230.

ROYAL COURT (SUPERIOR NUMBER)
(exercising the appellate jurisdiction conferred upon it by Article 22 of the Court of Appeal (Jersey) Law, 1961.)

Application dismissed; reasoned Judgment reserved: 14th November, 1996.

Reasoned Judgment delivered: 2nd December, 1996.

Before: Sir Philip Bailhache, Bailiff, and Jurats Blampied, Le Ruez, Vibert, Rumfitt, Potter, de Veulle and Querée.

Gary Stuart Sheldon

- v -

The Attorney General

Application for leave to appeal against a sentence of 9 months' imprisonment, passed by the Inferior Number of the Royal Court on 8th November, 1996, following a guilty plea to 1 count of Larceny.

Royal Court (Jersey) Law, 1948: Article 13 considered: the Bailiff's casting vote, where the Jurats are equally divided.

Held: There is no practice that, in criminal trials, the presiding Judge should exercise his casting vote in favour of leniency; presiding Judge has discretion to be exercised judicially.

C.E. Whelan, Esq., Crown Advocate.
Advocate D.M.C. Sowden for the accused.

JUDGMENT

THE BAILIFF: On the 14th November, 1996, the Court dismissed an application for leave to appeal by Gary Stuart Sheldon against his sentence of nine months' imprisonment for an offence of larceny, and stated that it would give its reasons at a later date. This we now proceed to do.

The facts are straightforward. The applicant is a 45 year old nurse who was appointed to live with and care for an elderly man who was known to be dying. The patient indeed died only a matter of days after the applicant had taken up his appointment. The patient's son gave the applicant permission to remain in the house for a short time. The applicant took advantage of that arrangement to steal a valuable ring and other jewellery and effects worth in total some £6,000. The applicant also stole a credit card which he used to purchase an air ticket to South Africa. He was arrested however before he could leave the United Kingdom. It was, in short, a mean offence, and a betrayal of the trust placed in him. In mitigation the applicant was treated as a first offender. It was said to have been an opportunist crime for which he felt great shame. The Crown Advocate moved for twelve months'

imprisonment. The defence advocate urged a non-custodial sentence. The Court retired to consider the matter and it emerged that the Jurats were divided. The Deputy Bailiff's judgment records:

> *"The Jurats are divided. One feels that the seriousness of the offence could only be met with a prison sentence, but in the particular circumstances that sentence would be reduced to nine months. The other Jurat feels that the particular circumstances of this case and the particular opportunist nature of the offence allows the imposition of a period of twelve months' probation with 240 hours of community service as recommended by the probation officer. The decision is therefore left to me. I have to recall that Sheldon was on the verge of leaving the jurisdiction of the Court forever and the theft is in my view such a serious breach of trust that I can see no alternative but to side with a decision to imprison and therefore, Sheldon, you are sentenced to nine months' imprisonment."*

Miss Sowden, for the applicant, based her argument on a single ground:-

> *"That the Court erred in that the Jurats were divided and the Deputy Bailiff exercised his casting vote in favour of a custodial sentence and this contrary to the practice of the Court."*

Counsel argued that it was the custom that, when the Jurats were divided, the presiding judge exercised his casting vote on the side of leniency. She relied upon the case of A.G. -v- Perron (10th November, 1989) Jersey Unreported where Tomes DB stated in giving the judgment of the court:-

> *"The learned Jurats were divided; one was minded to grant the conclusions; the other was persuaded by the principle referred to in Thomas on Sentencing (Second Edition) at p.31 that the maximum sentence should be reserved for the worst possible example of the offence concerned. Both in accordance with the convention that I should give my casting vote on the side of leniency and because I agree with the general principle the conclusions will be reduced ...".*

Miss Sowden conceded that Article 13(4) of the Royal Court (Jersey) Law 1948 conferred a discretion upon the presiding judge. Article 13(4) provides:-

> *"(4) In all causes and matters, civil, criminal or mixed, the Bailiff shall have a casting vote whenever the Jurats-*
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> *(a) being two in number, are divided in opinion as to the facts or as to the damages to be awarded or as to the sentence, fine or other sanction to be pronounced or imposed; or*
>
> *(b) being more than two in number, are so divided in opinion with respect to any one or more of the matters specified in sub-paragraph (a) of this paragraph that the giving of*

a casting vote is necessary for the finding of a majority opinion.

Counsel submitted however that it had become the custom for the presiding judge to exercise his casting vote on the side of leniency other than in exceptional circumstances. She submitted that there were no exceptional circumstances in this case.

Mr. Whelan, for the Attorney General, contended that it was important to emphasise that the Bailiff's casting vote was conferred by statute. The legislature had made an unambiguous statement in that regard. Mr. Whelan conceded - although his concession was based upon empirical observation rather than reported cases - that in practice the presiding judge usually did cast his vote on the side of leniency. He submitted however that this custom or practice had not become a binding rule of law. Counsel drew attention to the absurdity which would result if the presiding judge's hands were tied in this way. Suppose that the "lenient" view of one Jurat were plainly contrary to previous decisions of the court, or indeed in conflict with guidelines laid down by the Court of Appeal. It would be absurd if the presiding judge were obliged, contrary to his own judgment, to exercise his casting vote in favour of that view. Decision by minority would be an unusual process to determine any matter of substance.

We agree with the submissions of the Crown Advocate. Indeed we think that there is another reason why the submission of counsel for the applicant cannot be right. It is said that there is a convention that the casting vote should be cast on the side of leniency. In some cases however, where the choice lies between (say) a fine or a community service order, it may not be possible to say which is the more "lenient" sentence. Both options may have advantages and disadvantages, and the duty of the sentencing court is to balance those conflicting considerations and to reach a conclusion.

In our judgment there is no convention, custom or practice (the terms were used interchangeably by counsel) that in criminal trials the presiding judge should exercise his casting vote in favour of leniency. A presiding judge has a discretion which should be exercised judicially in accordance with his view of the particular circumstances of the case. It follows that the reference to such a convention in A.G. -v- Perron was erroneous.

It was for these reasons that the application for leave to appeal was dismissed. We directed however, in accordance with proviso (b) to Article 35 (4) of the Court of Appeal (Jersey) Law 1961 that no part of the time during which this applicant has been specially treated as an appellant in pursuance of the prison rules should be disregarded in computing the term of the sentence to which he is now subject.

Authorities

Lowes (1988) 10 Cr.App.R.(S) 175.

Whelan: "Aspects of Sentencing in the Superior Courts of Jersey": pp.55-63.

Clarkin, Pockett -v- A.G. (1991) JLR 213 CofA.

Maxwell's Interpretation of Statutes (12th Ed'n): Chapter 12: pp.264-270.

A.G. -v- Perron (10th November, 1989) Jersey Unreported.

Royal Court (Jersey) Law, 1948: Article 13.