BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL
(CRIMINAL DIVISION)

REFERENCES NOS. 1,2,3,4, & 5 OF 2004

BETWEEN:

THE HONOURABLE ATTORNEY GENERAL

Applicant

and

[1] ALBION HODGE
[2] BERTON SMITH
[3] LUDWIS ALLEN WHEATLEY
[4] BEVIS SYLVESTER

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon Mr. Ian D. Mitchell QC — Justice of Appeal [Ag.]

Appearances:

Mr. Terrence Williams, Principal Crown Counsel with Ms.Tania Richards for the Applicant
Mr. Joseph S. Archibald QC with Mr. Richard Rowe and Ms. Anthea Smith for Respondents Nos 1, 2 and 3

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2004: June 8, 9;
June 23.
June 25. [Re-issued]

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JUDGMENT

[1] GORDON, J.A.: By four separate applications the Honourable Attorney General of the British Virgin Islands (hereafter "BVI") sought this Court's leave to refer the sentences of the four Respondents imposed on the 4th December 2003, 19th and 20th day of January 2004 by the Hon Justice Hugh Rawlins to the Court of Appeal and by the same application

applied that if leave be granted that the application be treated as the respective References.

[2] At the commencement of the hearing of the applications Learned Counsel for the Honourable Attorney General sought and was granted leave to withdraw the Application in respect of Bevis Sylvester, the Respondent No 4. The hearings of the Applications against the other three Respondents were consolidated and heard together. There were in fact two applications in respect of Berton Smith in respect of sentences passed on him on the 4th December 2003 and on the 19th January 2004.

## Background

[3] On 4th December 2003 the Respondent Berton Smith was convicted of:

[a] Conspiracy to extort by a Public Officer and ordered to pay $129,097.00 compensation to the crown within three months or, in default, six months imprisonment;

[b] Procuring the execution of a valuable security by deception and sentenced to a fine of $20,000.00 payable within six months, in default four years imprisonment;

[c] Procuring the execution of a valuable security by deception and sentenced to a fine of $20,000.00 payable within six months, in default four years imprisonment;

[d] Procuring the execution of a valuable security by deception and sentenced to a fine of $20,000.00 payable within six months, in default four years imprisonment;

[e] Procuring the execution of a valuable security by deception and sentenced to a fine of $20,000.00 payable within six months, in default four years imprisonment.

[4] On 19th January 2004 the Respondents Albion Hodge, Berton Smith, Ludwis Allen Wheatley and Bevis Sylvester were convicted on their guilty pleas and sentenced as follows:

Albion Hodge – 6 months imprisonment

Berton Smith – *Count 1*: 9 months imprisonment

*Count 3*: Convicted Reprimanded and Discharged.

*Count 7:* 9 months imprisonment

Ludwis Allen Wheatley - *Count 1:* 9 months imprisonment;

*Count 5:* Convicted Reprimanded and Discharged

Bevis Sylvester - *Count 1:* 6 months imprisonment;

*Count 4:* Convicted Reprimanded and Discharged.

They had pleaded guilty to:

Abion Hodge- Obtaining Pecuniary Advantage by Deception contrary to section 219(1)(b) of the Criminal Code

Berton Smith- *Count 1:* Obtaining Pecuniary Advantage by Deception contrary to section 219(1)(b) of the Criminal Code

*Count 3:* Neglect of Duty contrary to Common Law

*Count 7:* Perverting the Course of Justice contrary to section 93 of the Criminal Code

Ludwis Allen Wheatley- Count 1: Obtaining Pecuniary Advantage by Deception contrary to section 219(1)(b) of the Criminal Code

Count 5: Neglect of Duty contrary to Common Law

Bevis Sylvester- *Count 1:* Obtaining Pecuniary Advantage by Deception contrary to section 219(1)(b) of the Criminal Code

*Count 5:* Neglect of Duty contrary to Common Law

All other charges against the Respondents were withdrawn pursuant to an agreement between the prosecution and the defence which agreement quite properly did not involve the learned trial Judge.

Variation of Sentence

[5] On 19th January, 2004 learned Queen's Counsel for Smith urged the learned trial Judge to vary the sentence he had given on the 4th December, 2003 to extend the period to pay the fine. The argument advanced on his behalf was that Smith could not pay the fine whilst in prison. The Crown raised the issue of *functus officio*. The learned trial Judge adjourned for the following day to hear arguments.

[6] On 20th January 2004 after hearing arguments on both sides the learned trial Judge varied the sentence as follows:

> Berton Smith*:* Paragraph 1 amended – Smith to be permitted to pay the sum of $129,000.00 within 3 months of date on which he is released from prison on sentence given on 19th January, 2004.
>
> Paragraphs 2-5 of order – pay each fine of $20,000.00 within 5 months of release from prison on sentence issued on 19th January, 2004.
>
> Albion Hodge*:* Compensation in the amount of $75,000.00 to be paid to the Crown; and $75,000.00 fine payable within two (2) months in default six (6) months imprisonment.

[7] The Learned Attorney General complains of two matters, firstly that the sentences were unduly lenient, and, secondly, that at the time that the learned trial Judge altered the sentences of the two Respondents, he was acting without jurisdiction as he was at that time *functus officio*.

[8] In respect of the first complaint, that the sentences were unduly lenient, the Principal Crown Counsel on behalf of the Applicant argued that Section 28 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance Cap 80 of the Revised Edition of the Laws of the Virgin Islands (hereafter "the Ordinance") imports Sections 35 and 36 of the Criminal Justice Act 1988 of England (hereinafter "the English Act") which latter provisions confer on the Attorney General of England the right, with leave of the

Court of Appeal of England, to refer a case to them to review the sentencing in a case to which that part of the English Act applies.

[9] Sections 27 and 28 of the Ordinance read as follows:

> "27. Subject to the provisions of this Ordinance, there shall be vested in the Court of Appeal-
> (a) the jurisdiction and powers which at the prescribed date were vested in the former Court of Appeal;
> (b) the jurisdiction and powers which at the prescribed date were vested in the British Caribbean Court of Appeal;
> (c) such other jurisdiction and powers as may be conferred upon it by this Ordinance or any other law.
>
> 28. The jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Ordinance and rules of court and where no special provisions are contained in this Ordinance or rules of Court such jurisdiction so far as concerns practice and procedure in relation to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England –
> (a) in relation to criminal matters, in the Court of Appeal (Criminal Division)
> (b) in relation to civil matters in the Court of Appeal (Civil Division)."

[10] Learned Counsel for the Hon. Attorney General urged that the provisions of section 28 imported the English law in respect of jurisdiction, procedure and practice into British Virgin Island law where no special provisions are contained in the Ordinance. With the greatest of respect to learned Counsel, I am of the view that he has misread the section. What the section says is that the "jurisdiction [of the Court of Appeal] so far as concerns practice and procedure …shall be exercised as nearly as may be in conformity" with English law. To put it another way, the section does not confer new jurisdiction, but merely states that where jurisdiction is conferred by the Ordinance and the Ordinance is silent as to practice or procedure in the exercising of that jurisdiction, then resort may be had to English law.

[11] This raises the question of whether the right granted by Section 36 of the English Act may be described as relating to procedure or practice. However, prior to doing so, the Ordinance needs to be examined.

[12] The Court of Appeal is a Court created by statute, and derives its powers and jurisdiction from statute. The Ordinance is the basic statute giving birth to the Court and its terms must be examined to see whether the amplification suggested by this Application is warranted, permissible or simply ultra vires.

[13] Section 35 of the Ordinance is the first section under the heading "Criminal Appeals from the High Court". It reads in part:

> "35-(1) In sections 35 to 57 unless the context otherwise requires –
> "appeal" means an appeal by a person convicted upon indictment;
> "appellant" means the person making such appeal; …

[14] Section 36 of the Ordinance creates the right of appeal and reads as follows:

> "36. A person convicted on indictment may appeal under this Ordinance to the Court of Appeal –
> (a) against his conviction on any ground of appeal which involves a question of law alone; and
> (b) with leave of the Court of Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to such Judge to be a sufficient ground of appeal; and
> (c) with leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

[15] Section 37 of the Ordinance sets out the powers of the Court of Appeal in criminal appeals. Sub-section (3) of that section is particularly apposite in this context and reads as follows:

> "(5) On an appeal [defined in section 35 quoted above] against sentence the Court of Appeal shall, if they think a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, and in any other case dismiss the appeal"

[16] Based, therefore, on the specific provisions which endow the Court of Appeal with its jurisdiction, I am satisfied that there is no power granted to the Attorney General such as is sought to be exercised in this Application. Reverting now to the question raised at paragraph 11 above, namely whether the power granted to the Attorney General under the English Act can be described as relating to procedure or practice, I derive assistance from

the 1949 Canadian case of Cullen v The King[1], where Rand J. speaking of the amendment of the Canadian Criminal Code to provide the right of the Crown to appeal commented that the amendment provided a striking departure from fundamental principles of security for the individual". He said:

> "At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life: and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy"

[17] I believe that the same sentiment prevails today as did in 1949. I am of the view that if the legislative authority is of the view that "strong reasons of public policy" dictate that the Crown should have the right of appeal against sentence, or for any other reason, then it is the duty of the legislature to pass the appropriate laws. It is not for this Court, or any other court, to take it upon itself to determine that there are strong reasons of public policy and to 'legislate' in derogation of the rights of the individual. I do not agree with learned Counsel for the Attorney General that we should assume a quasi legislative power by categorizing what he asks us to do as 'procedural'. The right given by section 36 of the English Act must be seen for what it is. It is both a right in the Attorney General, and a derogation of the right of an individual not to be put in jeopardy twice.

[18] I am further fortified in the view expressed above in that the laws of the Virgin Islands do make specific provision for appeals by the Crown in certain circumscribed circumstances. Section 51A of the Criminal Procedure Ordinance, Cap 18 of the Laws of the Virgin Islands provides that the prosecution may apply for leave to appeal where an accused has been acquitted in certain specific circumstances. No such right of appeal against sentence is given to the prosecution.

[19] I am of the view, and do so hold, that this Court has no jurisdiction to grant leave to the Attorney General, the Applicant, to appeal against the sentence passed by the Learned

[1] (1949), 94 C.C.C. 337

trial Judge on the grounds of the importation of sections 35 and 36 of the Criminal Justice Act 1988 of England.

[20] The second question raised by the Attorney General relates to the variation of sentence of Albion Hodge and Berton Smith. Learned Counsel for the Attorney General relied heavily on the case of Batchelor[2] as authority for saying, as he did, that upon entry of the final record of sentence the sentencing court cannot vary such a sentence. Learned Queens' Counsel for the Respondents, on the other hand, also relying on Batchelor, advanced, both before us and in the Court below the position that in fact it was not until there had been gaol delivery that the Judge became *functus officio*. I am uncertain why learned Counsel found it necessary to plumb those particular depths. Section 84 of the Ordinance provides the short answer to the question. Section 84 reads as follows:

> "Any fine or penalty imposed by a judge may, at any time before it has been paid or satisfied, be reduced or remitted by him."

Clearly if a Judge may reduce or remit, it follows logically that he also has a power to vary the terms of payment. The only question remaining therefore is whether the word "penalty" is broad enough to include imprisonment.

[21] In the case of R. v Smith[3] Erle C.J. said "The phrase 'last penalty of the law' shews that the word 'penalty' is capable of meaning any penal consequences" and in the same case Blackburn J stated "I am clearly of the opinion that the word 'penalty' is large enough to mean, is intended to mean, and does mean, any punishment, whether by imprisonment or otherwise". In my view therefore, section 84 of the Ordinance provides the complete answer to the argument of the Learned Principal Crown Counsel.

[22] In the premises, I hold, therefore, that the learned trial Judge, on the 20th January 2004, was not *functus officio* when he varied the sentences of Albion Hodge and Berton Smith and that the sentences as varied are lawful.

[2] 36 Cr. App. R 64

[23] Leave to appeal against sentence is refused.

Michael Gordon QC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

[Sgd.]
I concur.

Ian D. Mitchell, QC
Justice of Appeal [Ag.]

[3] (1862) Le & Ca 131