

THE TASMANIAN REPORTS

BEING

CASES DETERMINED IN THE SUPREME COURT OF
TASMANIA AND OTHER SUPERIOR COURTS IN THE
ISLAND

REGINA v. WEST

1958. Court of Criminal Appeal: Burbury C. J., Gibson and
Crisp JJ.

March 14, 17, 31, 1958.

*Criminal Law — Appeal and new trial — Appeal against
sentence — Application to increase sentence — Principles
to be applied — Facts — Judge's view of — Assumed most
favourable to respondent consistently with verdict —
Jury's recommendation to leniency — How to be treated.*

On an application for leave to appeal against sentence on the ground that it is manifestly inadequate, the Court of Criminal Appeal, in deciding whether the trial judge's discretion has been improperly exercised, should, unless there is reason to the contrary, assume that he has taken a view of the evidence most favourable to the defendant consistently with the verdict.

R. v. Geddes (1936), 36 S.R. (N.S.W.) 554, followed.

APPLICATION FOR LEAVE TO APPEAL.

Donald Clement West was arraigned before Green J. at Launceston Criminal Sittings in February 1958 on a charge of manslaughter contrary to the *Criminal Code*, s. 159. He pleaded not guilty. It appeared that the defendant driving a car came round a curve to where four cars were stopped after a collision between two of them and that he hit two of them and a man standing by them whom he killed. The Crown alleged that the defendant was culpably negligent because he went too fast, his car was defective, he was not looking where he was going, he did not handle his car properly, and he had been drinking. He was found guilty with a recommendation to leniency.

Before passing sentence Green J. said to the defendant:

"The jury have found you guilty of manslaughter and that is a serious crime. However, they have also strongly recommended that you should be shown leniency, and it is plain that they do not regard you as a man who had driven a car while under the influence of alcohol. Indeed on the evidence they could not find that you had done so.

"I think their recommendation must mean that they think you drove the car while you knew its brakes were faulty, and you only took the wheel unexpectedly and at a late hour to get your employer home when he could not or would not drive himself.

"This still leaves you guilty of manslaughter, but in view of the recommendation of the jury, who represent the community in the matter, it is a crime for which you should be shown leniency. I have decided to accede to the jury's recommendation."

His Honour sentenced him to a fine of £100 and nine months' imprisonment suspended on a recognizance to be of good behaviour for two years.

The Attorney-General gave notice of application for leave to appeal against the sentence upon the following grounds:

- "1. The learned Trial Judge imposed a sentence that was manifestly inadequate having regard to the nature of the crime and the circumstances of the case.
- "2. A more severe sentence was warranted in law and should have been passed.
- "3. The learned Trial Judge erred in law and in fact in holding that on the evidence the jury could not have found that the Respondent was under the influence of alcohol at the time of the commission of the crime or alternatively in holding that the jury did not so find.
- "4. The learned Trial Judge erred in law and in fact in holding that the verdict of the jury must mean that the jury merely thought the Respondent drove the car while he knew its brakes were faulty and that he only took the wheel unexpectedly and at a late hour to get his employer home when he could not or would not drive himself.

...

- "6. The learned Trial Judge erred in law and in fact in that he gave undue weight to the jury's recommendation for leniency."

Ground 5 is left out because it was abandoned at the hearing.

The defendant applied for leave to appeal against conviction.

D. M. Chambers Q.C., S.-G., and *J. B. Hutchins* for the Crown.

R. G. Hall for the respondent.

The respondent's application was heard first and dismissed.

Chambers Q.C. referred to *R. v. Sloan* (1947) E. & E.D., vol. 14, p. 562, no. 3798, *R. v. Byers* 1942, St. R. Qd. 277, [Burbury C.J. referred to *R. v. Geddes* (1936) 53 W.N. (N.S.W.) 157, 36 S.R. 554] *R. v. Charlton* (1911) 6 Cr. App. R. 119, and *Noonan v. Elson, ex p. Elson* 1950 St. R. Qd. 215, at p. 219, followed in *McKenna v. Johnson* [Unreported, Green J., 13th August, 1957].

Hall referred to *R. v. Stubbs* (1913) 8 Cr. App. R. 238, *R. v. Sidlow* (1908) 1 Cr. App. R. 28, *R. v. Gumbs* (1926) 19 Cr. App. R. 74, *R. v. Ball* (1951) 35 Cr. App. R. 164, and *Fleming v. Commr. of Transport* [1958] N.Z.L.R. 101.

Cur. adv. vult.

MARCH 31.

BURBURY C.J., after reviewing the course of the proceedings, continued:

The principles governing the exercise of the jurisdiction of the Court of Criminal Appeal upon an appeal against sentence (whether by a convicted person or by the Crown) are well settled.

Section 401 (2) of the Tasmanian *Criminal Code* provides that the Attorney-General may appeal to the Court of Criminal Appeal against sentence by the leave of the Court. Section 402 (4) of the Tasmanian *Criminal Code* is as follows:

"On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

This section is substantially the same as s. 4 (3) of the English *Criminal Appeal Act* 1907 except that the phrase "some other sentence more or less severe" is substituted in the Tasmanian Act for the phrase "different sentence". It follows that the ambit of the statutory appellate jurisdiction of the Tasmanian Court of Criminal Appeal should be the same as that of the English Court of Criminal Appeal and that the sentence must be shown to be manifestly excessive or wrong in principle (*Arch. Crim. Pl.*, 33rd edn., p. 350). It is, however, unnecessary to canvass the decisions of the English Court of Criminal Appeal because the High Court in *Cranssen v. The King* (1936) 55 C.L.R. 509 and in *Harris v. The Queen* (1954) 90 C.L.R. 652 has laid down the principles governing the exercise of a specific statutory appellate jurisdiction against sentence. In *Harris v. The Queen* the Court stated these principles as follows:

"In *Cranssen v. The King* (1936) 55 C.L.R. 509, the manner in which under that ordinance this Court should exercise its powers upon appeal with respect to sentences of imprisonment was discussed. The following observations were made:—'Section 24 of the *Judiciary Ordinance* 1921-1927 expressly mentions convictions and sentences among the judicial orders from which an appeal by leave shall lie to this court. It is evident that these words refer to convictions on indictment and sentences of imprisonment or other punishment. The Court is thus specifically given a jurisdiction to hear appeals from sentences of the Supreme Court of the territory. But, although this consideration may distinguish the power it is called upon to exercise from the general appellate power invoked in *House v. The King* (1936) 55 C.L.R. 499 it remains true that the appeal is from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It

is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority” (1954) 90 C.L.R. 652, at pp. 655, 656.

[His Honour then set forth the words of Green J. before passing sentence and continued:]

The learned trial judge's report to this Court made pursuant to the *Criminal Code*, s. 408, (so far as it is relevant) was as follows:

“West was charged with Manslaughter and I left that to the Jury, at the same time directing them that if they found him not guilty of Manslaughter they could find him guilty of Dangerous Driving under Section 32 of the Traffic Act 1957 if they thought he had driven at a speed or in a manner dangerous to the public in all the circumstances of the case. I had previously told Counsel that I did not propose to leave Reckless Driving to them as an alternative because in this case it seemed to me that if he had driven recklessly then his crime was Manslaughter.

“I directed the Jury, as appears from the note of my Summing-Up, that to convict West of Manslaughter they must be satisfied that he had been driving in a way which was culpably negligent. They returned to Court after a retirement of about an hour and asked a written question: ‘Does the decision of Manslaughter require circumstances of culpable negligence?’ I replied that it most certainly did, that it was the essence of the matter, and repeated my direction to them.

“After two hours had elapsed I sent for them and was then informed that they could not agree. I asked if there was any prospect of agreement if they deliberated further

and one jurymen at once said, 'We are divided six to six'. Another then asked if I would direct them again on the alternative verdict of Dangerous Driving, which I proceeded to do. However, I told them they could not consider the alternative verdict until they had first found the accused not guilty of Manslaughter. The foreman then said they wished to consider the matter further and they retired again. After about a further twenty minutes they returned to Court with a unanimous verdict of guilty of Manslaughter to which they added a strong recommendation to mercy.

"As to Ground 3 of the Appeal: A note of the remarks I made in passing sentence appear in the Appeal Book. It is true I said that it was plain that the jury did not regard the accused as a man who had driven a car while under the influence of alcohol and that on the evidence they could not have found that he had done so. I myself saw no evidence that the accused was under the influence of alcohol when he was driving the car and Senior Counsel for the Crown in his final address to the Jury at least twice said that the Crown did not contend that he was. In what I said in passing sentence I wished to emphasise that I was not dealing with the case of a drunken driver, and it seems to me quite clear that the jury did not think that they were doing so. I cannot imagine that they would strongly recommend such a person to leniency.

"As to Ground 4: I was not 'holding' anything about the jury's verdict. However, it was necessary for me to consider the jury's recommendation to leniency and to do that and decide what weight should be given to it I thought it necessary to consider what view the Jury might have taken of the facts in order to reach their verdict and yet add the recommendation they did. No one of course can say what view they did take, but it seemed to me that the one I stated was the most probable.

"It does not seem necessary for me to comment on the other grounds of appeal. I did not regard this as a bad case and I gave effect to the jury's recommendation, as I always do if I can."

It is apparent from what the learned trial judge said in sentencing the respondent and from what he has stated in his report that he was at pains to appreciate the implication of the jury's strong recommendation to mercy and to find some basis in the facts of the case for it so as to justify his giving full effect to it by not sending the respondent to gaol. I think it is also apparent that the dominant consideration which actuated the learned trial judge in extending leniency to the respondent was the view of the facts which his Honour assumed the jury had taken in adding the rider to their verdict. In sentencing the respondent his Honour referred to two matters of extenuation

upon which he thought the jury's recommendation was grounded:

- (1) that they did not regard the respondent as a man who had driven a car under the influence of liquor;
- (2) that they thought the respondent drove the car while he knew its brakes were faulty and that he only took the wheel unexpectedly and at a late hour to get his employer home when he could not or would not drive himself.

It is of course the duty of a judge who has the difficult task of determining the proper sentence to be imposed upon a person convicted of a crime to take into his consideration a recommendation by the jury for mercy. But it must be emphasised that it is not part of the verdict; it does not bind the trial judge; it operates only as a recommendation, and the responsibility in the interests of society to impose an appropriate sentence commensurate with the seriousness of the crime remains with the trial judge. It in no way absolves the trial judge from the duty of considering the circumstances of the crime independently for himself, and it no way requires him to put any remote or strained interpretation upon the facts to find some justification for the rider. In *Whittaker v. The King* (1928) 41 C.L.R. 230, at p. 240, Isaacs J. made some interesting observations upon the place of a recommendation for mercy in the administration of criminal justice. He said:

"The recommendation of a jury for leniency should always be treated with respect and careful attention. It is a recognized feature of our legal system. But a recommendation *simpliciter* is, after all, a recommendation only, and the Judge, on whom falls the sole responsibility of measuring the punishment within the limits assigned, must consider for himself how far it is consistent with the demands of justice that he should accede to the recommendation. But that is all."

In that case the High Court gave unqualified approval to the judgment of Street C.J. in *R. v. Whittaker* (1928) 28 S.R. (N.S.W.) 411, per Knox C.J. and Powers J. 41 C.L.R. at p. 235 and Isaacs J. at pp. 239, 240. Street C.J. said that the error into which the trial judge fell in that case was —

"in putting his own interpretation upon what he conceived to be the jury's view of the facts upon which they based their verdict *and their recommendation*, and then dismissing from his consideration everything but that version of the facts." (1928) 28 S.R. (N.S.W.) 411, at p. 418.

"... the Judge's duty then was to consider all the circumstances surrounding the crime for himself and to determine what in his opinion would be a fitting punishment." (1928) 28 S.R. (N.S.W.) 411, at pp. 419, 420.

“... [he] precluded himself from exercising his discretion, as he should have done, *upon a judicial review of the whole of the facts established in evidence.*”

“I think that when a Judge goes beyond the actual verdict of the jury, and, by a process of pure reasoning, arrives at a mental assumption that they must have found as facts things which were not necessarily involved in their verdict, and then treats these facts, so assumed, as established facts binding upon him he proceeds upon a wrong principle and lays the sentence which he imposes open to review”. (1928) 28 S.R. (N.S.W.) 411, at p. 420.

[His Honour's emphases]

With the utmost respect to the learned trial judge I am compelled to the conclusion that in his consideration of the sentence to be imposed he did proceed upon principles that were wrong in law. Had the decision of the High Court in *The King v. Whittaker* (1928) 41 C.L.R. 230 been brought to his Honour's attention I think his Honour would have approached his consideration of the jury's recommendation very differently and would not have given it the weight he did. And while it may very well be that his Honour did not dismiss from his mind all considerations other than his “mental assumption” of the view that the jury took of the facts, I think for the reasons I have stated the inference must at least be drawn that the dominant consideration upon which his Honour acted was the view of the facts upon which he assumed the jury based their recommendation. And if that was the dominant consideration upon which he exercised his discretion I think his discretion was exercised upon a wrong principle. In so doing he gave undue weight to the recommendation and over-emphasized its importance. In the words of Isaacs J. in *R. v. Whittaker* (1928) 41 C.L.R. 230, at p. 240, their recommendation for mercy by the jury was “pressed beyond the limits of its proper function”.

If then the learned trial judge erred in principle it is for this Court to impose a proper sentence in accordance with its own considered view of the facts, giving such weight as it thinks proper to the jury's recommendation, and it must consider how far it is consistent with the demands of justice that it should accede to the recommendation of mercy. (*R. v. Whittaker* (1928) 41 C.L.R. 230, at pp. 235, 240). And in considering the facts I do not think the Court of Criminal Appeal is bound to assume the view of the facts most favourable to the accused. The principle expressed by Jordan C.J. in *R. v. Geddes* (1936) 36 S.R. (N.S.W.) 554, at p. 556, I think only means that if the Court of Criminal Appeal is considering whether a sentence is manifestly inadequate (*and there is no other apparent mistake of principle*) the Court of Criminal Appeal should assume that the trial judge has taken a view of the evidence most favourable to the prisoner consistent with the verdict (i.e. that upon the trial judge's judicial review

of the facts he was entitled to take any view consistent with the verdict and if he imposed a light sentence it should be assumed he took the most favourable view of the facts). But in the present case I have come to the conclusion that the learned trial judge thought his primary duty was to ascertain the factual basis of the recommendation for mercy and to impose a sentence upon that assumed factual basis rather than upon his own considered view of the facts. This Court must therefore itself review the circumstances of the crime and come to an independent conclusion as to the appropriate punishment.

I have had the advantage of reading the reasons for judgment of Crisp J. and have little to add to his analysis of the evidence and the circumstances of the crime, and the conclusions he draws.

[His Honour, however, went on to consider the evidence of the respondent's drinking and concluded that it was enough to make him drive faster than he might otherwise have done knowing that the car's brakes were defective and concluded "that the alcohol had contributed to what I might call his initial irresponsibility in driving the car at any high speed."]

This Court must assume as the starting point of its consideration of the proper punishment for this crime that the jury acted in accordance with their oaths and were satisfied beyond reasonable doubt that the respondent caused the death of John Charles Black by his culpable negligence. The learned trial judge explained to the jury several times the necessary ingredients of the crime of manslaughter. It must steadily be borne in mind that to arrive at its verdict the jury must have been satisfied beyond reasonable doubt that the negligence of the respondent in driving the car "showed such a disregard for the life and safety of others as to amount to a crime against the State and to conduct deserving punishment". There is necessarily involved in the jury's verdict a conclusion of fact that the respondent drove the car at 50 m.p.h. knowing its brakes to be grossly ineffective and that by that criminal recklessness he killed a man. The respondent had about 150 yards in which to pull up or slow down to avoid the fatality. He was unable to do so because of his reckless speed (having regard to the known condition of the brakes).

It is the duty of the Court to impose a sentence commensurate with the seriousness of the crime. The primary consideration is that a properly instructed jury has adjudged the accused's conduct to have been such as to amount to reckless disregard of human life.

The only substantial mitigating circumstance relating to the crime that I can see is the fact that a dangerous situation was created on the highway partly through the negligence of others and in one sense it was the respondent's misfortune to come upon this dangerous situation when he was driving a car with faulty brakes. But I come back to this predominant consideration — through his criminal recklessness and

disregard of the lives and safety of others the respondent has killed a man. The nature of this crime is such that it would only be in the most exceptional circumstances that justice to the community would permit of any punishment short of a gaol sentence. And I find no such exceptional circumstances here. To accede to the jury's recommendation for mercy by imposing any lesser punishment would I think be giving undue weight to the recommendation in the circumstances. It would result in an unwarranted departure from the standard of punishment for this crime established by sentences imposed by the Tasmanian Criminal Courts and the Criminal Courts in England and in the other Australian States.

Taking into account all the circumstances and giving such weight to the jury's recommendation as I think it entitled to I have come to the conclusion that the interests of justice do not require a very heavy gaol sentence to be imposed.

Had it not been for the jury's strong recommendation for mercy I should have thought that a sentence of imprisonment of not less than two years would have been appropriate, but taking that recommendation into account I think that the proper sentence is fifteen months' imprisonment.

GIBSON J. I agree.

CRISP J., after stating how the matter came before the Court, went on: Appeals of this description are rare and properly so, but happily there is no doubt as to the principles which should be applied. Subject perhaps to some difference in emphasis, whether the appeal be by the Crown or by the person convicted against severity the principles are the same. They were stated by the High Court in *House v. The Queen* (1936) 55 C.L.R. 499, at p. 505, and repeated in *Cranssen v. The Queen* (1936) 55 C.L.R. 509, at p. 519, and in *Harris v. The Queen* (1954) 90 C.L.R. 654:

"But the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so." (1936) 55 C.L.R. 499, at pp. 504, 505.

Where, however, the Court is asked to review an exercise of clemency while the principles remain unchanged there is

likely to be some reluctance in their application in accordance with the general principle of resolving doubts in favour of one whose liberty is at stake. Possibly on that account it has been said that the appellate court "in the absence of some definite reason to the contrary should assume that the trial judge was entitled to take the view of the evidence most favourable, or least damaging, to the prisoner, that is consistent with the jury's verdict" (per Jordan C.J., *Reg. v. Geddes* (1936) 36 S.R. (N.S.W.) 554, at p. 556). But a view favourable to the prisoner may yet be unreasonable if it fails to accord with other facts proved to the jury which there is no reason to suspect they rejected or if the judge should ascribe to the jury a view which is illegal or impossible or conversely deny them the right to a view of the facts which was in fact open to them. In such a case it may be said that he has erred in principle (cf. *Whittaker v. The Queen* (1928) 41 C.L.R. 230 and *sub nom. R. v. Whittaker* (1928) 28 S.R. (N.S.W.) 411) and the sentence becomes at large to the appellate court, though in substituting its own discretion for that of the trial judge the appellate court would naturally pay great attention to any view which he has formed and which may be referable to the opportunity he alone has had of seeing and hearing both the accused and the witnesses.

In this case the learned trial judge said when passing sentence:

"The jury have found you guilty of Manslaughter and that is a serious crime. However, they have also strongly recommended that you should be shown leniency and it is plain they do not regard you as a man who had driven a car while under the influence of alcohol. Indeed on the evidence they could not find you had done so.

"I think their recommendation must mean they think you drove the car while you knew its brakes were faulty and you only took the wheel unexpectedly and at a late hour to get your employer home when he could not or would not drive himself. . ."

It is in relation to the first paragraph in particular that with respect I am persuaded that he erred inasmuch as it would appear that his discretion was influenced by considerations implicit in those conclusions. I am persuaded that this Court can and should review the sentence complained of if in its view it is inadequate.

That he was influenced by the considerations mentioned appears from his report furnished to this Court under the *Criminal Code*, s. 408(1). In it he said:

"It is true I said that it was plain that the jury did not regard the accused as a man who had driven a car while under the influence of alcohol and that on the evidence they could not have found that he had done so. I myself saw no evidence that the accused was under the influence of alcohol when he was driving the car and Senior Counsel

for the Crown in his final address to the jury at least twice said that the Crown did not contend that he was. In what I said in passing sentence I wished to emphasise that I was not dealing with the case of a drunken driver, and it seems to me quite clear that the jury did not think that they were doing so. I cannot imagine that they would strongly recommend such a person to leniency."

The views ascribed to senior counsel for the Crown were disallowed before us and the suggestion made that there had been some confusion between the state of colloquial drunkenness which counsel for the Crown said he had disclaimed, and the legal, but still culpable, concept of driving under the influence of intoxicating liquor. That counsel had been misunderstood it was said was demonstrated by the following passage in the summing-up:

"Well, there is not very much room there for you to be reasonably satisfied that he was so affected by drink that he shouldn't have been driving under the influence of liquor in the sense that he was committing an offence by driving in that fashion — as I understand it, Mr. Hutchins put it to you that he might have had the beers that he did have — he might even have had more — as to which I repeat there is no evidence — that he might have been affected by these drinks that he had to the extent that he was drowsy and his reaction time slowed down and that he ought to have realised that he should not have driven as fast as he did and was at fault in that. Well, that is a matter for you to consider for yourselves."

But from this it would appear more probable to me that the confusion was counsel's and this may well have led the learned judge in recollection to ascribe to counsel the views he has. But however that may be it nevertheless does appear that the Crown did urge the influence of intoxicating liquor as a circumstance of the crime, and in view of that and in view of the evidence which the Crown led on the subject I feel unable to deal with the matter as if intoxicating liquor were an issue of no moment at the trial raised for the first time by the Crown on appeal.

[His Honour reviewed the evidence and concluded:]

In all those circumstances I think an assumption that the jury did not and could not have concluded that the accused was under the influence of intoxicating liquor at the time of the accident at least to the extent of inducing a mental attitude of acceptance of risk and a recklessness of consequence was a view too favourable to the accused and unjustified by the evidence.

I do not overlook the fact that the learned trial judge was in part at least persuaded to the view he took by his interpretation of the jury's recommendation to mercy. As he said in his report,

"I wished to emphasise that I was not dealing with the case of a drunken driver and it seems to me quite clear that the jury did not think they were doing so. I cannot imagine that they would strongly recommend such a person to leniency". Juries' recommendations often pose problems that are insoluble by orthodox legal reasoning. As was said in *R. v. Whittaker* (1928) 28 S.R. (N.S.W.) 411, at p. 420:

"Human nature being what it is, such recommendations are not always based upon reason or upon logic. They may be based upon all kinds of considerations, and such things as sentiment, a spirit of compromise, a misunderstanding of the true situation, and a host of other things, may be responsible for them. A Judge is not bound to act upon such a recommendation, if, in his opinion, the circumstances do not justify it, and if the jury in the present case had been asked upon what they based their recommendation — and I think that it is to be regretted that they were not asked — it might have appeared that it did not rest upon any substantial basis and was not entitled to be given any real weight."

There was in this case, as appears from the learned trial judge's report some grounds for suspecting that this recommendation could have been a case of compromise, but to my mind a possible explanation of the recommendation could be the jury's realization that the accused was not solely responsible for the accident to the extent that the negligence of others, notably the driver of the Humber, may be said materially to have contributed to it. This, taken with the accused's apparent youth, apart from any impression he may have made in the witness box, as to which we know nothing, may well have induced the jury, having discharged their heavy task of finding guilt, to add such a rider. For myself I remain unperturbed by any suggestion of legal inconsistency between the verdict and the recommendation. In criminal matters the law no less than juries may often be regarded as illogical e.g. in relation to those verdicts which have been called by Dixon J. (as he then was) "merciful alternatives". The answer to the suggestion is I think to be found in the well-known aphorism that the life of the law "is not logic but experience".

There remains the question of the adequacy of the sentence. To my mind it was inadequate as out of keeping with sentences for similar offences in this Court, and as failing adequately to reflect its seriousness. The considerations relevant to this class of offence are well-known but to my mind, were it not for the jury's rider, a proper sentence would have been two years' imprisonment. To give effect to the rider and allowing for the considerations which I think might have influenced it I would reduce that by nine months.

Leave granted. Appeal allowed. Sentence quashed and sentence of fifteen months' imprisonment substituted.

Attorneys for the respondent: *Archer, Hall, Waterhouse & Campbell.*

F.D.C-S.