In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2007: No. 16

BETWEEN:

MAXWELL SINCLAIR ROBERTS

Appellant

-and-

LYNDON RAYNOR

Respondent

Date/s of Hearing: Tuesday 1 April and Thursday 3 April 2008
Date of Judgment: Thursday 3 April 2008

Elizabeth Christopher for the Appellant; and
Nicole Smith of the DPP's Chambers for the Respondent.

JUDGMENT

1. This appeal against sentence gives rise to a short but important point of principle. When it first came before me on Tuesday I adjourned it to allow the respondent to research and consider the point. However, from the result of those researches, it appears to be a matter of first impression.

2. The appellant was convicted after a contested trial of attempting to obtain $20M from a re-insurance company by a transparent and inept deception. He appealed his conviction and I dismissed that appeal on 30 May 2007, and remitted the matter to the Magistrates' Court for sentence. On 6 June 2007 the Magistrate, after hearing mitigation, sentenced the appellant to 5 years immediate imprisonment. It is apparent from the sentencing remarks that the learned Magistrate intended to impose upon Mr. Roberts the maximum sentence available to him.

3. The substantive offence of obtaining by deception is created by section 345 of the Criminal Code Act 1907 as amended ('the Code'), which provides –

> **Obtaining property by deception**
> 345 (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it shall be guilty of an offence and liable on summary conviction to a fine of $10,000 or to imprisonment for five years, or both; and on conviction on indictment to a fine of $100,000 or imprisonment for ten years, or both.

4. However, the appellant was charged, and convicted, of attempting to commit that offence. The sentence for attempts to commit indictable offences is prescribed by section 78 of the Code, which provides

> **Punishment for attempt to commit indictable offence where no special punishment provided**
> 78 Any person who attempts to commit an indictable offence other than treason or felony is liable, if no other punishment is provided, to a punishment equal to one-half of the greatest punishment to which an offender convicted of the offence which he attempted to commit is liable.

5. There is no dispute but that section 78 applies in this case. In particular the offence under section 345 is an indictable offence for these purposes, notwithstanding that it is triable either way, by reason of the definition of "indictable offence" in section 3 of the Code –

> "indictable offence" means an offence declared, in this Act, to be treason, a felony or a misdemeanour, and includes any offence in respect of which an accused person is triable on indictment whether or not he is also triable summarily;

In my judgment, the offence remains an indictable offence, notwithstanding that the offender is in fact tried summarily, although the conviction is treated as a conviction of a summary offence: see section 76 of the Code.

6. Had Mr. Roberts been tried on indictment it is clear that the maximum available to the sentencing court would have been 5 years, that being one half of the ten year maximum available for the completed offence. But he was not convicted on indictment. He was convicted summarily. Had he been convicted summarily for the completed offence the

maximum available to a Magistrate would only have been five years. In those circumstances does section 78 mean one half of the absolute maximum for the completed offence, as the prosecution contends, or does it mean only one half of the maximum available on summary conviction, as the appellant contends?

7. It seems to me plain that section 78 means one half of the maximum available to the sentencing court for the completed offence: in this case one half of the maximum available on summary conviction. Otherwise the distinction between an attempt and the completed offence would tend to be abrogated when an offence such as that created by section 345, is tried summarily. Moreover, as Ms. Smith very fairly and properly points out, it would produce an anomalous result in the case of certain offences where the maximum on indictment is more than twice that available on summary conviction. Thus, section 338 of the Code says that for the offence of Robbery a person –

> ". . . shall be liable on summary conviction to a fine of $10,000 or to imprisonment for five years, or both; and on conviction on indictment to imprisonment for twenty years."

In such a case the interpretation of section 78 for which the Crown contends would mean that a person convicted before a Magistrate of the complete offence could only be sentenced to five years imprisonment, but a person convicted of an attempt could be sentenced to ten years. This is clearly not what section 78 intended.

8. The Crown raise one further point, which is that on an appeal, this Court can substitute any sentence which it thinks appropriate[1], and it is submitted to me that I can now treat the matter as if it had been committed to me for sentence, and impose a sentence greater

[1] See section 18(3) of the Criminal Appeal Act 1952:
"(3) Subject as hereinafter provided, the Supreme Court, in determining an appeal under section 3 by an appellant against his sentence, if it appears to the Court that a different sentence should have been imposed, or that the appellant should have been dealt with in some other way —

> (a) may quash the sentence imposed by the court of summary jurisdiction and may impose such other sentence allowed by law (whether more or less severe) in substitution for the original sentence as the Court thinks just; or
> (b) may quash the sentence imposed by the court of summary jurisdiction and may deal with the appellant in such way as may be allowed by law in respect of the conviction of the offence in question;"

than that which the Magistrate could impose. I think, with respect, that that is not correct, and that section 18(3) of the Criminal Appeal Act, when it refers to "such other sentence allowed by law" means such other sentence as allowed by law to the original sentencing court. Otherwise, even on a defendant's appeal, this court could behave as if it were acting on a committal for sentence under section 25 of the Summary Jurisdiction Act. But this is not a committal for sentence, it is an appeal, and I think that on an appeal this court is bound by the sentencing limits of the court from which the appeal comes. So I do not feel able on this appeal to increase the sentence over that which was available to the Magistrate, irrespective of whether I might otherwise have been persuaded or might wish to have done so. I think therefore that the Magistrate was limited to a two and a half year sentence, and I do not think that I have power to go above that.

9. I therefore allow the appeal, quash the sentence and substitute a sentence of two and a half years. That was, as a matter of law, the maximum available to the learned Magistrate. I see no reason to reduce the sentence beyond that. Mr. Roberts plainly intended his scheme to succeed, and took quite elaborate steps to further it. The haplessness of the offence does not detract from its criminality. He has a very poor record for offences of dishonesty, and had indeed only come out of prison immediately before attempting to put this scheme into effect. In those circumstances I think that the learned Magistrate was entirely justified in imposing whatever maximum was open to him.

Dated the 3rd day of April 2008.

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Richard W. Ground
Chief Justice