will return to the imprisonment fixed by us, hereafter in this judgment.

4. We can now deal with the ground of appeal, that is, that the sentence of a fine of $4,000 was unduly lenient. We can say at once that the trial judge approached the question of sentence from a skewed perspective. She may have been led to that position by the submissions of Mr. Sampson, S.C. in the course of his plea in mitigation. Counsel spent a deal of time analyzing the prosecution case as if he were making a no case submission, and concluded with these words – (p. 23) "Given the tenuousness of this evidence, my lady; the sentencing court therefore having appreciated the evidence with such precision and the relevant portions, that is, the duty to assist the jury, the court of sentencing now is free to employ the ingredients, the essence of what was told to the jury in deciding, look, as the sentencing court, I am humbly suggesting, submitting that there might still be a little lurking doubt in the mind of the court now as sentence on the evidence we saw. Am I now sentencing the right person? What is the danger which I humbly recommend and submit could be factually possible in a situation as this?"

And his peroration included these words:-

> "…I am begging your Ladyship that it would respectfully, in my opinion, be an assault to justice to risk sending a man like this, given the evidence, to serve a sentence of incarceration…"

This argument put before the trial judge is, without doubt, fundamentally flawed. The weakness of the prosecution case can hardly be categorized as being in mitigation of sentence. This approach nullifies the functions of judge and jury which is the system operating in this jurisdiction and in this trial. The responsibility of the judge is to leave the case for the jury's consideration if he is satisfied there are facts which prove the case and are fit to be left to the jury. It is then for the jury having been given directions on the law by the judge to find where the truth lies. By its verdict, the jury indicates its view. A verdict of guilty is a clear indication that the prosecution case has been accepted. That result must be accepted by the trial judge. There is no warrant either in statute or in any authority for this view which was advanced by Mr. Sampson.

5. In the court below, counsel for the Crown was therefore correct when in responding to Mr. Sampson's submissions she began thus:-

> "…the jury obviously accepted the evidence of the prosecution and they convicted the accused of manslaughter by negligence and the sentence of the court has to be based on that conviction…"

She referred to a case *R. v. Mervin Vernon*, the facts of which were not altogether dissimilar to the present case, where the Chief Justice imposed a sentence of nine months' imprisonment and ordered the payment of compensation. She then returned to the theme of Mr. Sampson's submissions, and repeated her earlier comments:-

> "…The jury has convicted Sherwood Wade of manslaughter by negligence. They could not have done so if they did not accept the evidence of the prosecution and they were obviously of a different view from your Lordship and they are entitled to be of a different view. The Court in sentencing has to base the sentence on the conviction of the jury and I would most respectfully submit, my Lady, that a judge is not allowed where that judge may have felt that the evidence was weak or uncertain to substitute that uncertainty for the certain conviction of the jury."

For reasons not readily apparent to us, the trial judge, obviously miffed at these remarks , interjected –

> "..Who is trying to do that counsel? What are you submitting? Who is trying to do that?"

There was a courteous reply by counsel in which she pointed out that the criticisms of the evidence by Mr. Sampson led her to conclude that the court was being asked to base the sentence on its view of the evidence.

The record shows:-

> "The Court: The court is fully aware that the court has passed its verdict, so it is a totally different issue before the court now the court is fully aware of that. Lets proceed."

Mr. Sampson replied and the court proceeded to make some comments before imposing sentence. It is, we feel, necessary to quote her verbatim on the material portion of her ruling:-

> "…The learned prosecutor has urged upon this Honourable court the case of *The Queen v. Mervin Vernon* as a precedent in which a police officer has been convicted and sentenced of the lesser offence of causing death by careless conduct. I did not sit on that case and I am not aware of the quality of the evidence in that case. The learned Chief Justice having presided over that trial used his discretion to impose the sentence which he thought was most appropriate in that case. Having presided over this trial, I **<u>have first hand knowledge of the quality of the evidence</u>** and of the facts of this particular case, so I am using my own discretion to impose the best sentence that I see fit. I am of the view that no useful purpose will be served by sentencing you to prison. I therefore fine you the sum of $4000 to be paid by October 6, 2005, in default execution will be levied on your property". [Emphasis supplied]

6. It is as plain as can be that despite the comments of the judge to the contrary, made during the arguments of Crown counsel, she did not consider that – "it (sentence) is a totally different issue before the court now". She had obviously accepted the submissions of Mr. Sampson, S.C. *holus bolus* and preferred his to those of the Crown counsel. We have no hesitation in saying those submissions were as mischievous as they were fallacious. If they were to be accepted the rule of precedent would have no force, for a judge could only rely on cases he or she had previously tried. There would be no means of ascertaining the range of sentences being imposed so as to ensure consistency and certainty. The submissions made by Mr. Sampson and regrettably accepted by the trial judge were based on no known principle. The principle that the sentence of the court must be based on the jury's findings is

consonant with the principle of the separation of functions of judge and jury inherent in such a mode of trial. The principle is correctly stated in Archbold Criminal Pleading, Evidence and Practice para. 5 – 28: "where an offender is convicted by the jury, the sentencer must adopt the factual implications of the verdict as the basis of the sentence, where it is clear that the verdict can have been reached only on one basis…" see *R. v. Boyer 3 Cr. App. R (5)35; R. v. Solomon and Triumph 6 Cr. App. R(5)120; R. v. McGlade 12 Cr. App. R. (5)105.*

7. It only remains to state that there was agreement that the sentence imposed was unduly lenient. That leniency was based on the mistaken view that the quality of the evidence adduced at trial was a relevant factor to be placed in the scales in arriving at an appropriate sentence.

8. The judge is entitled to evaluate the nature of the offences proved. In the instant case, the appellant discharged his firearm, a lethal weapon, in the direction of the crowd. Since there was no allegation that he was under attack, his conduct can only be described as reckless and dangerous. It warranted condign punishment. Then the judge should see whether there were any mitigating factors with respect to the character of the appellant. We were told the appellant had an impeccable record, a factor which the judge could properly have in mind in the sentencing exercise. In our judgment, this offence justified a custodial sentence in line with *R. v. Mervin Vernon*, and police officers should hereafter realize that a custodial sentence is the appropriate sentence in cases of this nature. This case is being used to serve notice of this punishment which we recommend. In all the circumstances, we

imposed a sentence of a fine of $15,000 to be paid within six months hereof and in default nine months' imprisonment.

9. The above represents the reasons for the decision.

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MOTTLEY P

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SOSA JA

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CAREY JA