The Court of Appeal for Bermuda

CRIMINAL APPEAL No 11 & 13 of 2014

Between:

JOHN WARDMAN

Appellant/Respondent

-v-

THE QUEEN

Respondent/Appellant

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Saul Froomkin QC, Isis Law Limited, for Mr. Wardman
Mr. Rory Field and Ms. Victoria Greening, Department of Public Prosecutions, for the Respondent

Date of Hearing & Decision: **9 March 2015**

REASONS

Kay, JA

1. In the early hours of 27 December 2010 John Wardman (the Appellant) was driving a car on Manse Road, Paget when he lost control of it. Also in the car were his brother Christopher and, in the rear seat, their friend Alex Doyle. At the time, the Appellant was significantly intoxicated. The level of alcohol in his blood was more than twice the legal limit. As a result of the accident, Alex Doyle suffered serious injuries. On 17 July 2014 in the Supreme Court the Appellant was convicted by a jury of four offences. Although his defence at trial was that he had not been the driver at the material time, that is no longer an

issue. In the circumstances, three of the offences are no longer controversial. They are (1) driving with excess alcohol and causing grievous bodily harm to Alex Doyle; (2) impaired driving; and (3) driving with excess alcohol. For those he was later sentenced by the trial judge, Justice Simmons, to (1) six months' imprisonment; (2) $1,000 fine, 12 months' disqualification from driving and 10 demerit points; and (3) $1,000 fine and 12 months' disqualification. There is an appeal by the Prosecution contending that the sentence, specifically in relation to the offence involving grievous bodily harm, was manifestly inadequate. We shall return to that later.

2. The fourth offence in respect of which the Appellant was convicted is controversial. It is an offence of failing to provide Alex Doyle with the necessaries of life, contrary to section 316, read with section 271, of the Criminal Code Act 1907. This additional offence has no real sentencing implications for the Appellant. He received a concurrent sentence of 30 days' imprisonment. However, he appeals against conviction in relation to it. The use by the Prosecution of that particular offence in the context of a motoring case is unprecedented. Before addressing it, we should relate the facts in more detail.

The Facts

3. Alex Doyle had been the Appellant's best friend since they were five years old. On the night of 26 December, the Appellant, his brother Christopher and Alex had been drinking together in the Docksiders Bar on Front Street. They left together at about 2:00 am on 27 December and got into the Wardman family's Mitsubishi Space Wagon. The Appellant drove with his brother alongside him in the front and Alex Doyle in the rear passenger seat. Their intention was to travel to the Wardman family home in Warwick. The Appellant drove along East Broadway out of Hamilton and along Harbour Road. As he turned left into Manse Road, he lost control of the car which impacted with a wall opposite Burrows Lightbourn, causing severe damage to the driver's side of the vehicle. It seems to have been at this point that the Appellant sustained a head injury, and more significantly, Alex Doyle sustained a fractured skull, a fracture of his

right eye socket and a fractured left wrist. He also suffered a severed artery and a large blood clot in his brain. Nevertheless, the Appellant continued to drive the vehicle along Manse Road for about a further 118 meters before colliding with another wall, at which point the vehicle came to a standstill. Shortly afterwards, a tow truck driver, Keith Richardson, chanced upon the scene and offered to tow the damaged vehicle. The Appellant, who was standing outside the vehicle with his brother, and seemed desperate to get home, accepted the offer. Neither of them mentioned the fact that Alex Doyle remained, seriously injured, in the vehicle. When Mr. Richardson noticed him, he immediately telephoned the emergency services.

4. Reserve Inspector Amin Donawa was off duty and at home nearby. Having heard the collision, he went to the scene. The Appellant said nothing to him about Alex Doyle being in the back of the car and being in need of medical attention. However, Inspector Donawa noticed the injured man and then informed the emergency services. They attended and removed Alex Doyle to hospital. There is no doubt that his injuries were extremely serious, necessitating extensive treatment which remains ongoing four years later. He is no longer on speaking terms with the Appellant.
5. It is a most unattractive feature of the case that when police officers attended the scene, it was Christopher Wardman who initially claimed to have been the driver. It was only after he had been arrested that he told the truth. In September 2011, he pleaded guilty to attempting to pervert the course of justice and was fined. Meanwhile, following Christopher's change of story, the Appellant was arrested at the scene for driving whilst impaired. He chose to make no comment when interviewed by the Police and he did not give evidence at his trial. His stance there was to put the Prosecution to proof that he had been the driver at the material time.

Failure to Provide the Necessaries of Life

6. The duty to provide the necessaries of life is imposed by section 271 of the Criminal Code which provides:

> It is the duty of every person having the charge of another person who is unable, by reason of age, sickness, unsoundness of mind, detention or any other cause, to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or by reason of any act, whether lawful or unlawful, of the person who has such charge to provide for that other person the necessaries of life; and he is deemed to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty."

This is the foundation for the specific offence created by section 316 in these terms:

> "Any person who, being charged with the duty of providing for another person the necessaries of life, without lawful excuse fails to do so, whereby the life of that other person is, or is likely to be endangered, or his health is or is likely to be permanently injured, is guilty of a misdemeanour, and is liable on conviction by a court of summary jurisdiction to imprisonment for twelve months and on conviction on indictment to imprisonment for two years."

7. Although these provisions have been part of the Criminal Code of Bermuda for almost 100 years, there is no known record of their ever having been used by prosecutors before this case. Similar provisions have also enjoyed longevity in Queensland and in Canada. In Canada there are examples of their use but it does not seem that they have been applied anywhere to the aftermath of a road traffic accident. It seems to us that they were probably conceived as a means of criminalizing in more obvious and less transient circumstances, typified by relationships in loco parentis but not limited to responsibility for children. For example, they could apply where the protected person is a hospital patient or a prisoner. This is not to say that they are incapable of application in novel situations. However, as this case demonstrates, resort to them in some situations will introduce unnecessary complexity to criminal proceedings without any obvious benefit. It is common ground that the most serious offence on the indictment in the present case, and the one which attracted the heaviest penalty, was the causing of grievous bodily harm whilst driving with excess alcohol. Once it was established that the Appellant was the driver (the central

issue at trial), he was bound to be convicted of that offence. In these circumstances, there was no purpose in having additional counts in the indictment unless they had sentencing implications, and no obvious purpose to be served by attempting to shoehorn the facts which occurred within a few minutes after the accident into an offence which was not designed to cover such eventualities.

8. The grounds of appeal against conviction do not go so far as to contend that the offence created by section 316 is incapable as a matter of law of applying to the aftermath of a road traffic accident (although the submissions of Mr. Saul Froomkin Q.C. came close to that). Their thrust is to seek to demonstrate, by reference to the Judge's summation, just how inappropriate it was to resort to section 316 in this case. There seems to have been a somewhat desultory attempt by defence counsel at the trial (Mr. Froomkin did not appear below) to challenge the lawfulness of the inclusion of the section 316 offence on the indictment, but it appears to have been batted away without detailed consideration.

9. We turn to the summation. Mr. Froomkin advances four main criticisms. First he submits that the Judge erred in law when directing the jury with respect to the essential elements of the offence. In this context, it has to be kept in mind that the gravamen of the offence, according to the Crown, was the failure of the appellant to provide Alex Doyle with the necessaries of life after he had sustained his injuries by providing assistance and summoning the emergency services. Mr. Froomkin's first point is that, save for reading out the words of section 316, the Judge gave the jury no assistance on the defence of lawful excuse. He submits that the need for such assistance arose because, on any view, the period of time was short (5-10 minutes) and, when considering what the Appellant had failed to do, the jury should have been instructed to have regard to there having been no evidence that the Appellant or his brother was in possession of a cell phone; to the fact that Mr. Richardson arrived on the scene very quickly and called the emergency services; to the fact that Inspector Donawa also made a similar call when he arrived minutes later; and to the

facts that, when Inspector Donawa arrived, he told the brothers to keep talking to Alex Doyle and, when the paramedics arrived, Christopher was "tending to the victim" through the car window. Whilst it is true that altruism does not appear to have been in the Appellant's mind at this stage, the question arises: did he have a legal duty under section 271 to duplicate the efforts of others? A consideration of such matters might have led the jury to conclude that the Crown had failed to prove that he had lawful excuse for not having done what others had done. The Director of Public Prosecutions submits that these aspects of the case had not featured in the evidence or in submissions to the jury and that, accordingly, the Appellant had not discharged the evidential burden which would have required the person to prove an absence of lawful excuse. He then submits that, if the Judge had concerned herself with such matters, it would have undermined the Appellant's real defence that he had not been the driver.

10. We do not think that the first of the Director's submissions is correct. The Appellant did not need to give evidence to establish the undisputed facts about the short timescale and the action of others. They were sufficiently established to discharge the evidential burden, regardless of whether defence counsel chose to spend time on the ingredients of this less serious offence when addressing the jury. If the Appellant was to have a fair trial in relation to the section 316 offence, these matters had to be the subject of proper direction. This is a striking illustration of the inappropriateness of including the section 316 offence on the indictment. It also diminishes the force of the Director's second submission. It is unattractive to postulate that a defendant's tenable defence on one, lesser, count should not be left to the jury because it might divert attention from his primary defence on another, more serious, count. The better answer is not to insist on the inclusion of the unnecessary count.

11. Secondly, Mr. Froomkin submits that the Judge misdirected the jury by conflating the meaning and purpose of the word "change" in section 217 with the meaning and purpose of the words "charged with" in section 316. The Judge said:-

> "The second element, then, concerns the charge referred to in section 316 and 271. The relevant position of the parties, that is Mr. Wardman and Alex Doyle, and the existence of an element of control exercised by one person and a dependency on the part of the other, are factors to consider in determining whether a person is under the charge of another."

Moments later she added:-

> "The third element then is the duty. A duty under the section arises when a person who is under the charge of another is unable to withdraw from that charge and is unable to provide himself with the necessaries of life. It is a duty to take care of the person appropriate to the circumstances and in a timely manner appropriate to the circumstances. The duty remains until the duty has been discharged. And, in this case, for example, by the ambulance staff taking over Alexander Doyle's care."

12. This is a difficult area and one cannot help but sympathize with the Judge. It is true that the word "charge" or "charged" is used in different senses, in section 271 and section 316. In section 271, "charge of" is used in the sense of "responsibility for", whereas in section 316 "charged with" is used in the sense of "legally obliged", as a result of the duty imposed by section 271. There are two stages: the imposition of the duty pursuant to section 271 and the offence committed by failing to perform that duty pursuant to section 316. It is therefore confusing to refer, as the Judge did, to "the charge referred to under section 316 and 271."
13. The difficulties are compounded when one considers, as was necessary in this case, when the duty arose; what its content was; how that content may have been reduced by the actions of others; and when the duty came to an end. These were crucial questions for the jury, but it is not possible to say that they were given helpful assistance with regard to them. The Judge was faced with enormous, probably insuperable, difficulties in having to guide the jury through real complexities compressed into a narrow time frame in circumstances which could not have been foreseen or intended when the offence was created a century ago.

14. It is appropriate to take Mr. Froomkin's third and fourth criticisms together. They arise from what the Judge said to the jury about the duty. There are two paragraphs: -

> "I can tell you, as a matter of law, that the Road Traffic Act refers to the driver of a car as being in care and control of the vehicle. Therefore, in that sense, it is open to you to consider that a driver of a vehicle will have dominion over a passenger, much as in the days gone by we would say that a master would have dominion over a servant."

And:

> "[The duty] is a duty to take care of the person appropriate to the circumstances and in a timely manner appropriate to the circumstances."

15. In essence, the criticism of these passages is that, in different ways, they could only have confused or misled the jury in relation to the duty.

16. The provision in the Road Traffic Act 1947 is section 35H(2), which provides that a person who occupies the driver's seat is "deemed to have had the care and control of the vehicle unless he establishes by a preponderance of evidence that he did not enter or mount the vehicle for the purpose of setting it in motion". Mr. Froomkin makes three telling points: (1) the provision is in the form of a presumption which can be rebutted, but the Judge did not mention that; (2) more particularly, section 35H(1) makes it clear that the provisions of section 35H apply to certain proceedings under specific provisions of the Road Traffic Act; they have no wider relevance; and (3) in any event, section 35H(2) is concerned with the care and control of the vehicle, not the passengers, a fortiori when the driver is no longer occupying the driver's seat. For these reasons, it is plain that the Judge introducing a statutory provision which has nothing to do with the offence under section 316 of the Criminal Code. By doing so, she created the risk that, having found the Appellant to have been the driver of the car, the jury would conclude without more ado that Alex Doyle was at all material times in his charge and the beneficiary of the duty to be provided with the necessaries of life.

17. Further confusion could have been caused to the jury's consideration by the Judge's direction that the duty under section 271 and 316 is a duty " to take care of the person appropriate to the circumstances and in a timely manner appropriate to the circumstances." That would be akin to a general duty of care rather than a narrower duty to provide the necessaries of life.
18. All this leads to the inevitable conclusion that the Judge cannot but have confused the jury in the course of her endeavour to assist them in relation to this offence. Her task was an unenviable one, and she deserves sympathy because she was compelled to provide assistance in relation to an obscure and complex offence which ought not to have been charged in the circumstances of this case. In these reasons, we consider the conviction on this count to be demonstrably unsafe and we quash it. It is unnecessary to address a further and more speculative ground of appeal which sought to take issue with a single sentence in the summation.

The DPP's Appeal Against Sentence

19. The DPP seeks to appeal against the sentence of six months' imprisonment in relation to the offence of driving with more than 80 mg alcohol in the blood and causing grievous bodily harm to another, on the ground that the sentence was "manifestly inadequate." On behalf of John Wardman, the Respondent to this appeal, Mr. Froomkin takes a preliminary point. The right to appeal against a sentence on the ground that it is manifestly inadequate stems from section 17A of the Court of Appeal Act 1964, as amended. It states –

> " A person who is the informant in respect of a charge or an offence heard and determined by the Supreme Court it its original…jurisdiction may, with the leave of the Court of Appeal, appeal against the sentence or order passed thereon –
> (a) …upon the ground that it is manifestly inadequate…"

20. Section 1 of the act defines "informant" as "the person who has laid the information in a prosecution before a court of summary jurisdiction." In contrast, the prosecutorial right to appeal an acquittal or discharge is expressly conferred upon "the Director of Public Prosecutions or the informant, as the

case may be" : section 17(2). And the prosecutorial right to appeal against an acquittal or discharge for murder is expressly conferred upon the Director of Public Prosecutions: section 17B. So, submits Mr. Froomkin, only "the informant" can bring an appeal against sentence on the ground that it is manifestly inadequate.

21. In the present case, the information was laid by a police inspector. However, the notice of appeal was issued in the name of Ms. Victoria Greening, Crown Counsel, of the Department of Public Prosecutions. She signed the notice "on behalf of" the Director of Public Prosecutions. The police inspector informant was not involved at the appeal stage.

22. Mr. Froomkin's submission is advanced on the basis that the notice of appeal is invalid and that this is definitively established by *Plant –v- Robinson*, a decision of this Court (Criminal Appeal No. 1 of 1983). However, the jurisprudence does not stop there. In *The Queen –v- Bascome* [2004] Bda LR 28, this Court considered that the relevant passage in *Plant –v- Robinson* was obiter because the case was decided on a different point (and in any event the passage seems to have been based on a concession) and, in the words of Collett JA,

> "…it is not the intention of the Act to confine the right to seek leave to appeal a sentence passed by the Supreme Court in the exercise of its original jurisdiction, on the ground of undue leniency, to the original informant in the Magistrates' Court alone. The context requires that the right to do so should subsist also in the Attorney General on behalf of the Crown…"

At that time, the Attorney General was still discharging the prosecutorial function now vested in the Director of Public Prosecutions.

23. The context alluded to by Collett JA included section 16, which provides:

> "Subject to section 17 and any Rules, any person aggrieved by a judgment of the Supreme Court in any criminal proceeding, whether in its original on appellate jurisdiction, may appeal to the Court of Appeal…"

24. Although section 16 is "subject to section 17", when section 17A was later brought into the statute, section 16 was not amended so as to be subject to it. Moreover, it would be "quite anomalous" (per Collett JA in *Bascome*) if the right to seek leave to appeal were confined to the original informant to the exclusion of the Attorney General or, now, the Direction of Public Prosecutions.

25. In our judgment, this is a compelling, indeed irrefutable analysis. It permits a purposive construction wholly in accord with common sense. We reject Mr. Froomkin's attempt to distinguish *Bascome* and his alternative criticism of it as "bad law." We are satisfied that this appeal against sentence is validly constituted.

26. It is next necessary to understand how the Judge arrived at the sentence of six months' imprisonment. By section 6 and Schedule 1 of the Traffic Offences (Penalties) Act 1976, the offence attracts a sentence of "not less than one and not more than ten years." Moreover, that is expressed to be "Notwithstanding section 54(a), (b) and (d) of the Criminal Code 1907." Nevertheless it is clear from *Cox and Dillas –v- The Queen* [2008) Bda LR 65 that a judge may pass a sentence shorter than one year if a sentence of one year or more would be disproportionate. In the words of Zacca P (at paragraph 16):

> "In determining…whether the appropriate sentence is a shorter term of imprisonment than the minimum period specified in the legislation, the judge should consider whether there are reasons why the specified term would produce a disproportionate result in the particular case."

It is common ground that this approach is relevant to the offence the subject of this appeal.

27. Before the Judge, counsel then appearing for the Appellant contended for a sentence of less than one year and that, exceptionally, it should be suspended by reference to mitigating factors, to which I shall return. Ms. Greening, on behalf of the Director of Public Prosecutions, submitted that the appropriate sentence was one of immediate imprisonment of between one year and eighteen months.

28. In her lengthy sentencing remarks, the Judge referred to the acknowledged prevalence of drunk-driving offences in Bermuda, adding: -

> "The mandatory minimum of one year reflects the concerns of our society for the risks to public safety that drinking and driving pose."

29. She then referred to matters which she considered were reflected in the verdicts of the jury, including (1) the offender was at least two and a half times over the 80mg limit; (2) he had driven in that state, with passenger, a "… not inconsiderable distance"; (3) excessive speed played a part; (4) the seriousness of Alex Doyle's injuries; (4) the attempt to drive off after the initial collision and then to countenance the shifting of blame to Christopher Wardman; (5) and the continuing insistence in his allocutus that he was not the driver. Having considered the case of *The Queen –v- William Donald Roberts*, [2005] Bda LR 40 (where the injuries were less severe, the defendant had pleaded guilty and the sentence imposed was one year's imprisonment) she stated that "the minimum sentence of on year's imprisonment is therefore an appropriate starting point," before adding:-

> "…a sentence range of 12 to 15 months is appropriate in your case."

30. She next turned to aggravating and mitigating factors. In relation to aggravating factors she referred to "a total disregard for the rules of the road"; speed; the excess of two and a half times the 80 mg limit; the distance driven; the irresponsible behaviour and attempt to transfer blame in the aftermath; the seriousness of the injuries; the prevalence of said offences and the need for deterrence. All this led her to observe that:-

> "…… a sentence in the higher sentencing range of 15 months is appropriate."

31. Turning to mitigating circumstances, she referred to good character, including a lack of prior motoring convictions; expressions of remorse; the forswearing of drinking and driving; and "reparations" (which seems to be a reference to the settlement of Alex Doyle's civil action in the sum of $200,000 paid by the

liability insurers). These factors merited a reduction to 12 months' imprisonment which the Judge described as "proportionate to the gravity of the offence."

32. Next, the Judge addressed the possibility of suspending the sentence which would require exceptional circumstances. She referred to the following factors: relative youth (26 at the time of the offence); numerous laudatory letters which suggested that it was highly unlikely that there would be any reoffending; high academic achievements (including obtaining a Ph. D in New Zealand since the offence); delay "through no direct behaviour of your own"; and the terminal illness of the offender's father who had been given a poor prognosis. Although first introduced in the context of consideration of a suspended sentence, the Judge considered that these factors could also "further eliminate the stringency of a lengthy custodial sentence."

33. Consideration of all these factors led the Judge to conclude that there was no basis for suspending the sentence but that its appropriate length was six months.

34. We are bound to say that we detect a degree of confusion in the Judge's approach. First (and in favour of the offender) there appears to be a degree of double counting in the consideration of the starting point and the aggravating factors. Secondly, some matters seemingly under consideration in the context of whether or not to suspend the sentence, seem to come back in as mitigating factors in relation to the length of the sentence, quite appropriately in some cases. In other places, however, the approach was more the result of error than of confusion. To treat "expression of remorse" as a mitigating factor was simply wrong. Through his counsel and in his own words, the offender expressed sorrow and regret about the plight of Alex Doyle, but to equate that with ""remorse" is unsustainable At the time of sentence and to this day the offender has maintained that he was not the driver. Remorse is incompatible with that stance. Moreover, to attach weight to the compensation paid to Alex Doyle was, as Mr. Froomkin was eventually constrained to concede, quite wrong. These were significant errors.

35. We come back to the question of the correct starting point. As the Crown contended at trial for a sentence of 18 months maximum, it would be unfair to go behind that now in this case. It also reflects the putative starting point in *Roberts*, where the sentence of 12 months would have been one of 15 months but for the guilty plea. Moreover, we do not see how the starting point can possibly be less than the sentence stated by the legislature to be the minimum.

36. The aggravating factors in this case are deeply troubling They are essentially the ones identified by the Judge in the two paragraphs to which we have referred, particularly (1) the fact that the amount of alcohol was two and a half times the legal limit; (2) driving at a speed and/or in a manner which resulted in loss of control of the car; (3) the seriousness of Alex Doyle's injuries; (4) the reprehensible nature of the attempt to divert responsibility for the accident; and (5) the lack of real remorse, evidenced by the continuing denial of having been the driver.

37. No doubt appreciating that the level of alcohol and the seriousness of the injuries are startling features of this case, Mr. Froomkin submits that they are not aggravating features which are capable of impacting on the length of the sentence, because they are simply ingredients inherent in the definition of the offence. That definition simply requires a level of "more than 80 mg of alcohol" and grievous bodily harm. We unhesitatingly reject this submission. It is axiomatic that, within the narrow definition of any offence, there are quantitative and qualitative degrees of seriousness. Theft involves the appropriation of property belonging to another, but it would be absurd to suggest that a theft of money is of equal seriousness, regardless of the amount taken or the vulnerability of, and the consequences to, the victim. Stealing from a bank is more serious if the thief takes millions of dollars than if he takes hundreds. Similarly, taking the life savings of vulnerable pensioners and causing them untold distress, even though the amount taken is relatively small, is more serious than taking the same amount from a drug dealer. We consider that the aggravating features in the present case are very serious.

38. The mitigating factors, on the other hand, were limited and in our view, they were overestimated by the Judge. We do not consider that the Appellant's age (26 at the time) was such as to accord significant mitigation. The "remorse" did not embrace a real acceptance of responsibility – quite the contrary – and, as we have said, the reference to "reparations" was unjustified. In truth, the only real mitigation lay in the facts that the offence was very out of character and the Appellant's current family circumstances are saddened by his father's terminal illness.

39. Taking all these matters into consideration, we are satisfied beyond doubt that the sentence of six months' imprisonment was manifestly inadequate. In our view, even at this stage, the least sentence which should be imposed on the appellant is one of twelve months' imprisonment. We say "even at this stage" because we are sensitive to the fact that the Appellant has already been released from the sentence previously imposed, and we acknowledge the particular hardship which will flow from being returned to custody in these circumstances. However, this chronology would not have occurred but for the fact that the Appellant successfully obtained an adjournment of the appeal last November (when he was still in custody) in order to facilitate a change of counsel. Taking all these matters into consideration, we therefore allow the appeal of the Director of Public Prosecutions and substitute a sentence of 12 months' imprisonment on count 2. The sentences on counts 3 and 4 are unaffected.

Guidance

40. We have been invited by the Director of Public Prosecutions to stand outside the boundaries of this appeal and to give general guidance on the correct level of sentencing for the offence of causing grievous bodily harm whilst driving with excess alcohol. The appropriate sentence is obviously dependant on the facts of the particular case. In this regard, it will be relevant to consider the effect of the victim's injuries, the amount by which the defendant exceeded the legal alcohol limit, the quality of the driving and any aggravating and mitigating

factors. We do not feel it appropriate to formulate a detailed tariff. However, we do feel able to say that the current level of sentencing strikes us as being too low, having regard to the seriousness of these offences and the prevalence of impaired driving in Bermuda. We remind ourselves that the legislature has adopted a minimum of one year's imprisonment and a maximum of ten. We can best illustrate our view of the appropriate level of sentencing by reference to the facts of this case. It is our view that, in future, if the facts of this case were to recur, with precisely the same aggravating and mitigating features, the appropriate sentence would be not less than three years' imprisonment. We have not imposed that on this Appellant because it would be unfair to do so at this stage, having regard to the common understanding of the appropriate level of sentence which existed hitherto. Future offenders should expect no such mercy.

Signed

Kay, JA

Signed

Baker, P

Signed

Bell, JA