

IN THE SUPREME COURT)
)
 OF WESTERN AUSTRALIA)

Heard: 8th & 9th August, 1977

Judgment: 25 AUG 1977

THE FULL COURT

COURT OF CRIMINAL APPEAL

CORAM: LAVAN S.P.J., WALLACE J., SMITH J.

C.C.A. Nos. 31 & 34 of 1977

B E T W E E N:	KENNETH LEONARD GUY	<u>Appellant</u>
	-and-	
	THE QUEEN	<u>Respondent</u>

C.C.A. Nos. 38 & 42 of 1977

B E T W E E N:	THE QUEEN	<u>Appellant</u>
	-and-	
	KENNETH LEONARD GUY	<u>Respondent</u>

C.C.A. No. 33 of 1977

B E T W E E N:	STEPHEN JOHN FINGER	<u>Appellant</u>
	-and-	
	THE QUEEN	<u>Respondent</u>

C.C.A. No. 39 of 1977

B E T W E E N:	THE QUEEN	<u>Appellant</u>
	-and-	
	STEPHEN JOHN FINGER	<u>Respondent</u>

C.C.A. Nos. 36 & 37 of 1977

B E T W E E N	THE QUEEN	<u>Appellant</u>
	-and-	
	MARIO LAZZARO	<u>Respondent</u>

Mr. K. N. Allan appeared for the appellants Guy and Finger on their appeals and as respondents on the Crown appeals.

Mr. M. Zilko appeared for the appellant Lazzaro on the Crown appeal.

Mr. K. H. Parker, Q.C., with him Mr. H. McLernon, represented the Crown.

Authorities cited -

Subramaniam v. Public Prosecutor, (1956) 1 W.L.R. 965 (PC)
Grew v. Cubitt, (1951) 2 Times L.R. 305
Jones v. Metcalfe, (1967) 1 W.L.R. 1286
McLean v. R., (1968) 52 Cr.App.R. 80
Gaio v. R., (1960) 104 C.L.R. 419
Osbourne v. R., Virtue v. R., (1973) 1 Q.B. 678
Jones v. Dunkell, (1958-9) 101 C.L.R. 298
Costas v. R., (1967) 52 Cr.App.R. 115
Kastercum v. R., (1972) 56 Cr.App.R. 298
R. v. Turnbull, (1976) 3 A.E.R. 549
R. v. Chandler, (1976) 3 A.E.R. 105
Hall v. R., (1971) 1 A.E.R. 322
R. v. Parkes, (1976) 3 A.E.R. 380
R. v. McLean, (1968) 52 C.A.R. 80
Al Hing v. Hough, (1926) 28 W.A.L.R. 95

JUDGMENT OF THE COURT -

These appeals from the District Court involve, in the first place, the conviction after trial of Kenneth Leonard Guy, Stephen John Finger and Mario Lazzaro each of two counts of breaking entering and stealing from two gun shops, numerous pistols, shotguns, ammunition, a knife, a rifle and money at Subiaco on 8th January 1977, and in the second place, pleas of guilty by Lazzaro and Guy to charges of assault upon investigating policemen performing their duty - in the case of Guy two charges. Guy and Finger appeal against their convictions in respect of the two counts of breaking entering and stealing and Guy seeks leave to appeal against the severity of sentences imposed in regard thereto. Finally, the Crown appeals against the inadequacy of all sentences imposed by the learned District Court judges in respect of the two convictions for breaking entering and stealing and further in respect of the concurrent sentences imposed for assault. Shortly, the facts are as follows.

At about 6.45 p.m. the above average observation of one Galvin, a public spirited citizen, brought to notice the activities of Lazzaro and Guy in a laneway off Rokeby Road near to the junction of Roberts Road, Subiaco. The laneway borders the northern side of a gun shop conducted by Max Williams & Co.. Galvin, who had been driving north in Rokeby Road, had brought his vehicle to a halt in a line of traffic just opposite the laneway. There he saw Lazzaro and Guy in circumstances which gave rise to his closer attention. Shortly thereafter both prisoners were seen to walk in a northerly direction along Rokeby Road, then run across Roberts Road and get into a Holden station wagon coloured in two tones, the predominant thereof being red. The Holden moved off very quickly and at that stage Galvin's van had reached the junction of Roberts Road and he was able to follow the Holden vehicle observing the number on the rear thereof and committing it to memory by repeating it over and over aloud to himself whilst he looked for a pen. Soon after he saw a police officer, one Collard, to whom he gave firstly the number of the vehicle he had seen and committed to memory and then a description of that vehicle and a description of the two men he had seen in the

laneway. He did not observe what Constable Collard wrote down. Only a short time beforehand - approximately 15 minutes - another observant and helpful citizen, one Bolitho, had seen the two accused, Lazzaro inside the gun shop of Malcolm McLean & Co. Pty. Ltd. situate in Roberts Road just around the corner from the shop of Max Williams & Co. - and Guy outside that shop. Bolitho was standing in the street and when he looked in the shop window he was surprised to observe the head and shoulders of Lazzaro emerging above the counter therein. The actions of both prisoners were highly suspicious. Bolitho was not as accurate as Galvin in describing Lazzaro but was more accurate in his recollection of the appearance of Guy. Later he too spoke to Constable Collard and gave him a description of the two prisoners.

Five days later, after the apprehension of, inter alia, Lazzaro and Guy, Galvin identified each of the prisoners in separately conducted line-ups at C.I.B. headquarters. He further identified the two prisoners in court. Subsequently Bolitho identified Guy in the lower court. Having read his evidence in chief and the substantial cross-examination to which he was subjected by the three counsel for the prisoners it is not difficult to form the opinion that the jury must have been impressed by the accuracy of Galvin's evidence.

On Wednesday morning, the 12th January, the house occupied by the three prisoners was invaded by a substantial force of the C.I.B.. Although most of the property taken from Williams' gun shop had been recovered from the laneway at the rear thereof, one Browning .32 automatic pistol, one five inch blade Kershaw knife and something in excess of about \$290 in cash were not recovered. On the other hand, the nine 12 gauge shotguns, one .22 revolver and one Winchester rifle taken from McLean's gun shop were recovered in various rooms of the house occupied by the three prisoners - three of the shotguns loaded, one in each of the three bedrooms occupied by the three prisoners - and one cut down into pieces. In addition ammunition found in the house was identified as having been stolen from McLean's gun shop. Behind a mask on the wall of one of the bedrooms was found most of the money. Outside the house was the Holden station sedan coloured as described by Galvin in his evidence and bearing the registration

number reported by him to Constable Collard and entered in the latter's notebook.

It was alleged by the Crown but denied by all prisoners that they orally confessed to being involved in the two crimes. Finger was the driver of the vehicle in question and his argument as to confession was that he was overborne by the investigating detectives, worried, exhausted and inferentially that his confession was not voluntary.

In the course of the apprehension of the three prisoners, Guy assaulted two investigating detectives who frustrated his escape and at Police Headquarters Lazzaro, an ex-pugilist, assaulted an investigating detective. The three prisoners were each sentenced to four years' imprisonment in respect of each count of breaking entering and stealing to be served concurrently, whilst Lazzaro and Guy were sentenced to twelve months each in respect of the assault charges each such sentence to again be served concurrently with the sentences imposed for breaking entering and stealing. It is unfortunate in the circumstances that the sentences for assault were imposed by two different District Court Judges, neither of whom tried the prisoners of the breaking entering and stealing charges. Each prisoner had been in prison $4\frac{1}{4}$ months when sentenced. The minimum term imposed on each was 2 years.

The two appeals against conviction by Guy and Finger are based substantially upon the argument that the evidence of Collard relating to what he was told by Galvin and the notes made in his notebook thereof should not have been admitted into evidence, firstly as to identification of the motor vehicle, its description and its registration number, and secondly, as to the description of the persons seen by both Galvin and Bolitho. Then it is said on behalf of Guy and Finger that a conversation which took place between the detective organising the line-ups and Galvin not within hearing of Guy should not have been admitted in evidence and that the learned trial Judge misdirected the jury in the following manner:

"6...In this case you have been told that none of the three accused made a written statement. That fact alone of course cannot, by itself, be evidence of guilty. That fact alone cannot be held against that particular person. If it were, the right to remain silent, the right to refuse to give a statement, would cease to be a right - it would be a trap.

Of course, it is a matter that you can consider along with other evidence. It is a matter that you consider as being part of the general circumstances. But in itself it cannot be held in the scale, or placed in the scale against the accused

7...The accused in this case were not obliged as a matter of law or as a matter of practice to inform the police, or to inform anyone that they did not commit the offence; they were at the Ocean Beach Hotel or they were home. Simply because they did not do that cannot be put in the scale against them.

It is however, one of the circumstances which you cannot and should not ignore and it is one of the circumstances which you can bear in mind when assessing the likelihood or otherwise of the evidence that they have given to you this week."

Finally, it is said, and we hope we do not do the grounds of appeal an injustice, that his Honour did not adequately direct the jury in respect of the alibis put forward by all accused, failed to warn the jury adequately on the subject of identification and did not direct the jury properly in respect of the evidence to be considered against each accused or in respect of their defences to the charges brought.

The grounds of appeal relating to sentences imposed upon Guy are based upon the hopeless proposition that the terms of imprisonment imposed were each both in the finite and minimum terms manifestly harsh and excessive having regard to all of the circumstances. For the Crown's part it pleads that the sentences imposed by the learned District Court Judges were manifestly inadequate in that the terms thereof failed to reflect a proper assessment of the gravity of the offences committed and failed to have due regard to the retributive and deterrent aspects of the sentencing processes. Importantly it is contended that none of the sentences should have been made concurrent save, possibly, the two sentences imposed upon Guy for assault. The principles relating to the authority of this Court to interfere with the discretion exercised by a sentencing judge are identical whether one has regard to the position of the prisoners or the Crown. The authorities in support thereof are set out in R. v. Lawler to which we will refer in a moment.

The first four grounds of appeal concern the putting into evidence of two pages of Constable Collard's notebook. The only portion thereof which the Crown sought to put in evidence was that relating to the registration number of the vehicle recorded by Collard on information given to him by Galvin. It is fair to say that his Honour took the view that both pages should be admitted. Further counsel for the defence once their objection to that portion of the notebook relating to the registration number going in was overruled then wished the full contents to be made available to the jury because as was subsequently seen there were some discrepancies therein in the identification evidence of the two civilian witnesses out of which it was hoped to gain some capital in cross-examination - as indeed defence counsel so succeeded. What it is therefore important to appreciate is the nature of the evidence sought to be adduced.

On the one hand Galvin was available to swear to the truth of his recollections inclusive of the registration number of the vehicle and to be cross-examined thereon, whilst on the other Collard was called to give evidence of what he had been told by Galvin and Bolitho and to be cross-examined thereon. The note which he recorded was surely primary evidence of that conversation. Once so understood, clearly the evidence of each of the witnesses was admissible. "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made". See Subramaniam v. Public Prosecutor, (1956) 1 W.L.R. 965, at p. 969.

The above statement is cited with approval in the 11th Ed. of Phipson on Evidence at para. 638, and does, we believe, represent the clearest definition available of the application of the rule. In this case, however, both witnesses were available for cross-examination and gave their evidence on oath, Galvin as to the truth of his evidence - Collard as to what Galvin had told him, not as to the truth of what Galvin had told him. The very bases for the

exclusion of hearsay evidence, i.e. the giving of evidence on oath and the availability of the witness to be cross-examined thereon so as to test his testimony are both available. When seen in this light an examination of the authorities relied upon by counsel for the appellants reveals the non-applicability thereof. Each of those cases was entirely dependent on its own facts and do not cut across principle. In Jones v. Metcalfe, (1967) 3 All E.R. 205, there is no suggestion that the independent witness had given the number of the lorry observed to the police officer who interviewed the appellant so that that officer could give evidence thereof. In Grew v. Cubitt, (1951) 49 L.G.R. 650, the wife of the independent witness who recorded the number of the vehicle in question was not called to give evidence, nor was the witness asked as to whether he had seen the wife write the number down and more importantly the interviewing constable had not been given that number. That was a case where there was positively no evidence identifying either driver or lorry. In the case of The Queen v. McLean, (1968) 52 C.A.R. 80, the facts were that the victim of the prisoner's aggravated robbery was unable to say what he had dictated to the by-stander whose evidence was that such dictation included the registration number of a nearby vehicle allegedly used by the prisoner. That, of course, is not the position with respect to Galvin. We would have thought a more appropriate authority and one together with that of Subramaniam binding upon this Court is that of Gaio v. The Queen, (1960) 104 C.L.R. 419, where it was held that the evidence of a patrol officer's interrogation of the accused in the course of which the accused made a confession in a native dialect which was unintelligible to the patrol officer was admissible in evidence it being proved that a full and faithful translation into English of all of the accused's answers to questions asked by the patrol officer was made by a native interpreter at the time of the interrogation. Finally, we are indebted to Mr. Parker for drawing to our attention the recent authorities of R. v. Osbourne and R. v. Virtue, 1973 Q.B. 678, wherein the Court of Appeal upheld the admission of evidence given by a police witness as to the identification made by two women witnesses who had been involved in the conduct of a line-up and the identification of the prisoners concerned some

7½ months before trial and when one of the witnesses was unable to recollect having picked out anyone at the parade. The evidence of the police officer was admissible for it did not contradict the women's evidence and was led only as to their identification and not as to whether or not that identification was accurate. In such circumstances it is, of course, the trial Judge's responsibility to point out to the jury how the evidence is admitted and how it is to be viewed.

For these reasons we are of the opinion that his Honour was correct in admitting both the evidence of Collard as to what Galvin had told him with respect to the registration number of the vehicle and the pocket book notepaper upon which Galvin's advice was written as primary evidence of what Collard recorded. There is indeed no substance to the first four grounds of appeal, particularly if one has regard to the balance of the evidence given by Galvin and Bolitho as to the description of the vehicle found outside the premises raided by the police and occupied by the three prisoners and the very descriptions of the prisoners themselves, to say nothing of the subsequent detailed identification of the weapons stolen from the two premises, and subsequently recovered outside one of the premises and in the house and under the beds and in the wardrobes of the house occupied by the three prisoners.

To understand ground 5, it is necessary to shortly outline the circumstances in which it is contended that what Galvin had to say was inadmissible. Sergeant Scott was in charge of the first identification line-up. During its course Galvin asked to speak to Scott privately and did so outside the room where the line-up was being conducted. The Crown did not seek to adduce evidence as to what transpired in that conversation. In the course of cross-examination, however, defence counsel sought to make capital thereon by inferring that the witness was uncertain in his identification of the prisoner Guy and had sought outside direction. For this reason prosecuting counsel sought to adduce from the witness Scott in examination in chief evidence of what transpired during the conversation in question. His Honour, in our opinion, rightly

permitted the examination to proceed for in no way can it be contended that what transpired was inadmissible as hearsay. Again one must advert to what was in fact being done. The evidence was not being led in proof of the content of the conversation nor in assertion of any matter. The evidence was relevant because defence counsel made it relevant. To have failed to move from the mind of the jurors any inference that the police directed Guy in his identification of the prisoners would have been unfair to the prosecution and one must always bear in mind that the conduct of a criminal trial involves fairness not only to the defence but also to the prosecution.

We turn to deal with the two passages in his Honour's charge to which the appellants take objection. In so far as the passage dealing with the lack of written statements made by the accused, it is their argument that his Honour could have misled the jury by the use of the word "alone" where appearing in the second sentence; in other words, whilst it is quite clear that the failure of an accused person to make a statement cannot be evidence of his guilt if other facts are added thereto it may be an element in the jury's consideration. Mr. Allan has argued that it is akin to saying "where there is smoke there may be fire". We cannot agree. Counsel's argument is based upon an unreasonable dissection of what his Honour had to say. In the end the test is as to whether upon a fair appreciation of the whole of the charge the jury may be said to have been misled in this particular area and we do not conclude that to be the case.

We have reached a similar conclusion in respect of ground 7. There the accused argue that what his Honour conveyed to the jury is that if you reject the alibi therefore the identification must be correct, and prayed in aid thereof is the passage appearing at p.553 in the report of The Queen v. Turnbull, (1976) 3 All E.R. 549, wherein the Court of Appeal drew attention to the care to be taken by a judge when directing the jury about the support of an identification which may be derived from the fact that they have rejected an alibi. We are not of the opinion that what his Honour had to say could in any way have led the jury to the conclusion that because they may be of the opinion that the accused were lying with

respect to the alibis given, that fact by itself did not prove that they had been identified as the accused. In our view, covering ground 8 as well, his Honour has taken the recommended direction in respect of identification from the authority of Turnbull's case and his charge thereon is impeccable. Such a comment therefore covers grounds 9 and 10.

During the course of the trial Mr. Mazza was at pains to point out to his Honour the need to draw the jury's attention to what evidence was admissible against each accused as that evidence was adduced in the witness box. His Honour followed that practice thereafter and again fully charged the jury in respect of their responsibilities in reaching a conclusion separately against each accused in respect of each count. In our view the accused had no cause for complaint in regard thereto.

For all of these reasons we would dismiss the appeals as to conviction. Our reasons for refusing Guy's application for leave to appeal in respect of the sentences imposed upon him will be revealed as we deal with the Crown's appeal as to the inadequacy of sentence imposed upon each of the three accused.

In The Queen v. Lawler the Court of Criminal Appeal last year dealt for the first time in this State with the principles applicable to an appeal by the Crown against inadequacy of sentence imposed upon a convicted person. There is no need to canvass the authorities applicable thereto save to repeat the principle laid down by Kitto J. in Australian Coal and Shale Employees' Federation v. The Commonwealth, (1956) 94 C.L.R. 621 at p. 627, - "There is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the Court of Appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may

infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance: House v. R., (1936) 55 C.L.R. 499, at pp. 504-505" - as being the principle which we should follow. See also the recent decisions in R. v. Dall, (1975) V.R. 754, and R. v. Williscroft, (1975) V.R. 292, both decisions of the Victorian Court of Criminal Appeal.

Here the Crown argues that the crimes committed by the three accused in breaking entering and stealing from two gun shops cannot be viewed as ordinary crimes of that nature. With this proposition we agree and we do not think that the learned trial Judge disagreed thereon. The Crown concedes that a sentence of four years in respect of each charge, though on the lower end of the scale, is not appealable within his Honour's discretion. What the Crown does say, and we believe it to be entirely correct, is that his Honour fell into error when he made the two counts concurrent as arising out of the one venture. It is, of course, widely held that where two offences arise out of the same transaction, are committed on the one day, and are the subject of two counts in the one indictment, generally the appropriate course is to make whatever sentences are given concurrent. R. v. Hussain, (1962) Crim.L.R. 712; R. v. Saleem, (1964) Crim.L.R. 482. With respect we cannot agree with his Honour's conclusion any more than the argument that this could not be viewed as anything other than an adventure to obtain a supply of firearms. Each crime was separately planned and separately carried out and each represented a separate depredation upon the property of others or as referred to in Williscroft, "different invasions of property" - see at p.303.

The crimes committed by the three prisoners are extremely serious particularly when one has regard to the purpose for which the firearms were obtained - that is, the sale thereof in unauthorised quarters, at a time when the use of such firearms has become commonplace in armed robberies throughout the Commonwealth. Each of the three accused are experienced criminals and in our view we would be failing in the duty entrusted to us if we did not reflect in the sentences imposed not only all of those elements of retribution and deterrence which make up the sentencing process but also society's abhorrence at

the commission of such crimes. In this case we consider the conclusion reached by the Court of Criminal Appeal in Queensland in R. v. Hally, (1965) Qd.R. 582, wherein a solicitor who committed two offences of having fraudulently disposed of trust property during the one period of time was rightly sentenced to cumulative terms of imprisonment more appropriate. There it was said that the offences arose out of different transactions and were quite distinct; see Gibbs J. at p. 585. In Kastercum v. R., (1972) 56 C.A.R. 298, the Lord Chief Justice, Widgery L.C.J., acknowledged the well known working principle of the Court of Criminal Appeal to which we have already referred but gave as the reason therefor the fact that "if a man is charged with several serious offences arising out of the same situation and consecutive sentences are imposed, the total very often proves to be much too great for the incident in question"; see at p. 300. The rule is only of a working nature and is not mandatory. For these reasons we would uphold the Crown's appeal and make the sentences to be imposed in respect of the convictions for breaking entering and stealing cumulative.

What then should one do with the sentences imposed upon Guy and Lazzaro for assault of the investigating police officers? Here the principles set out above are again applicable and are reflected also in Kastercum v. The Queen. The task of the police in apprehending the criminal element in the community is hard enough without being subjected to physical violence and indeed the dangers of dealing with such criminals.

Upon the principles referred to we are of the opinion that their Honours were in error in failing to make the sentences for assault cumulative with those imposed for the principal offences. It is fair enough, we believe, however, to have made the two sentences imposed on Guy for assault concurrent. Bearing in mind the basis for the rule relating to concurrent sentences referred to by Widgery L.C.J., we are of the opinion that the sentences which the applicant should be called upon to serve should be as follows:

As to each first count of breaking entering and stealing,
four years;

As to the second of such counts, two years;
We would not interfere with the length of the sentences

imposed for assault.

All sentences, however, should be served cumulatively so that in the end result Guy would be obliged to serve a period of 6½ years, Finger 6 years, and Lazzaro 7 years.

There arises the difficulty of assessing minimum terms. Having regard to the directions set out in the Offenders Probation and Parole Act and the principles laid down in Lyons v. R., (1973) 131 C.L.R. 623, we wonder whether the applicants are entitled to the benefit of that legislation. Having regard to their age, however, and in at least two instances their unfortunate background and, indeed, the exercise of their Honours' discretion we have reached the conclusion that the applicants should be given one more chance to rehabilitate themselves. We do not overlook the fact that they had served 4½ months imprisonment at the time they were sentenced. Bearing all these factors in mind we would fix a minimum term of 4 years in respect of each of them before they become eligible for parole.