A

WILLIE SIU

v.

B **REGINAM**

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Tompkins J.A.), 31st August, 7th September]

Criminal Jurisdiction

C *Criminal law—sentence—previous convictions—comparatively minor offence—sentencing court unduly influenced by number of previous convictions—considerations affecting sentencing policy—Penal Code 1963 (B.S.I.P.) s. 254(1)—Criminal Procedure Code 1961 (B.S.I.P.) ss. 193A(3).*

The appellant pleaded guilty in the Magistrate's Court to a charge of larceny of clothing of a value less than $5. He had nineteen previous
D convictions extending over twenty years, the most recent of which was some eighteen months prior to the present offence and for which he had been sentenced to four months' imprisonment. Having regard to his previous convictions the magistrate committed the appellant to the High Court, which imposed a sentence of imprisonment for two years. On appeal against this sentence —

E *Held:* 1. It is a well recognised principle that a severe sentence for a trifling offence cannot be justified *merely* on the ground that the offender has had many previous convictions, though they may be looked at to establish the prisoner's character and to assist in determining the punishment appropriate to a man of that character for the particular offence.

F 2. In addition, a harsh sentencing policy was wrong as (i) in the case of a man with so many previous convictions it would have a limited deterrent effect (ii) it might reduce the chance of his rehabilitation by giving him a sense of injustice and (iii) it would not encourage a plea of guilty, though such a plea might be taken into consideration on sentence.

3. The sentence of two years' imprisonment was accordingly too severe and should be reduced to one year.

G Cases referred to:

Chandra Prakash Singh v. Reginam (1970) 16 F.L.R. 188.

Maxwell v Reginam (1924) 18 Cr. App. R. 13.

R. v. Betteridge (1924) 28 Cr. App. R. 171.

H *R. v. Casey* (1931) G.L.R. (N.Z.) 286.

R. v. de Haan [1968] 2 Q.B. 108; [1967] 3 All E.R. 618.

R. v. Withers (1935) 25 Cr. App. R. 53.

Appeal against a sentence imposed by the High Court of the Western Pacific.

K. C. Ramrakha for the appellant.

T. U. Tuivaga for the respondent.

7th September 1971

Judgment of the Court:

The appellant pleaded guilty in the Magistrate's Court for the Malaita District of the British Solomon Islands Protectorate to a charge of Larceny contrary to section 254(1) of the Penal Code (1963).

In view of the number of times the appellant had previously been convicted the learned Magistrate committed the appellant to the High Court for sentence under section 193A of the Criminal Procedure Code (Cap. 11 — Laws of the British Solomon Islands Protectorate, 1961) and he was there sentenced to two years' imprisonment. Subsection (3) of section 193A provides for an appeal to this Court by any person aggrieved by any sentence so passed, in like manner as if he had been tried, convicted and sentenced by the High Court.

On the appeal against sentence counsel for the appellant argued that the sentence of two years' imprisonment was illegal and without jurisdiction. This was because the appellant had (in counsel's submission) been tried by the Magistrate under the shortened procedure prescribed by section 194 of the Criminal Procedure Code, whereas the offence of larceny contrary to section 254(1) of the Penal Code was not one which was triable under section 194. This was because, by subsection (1), section 194 embraced only those offences for which the maximum penalty did not exceed imprisonment for six months or a fine of £50, or both. The maximum penalty prescribed by section 254(1) of the Penal Code for simple larceny is five years' imprisonment which clearly removes it from the scope of section 194 of the Criminal Procedure Code. We should perhaps add that the researches of counsel have not discovered any widening amendment to that section. We would add also, that a similar section of the Fiji Criminal Procedure Code (Cap. 14) was considered by this Court in *Chandra Prakash Singh v. Reginam* (1970) 16 F.L.R. 188, and it was held that where a person was wrongly tried under the shortened procedure it was a matter going to jurisdiction and that therefore the Court could not apply the proviso to section 22(1) of the Court of Appeal Ordinance (Cap. 8).

The appeal being against sentence, after a plea of guilty, the argument is a technical one, and we are not disposed to accede to it unless we are satisfied that it is based upon an unassailable premise. Of this we are not in fact satisfied. The only basis for the submission is that the Magistrate's record of proceedings was written on a printed form headed —

> *"Special Procedure in Minor Cases*
>
> (section 194 Criminal Procedure Code)"

Then is recorded the date, the name of the accused, the fact that the charge was explained to him, and his plea of guilty. That ended the proceedings except so far as they related to sentence.

The use of this form does not satisfy us that the Magistrate was in fact proceeding under section 194 or that he regarded himself as doing so. Our reasons are first, that as provided by subsection (1) the section only becomes available "if so requested by the Public Prosecutor"; there is no record that any such request was made. Secondly, that the maximum punishment under section 254(1) of the Penal Code is so manifestly outside the limits of section 194 that the Magistrate could not have failed to know it. Thirdly, by section 194(7) the maximum penalty which could be imposed after a trial under that section is a fine of £5, or one month's imprisonment in default; this, again, must have been known to the Magistrate, would have clearly been within his jurisdiction, and would render completely pointless his committal of the appellant to the Supreme Court.

Having regard to the fact that all the Magistrate did was to take the plea of the appellant, a matter quite within his ordinary jurisdiction, and for the reasons we have given, we do not accept that the use of the printed form is sufficient to show that the trial was under section 194, or that the sentence of the High Court was illegal.

We now turn to consider the main ground of this appeal which was, that the sentence of two years imprisoment was too severe for the offence the appellant committed.

We realise that the Judge on the spot who is conversant with the local conditions is by far the best qualified to assess the most appropriate penalty having regard both to the offence committed and to the character of the prisoner. For this reason we have always hesitated to interfere with a sentence imposed by the trial Judge, particularly in the outlying Pacific Islands. But here, with the greatest respect, we are persuaded that the learned Judge has proceeded on a wrong principle in imposing a sentence of two years' imprisonment for this comparatively minor offence of stealing clothing of the value of under $5.00. We realise that the theft was from a house but the prisoner was not convicted of burglary.

The convicted person, who had pleaded guilty, was aged 29. He had 19 previous convictions which extend from 20 years ago when, at the age of only 9, he was sentenced to four months' imprisonment, up to 7th November, 1969, some 18 months before the present offence. He is married with one child. In imposing sentence the learned Judge said :

> "The trial magistrate appears to have given up. Short terms of imprisonment seem to make no difference to this habitual thief. I would try police supervision under s.40 P.C. except that there was no proper means of enforcing it. Perhaps a longer sentence may have some effect."

Halsbury's Laws of England 3rd Edn. Vol. 10 p. 489 para. 890 says :

> "It is the practice of criminal courts generally to punish persistent offenders more severely than those who have not been previously convicted . . . but it is not right to be guided merely by previous

convictions, and it is a well recognised principle that a severe sentence for a trifling offence cannot be justified merely on the ground that the offender has had many previous convictions." A

In *Maxwell v. R.* (1924) 18 Cr. App. R. 13 the Lord Chief Justice said :

"This appellant has been convicted 19 times previously though he is only 41 years old . . . . It is a difficult question whether a man of bad character should be sentenced solely with reference to the substantive offence with which he is charged, or whether his previous convictions should always be considered. But at any rate it is clear that a heavy sentence should not be passed for a minor offence merely because the prisoner has previously committed serious offences." B C

In *R. v. Betteridge* (1942) 28 Cr. App. R. 171 the Lord Chief Justice said at p. 172 :

"We think it is not right to hold over a man's past offences, which have been dealt with by appropriate sentences, as we must assume past offences have been dealt with, and add them up and increase accordingly the severity of the sentence for a later offence. That is dangerously like punishing a man twice over for one offence. If a man who has been convicted shows himself unresponsive to leniency and persists in a life of crime, that is a reason for giving him the proper and deserved sentence in the particular case." D

In *R. v. Casey* (1931) N.Z. G.L.R. 286, Myers C.J. in giving the judgment of the court of appeal said : E

"The court should always be careful to see that a sentence of a prisoner who has been previously convicted is not increased *merely* because of those previous convictions. If a sentence were increased *merely* on that ground it would result in the prisoner being in effect sentence again for an offence which he has expiated . . . We think that the learned Solicitor-General put the matter fairly and accurately when he submitted that the previous convictions may be looked at for the purpose of establishing a prisoner's character and assisting to determine the punishment that is appropriate to the case of a man of that character for the particular offence for which he is to be sentenced." F G

Here for the comparatively minor offence of stealing clothing of a value of $4.80 the learned trial Judge has sentenced the prisoner to two years' imprisonment. We think that he must have been influenced unduly by the number of previous convictions in imposing such a severe sentence. We think that a very harsh sentencing policy is wrong for a variety of reasons in addition to what we have said above. First, for a man who has had 19 convictions in a space of 20 years, it would have a limited deterrent effect. Secondly, it may also tend to reduce the chance of his rehabilitation by giving him a sense of injustice. Thirdly, it would not encourage him if he had committed an offence, to plead guilty although H

this is a matter which may be taken into consideration on a sentence
A *de Haan* [1967] 3 All E.R. 618. It is true that if a crime be prevalent a more severe sentence than otherwise may be imposed as a deterrent, provided accused is not made a scapegoat for others who had committed similar crimes and have not been apprehended; *R. v. Withers* (1935) 25 Cr. App. R. 53 at p. 54. However, taking all the above factors into consideration, we think that this sentence is too severe and should be reduced to 1 year's imprisonment. Accordingly, the appeal against sentence is
B allowed and the sentence of two years' imprisonment quashed and in lieu thereof the prisoner is sentenced to 12 months' imprisonment which, of course, will take effect as from the date of original sentencing on 28th April, 1971.

Appeal allowed — sentence reduced.