KRISHNA AND OTHERS

v.

REGINAM

[SUPREME COURT, 1962 (MacDuff C.J.), 24th, 29th-31st August, 19th October]

Appellate Jurisdiction

Criminal law—sentence—concurrent or consecutive sentences—principles applicable.

Criminal law—sentence—taking other untried but admitted offences into consideration—principles applicable.

While the question of the imposition of concurrent or consecutive sentences is always within the discretion of the trial court, the general principle is that separate and distinct offences should attract separate and distinct sentences.

The practice of taking other offences into account when passing sentence is based on convention and has no statutory foundation: per Lord Goddard C.J. in *R. v. Webb* [1953] 2 W.L.R. 1056, 1058. The practice should only be followed where the accused person desires that other untried but admitted offences should be taken into consideration and if the offences are similar to the one for which the prisoner has been convicted.

Cases referred to: *R. v. Webb* [1953] 2 W.L.R. 1056; [1953] 2 Q.B. 390: *R. v. Greenberg* [1943] K.B. 381; 29 Cr. App. R. 51: *R. v. Wilkes* 19 How. St. Tr. 1075: *R. v. Hutchinson* [1962] Crim. L.R. 496; 106 S.J. 393: *R. v. Blake* [1962] 2 Q.B. 377; (1961) 45 Cr. App. R. 292: *Mugola v. R.* (1953) 20 E.A.C.A. 171: *R. v. Tremayne* (1932) 23 Cr. App. R. 191: *R. v. Hobson* (1942) 29 Cr. App. R. 30: *R. v. Nicholson* (No. 2) (1947) 32 Cr. App. R. 127; [1947] 2 All E.R. 535: *R. v. Neal* [1949] 2 K.B. 590; [1949] 2 All E.R. 438: *Sawedi Mukasa v. R.* (1946) 13 E.A.C.A. 97.

Appeals against sentence and cases on revision were considered together by the Chief Justice and the judgment is reported only insofar as it contains a statement of general principles in relation to the matters mentioned in the headnote.

R. A. Kearsley for the appellants.

B. A. Palmer for the respondent.

MACDUFF C.J. (in part): [19th October, 1962]—

This Appellant again pleaded guilty and again asked that this offence be taken into consideration in imposing sentence in the other cases. He was sentenced to twelve months' imprisonment to run concurrently with sentences imposed in three other cases — No. 1688 of 1962, No. 1691 of 1962 and No. 1692 of 1962.

To summarise the position in respect of this Appellant he was con-
cted of three serious gang larcenies committed on the 12th May,
62, 25th May, 1962, between 31st May and 5th June, 1962, and of
serious assault committed on 2nd June, 1962. His record included
previous conviction for attempted murder for which he had received
sentence of fifteen years' imprisonment. There appears, there-
re, to be two principles in sentencing which require consider-
on, first that of concurrent sentences, second that of taking "other
fences into consideration".

As I apprehend the position while the question of imposition of
oncurrent" sentences or "consecutive" sentences is always within
e discretion of the trial Court, the general principle is that separate
d distinct offences should attract separate and consecutive sen-
ces. That this is so is clear from the language used by Lewis J.
delivering the judgment of the Court of Criminal Appeal in *R. v.*
eenberg [1943] K.B. 381 at p. 383 :

> "the case of *Rex v. Wilkes* in this House is clear and distinct authority in favour of the proposition, that, when a man is found guilty of two misdemeanours, being distinct and separate offences (I apprehend it makes no kind of difference whether it be by two indictments simultaneously tried and found against him, or upon two counts in one and the same indictment), there not only a competent but the proper course was, and is, to pronounce a second sentence of imprisonment (assuming it to be within the power of the court as to duration), to commence and begin after the expiration of the first."

more recent example is quoted at p. 496 of the Criminal Law
view, 1962, as follows :

> "In *R. v. Hutchinson* (Lord Parker, C.J., Winn and Widgery, JJ : 106 S.J. 393) the appellant was sentenced in January 1962 to six years' imprisonment for an offence of robbery with violence (wages amounting to £8,000) committed on July 21, 1961. In February, 1962, he was sentenced to two years' imprisonment consecutive for an offence of stealing a lorry load of goods worth £7,000 on July 10, 1961. He appealed against the latter sentence. Lord Parker, giving judgment, observed that the offences had not been tried in order of time and said that no one could possibly say that the sentence of six years was excessive, having regard to the nature of the offence. The judge at the second trial had been in a difficulty because although the offence before him was very serious he did not wish to give the appellant, who was only twenty-five, a sentence, which added to the six years would be regarded as inordinate. Accordingly, he reduced the sentence he would otherwise have given to two years. The court felt that the proper approach to the matter was to consider what should have happened if the cases had been dealt in their proper order. The appellant had eight previous convictions. With that record no court could properly have passed a sentence of less than four years for the offence of stealing the lorry. The offence of robbery with violence was very serious and had been committed whilst the appellant was on bail. A court dealing with

that must have given at least six years' imprisonment consecutive to the four years for the earlier offence. That was the proper sentence, unless it could be said that ten years was inordinate for a man of twenty-five. The court had reluctantly come to the conclusion that ten years was not inordinate for a man of twenty-five who took part in such serious offences, and the sentence of two years' imprisonment consecutive would be varied to four years' consecutive."

A

It will be noted that here again the principle of separate and distinct offences attracting separate sentences is applied and in addition consideration is given to a reasonable maximum penalty in respect of the total offences.

B

Another recent case is that of *R. v. George Blake* (1961) 45 Cr. App. R. 292 in which it was held that where an indictment contains a number of counts each alleging a separate and distinct offence, the discretion of the Judge in passing sentence is not limited so as to prevent him from passing consecutive sentences which will total more than the maximum permitted for any one of the offences taken by itself. In that case sentences totalling 42 years' imprisonment for five counts were affirmed.

C

Turning next to concurrent sentences, the practice is, where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. *Sawedi Mukasa v. R.* 13 E.A.C. A. 97 applied this principle to two counts one of burglary and the other of theft. This practice had been extended to cases where although the offences have not been committed at the same time, they have been of the same type and have, in effect, formed part of one transaction. An example of this type of offence would be several counts of embezzlement, or fraudulent false accounting, from the same firm over a period of time. Even here if each offence is separate and distinct it is proper to impose separate sentences—*Joseph Mugola v. R.* (1953) 20 E.A. C.A. 171.

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E

I turn now to the question of "taking other offences into consideration" in imposing sentence. The reasons for and basis of this practice are set out by Lord Goddard C.J. in *R. v. Webb* (1953) 2 W.L.R. 1056, where he says at p. 1058:

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"It appears that when a person subject to one of these orders is found guilty of a subsequent offence the court sentences him for the latter offence and not infrequently states that it is taking into account the breach of the probation order or of the conditional discharge. That was done in the present case, the prisoner being on probation at the time he committed the three offences. It must, however, he borne in mind that the practice of taking other offences into account, however beneficial and advantageous to an offender, is based merely on convention and has no statutory foundation. It arose entirely from a desire to give prisoners a clean sheet when they came out of prison, and to obviate the necessity or chance of their being re-arrested and charged and again returned to prison. A sentence which the court states takes other offences into consideration is still in law only passed

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> for the offence with which the court is actually dealing. Thus, if a conviction only carries a sentence of, say, 12 months' imprisonment, the court cannot pass a larger sentence by taking other offences into consideration: see *Rex v. Tremayne* and *Rex v. Hobson*. It has also been held that when the conviction has been quashed on appeal the prisoner may be subsequently indicted and tried for offences which the court took into consideration. There had been no conviction for those offences so no plea of autrefois convict could be raised: *Rex v. Nicholson* (No. 2); *Rex v. Neal*.
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> Merely to take breaches of probation or of conditional discharge into consideration is therefore undesirable and, indeed, wrong. They should be separately considered and separate sentences should be passed, so that the original offences may rank as convictions, as they will by virtue of the proviso already referred to.
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> There may be cases in which a court would think fit to make the sentences for the original and subsequent offences concurrent, but it would seem desirable that this power should only be used exceptionally; it is most important that offenders should be made to realise that discharge whether on probation or conditionally is not a mere formality, and that a subsequent offence committed during the operative period of the order will involve punishment for the crime for which they were originally given the benefit of this lenient treatment."

The general principles to be applied are summarised in *Archbold's Criminal Pleading Evidence and Practice*, 34th Ed., at p. 218 in these words:

> "Where offences other than the one of which the prisoner has been convicted have been committed by him and are still untried and are admitted by him, and he desires that they should be taken into consideration in determining the sentence, the judge may properly take them into consideration if the offences are similar to the one for which the prisoner has been convicted, whether there has already been a committal for trial in another jurisdiction or not. But if in fact there has been a committal in another jurisdiction the judge should first be satisfied that the prosecution consents, and such consent should not be withheld except on good grounds. If the offences desired to be taken into consideration are dissimilar from the one of which the prisoner has been convicted, the judge should not take them into consideration, even with the consent of the prosecution, without first considering whether in all the circumstances it is proper so to do. A court should not purport to take into consideration outstanding offences which it would itself have no jurisdiction to try."

Applying those principles to the charges against the first Appellant it would appear that none of these offences could be "taken into consideration" in the true sense of that term. Separate trials were had in respect of each of these offences and one was not of a nature similar to the other three. Since each was a separate and distinct offence consecutive sentences should have been imposed.