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LEGISLATION

The Terrorism Act 2000 (United Kingdom)

On 20th July 2000 Royal Assent was given to the Terrorism Act 2000 to become law in the United Kingdom. Below is an excerpt from the Explanatory Notes prepared by the Home Office and the Northern Ireland Office in order to assist in the understanding of its provisions. Full text of the Act and Explanatory Notes can be found on this website:

<http://www.hmso.gov.uk/acts/en/2000en11.htm>

“The Act reforms and extends previous counter-terrorist legislation, and puts it largely on a permanent basis. The previous legislation concerned are:

- the Prevention of Terrorism (Temporary Provisions) Act 1989 (c. 4) (“the PTA”);
- the Northern Ireland (Emergency Provisions) Act 1996 (c. 22) (“the EPA”); and
- sections 1 to 4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40).

The Act builds on the proposals in the Government's consultation document *Legislation against terrorism* (Cm 4178), published in December 1998. The consultation document in turn responded to Lord Lloyd of Berwick's *Inquiry into legislation against terrorism* (Cm 3420), published in October 1996.

Previous counter-terrorist legislation provided a range of measures designed to prevent terrorism and support the investigation of terrorist crime. These fall into three broad categories: a power for the Secretary of State to proscribe terrorist organisations, backed up by a series of offences connected with such organisations (membership, fundraising etc); other specific offences connected with terrorism (such as fund-raising for terrorist purposes, training in the use of firearms for terrorist purposes, etc); and a range of police powers (powers of investigation, arrest, stop and search, detention, etc).

The Act repeals the PTA and re-enacts those of its provisions which remain necessary, with a number of modifications. The previous counter-terrorist legislation was subject to annual renewal by Parliament. Under the Act this will in general no longer be the case. The main provisions in the Act are to be permanent. There will, however, continue to be an annual report to Parliament on the working of the Act; this is required under section 126.

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For further information or copies, please
contact: The Editor, Criminal Law Unit,
Legal & Constitutional Affairs Division (LCAD),
Commonwealth Secretariat,
Marlborough House, Pall Mall,
London SW1Y 5HX, United Kingdom.
Tel: +44 (0)20 7747 6417/6420/6423
Fax: +44 (0)20 7839 3302
E-mail: k.prost@commonwealth.int
v.wright@commonwealth.int

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The EPA would have repealed itself on 24 August 2000. The consultation document expressed the Government's hope that the special provision it makes for Northern Ireland might not be needed after that date, an objective to be kept under review in the light of developments in the security situation. The Government takes the view that the time is not yet right to remove all of these provisions. Part VII of the Act therefore provides additional temporary measures for Northern Ireland only. These are subject to annual renewal and are time-limited to 5 years.

The previous counter-terrorist legislation was originally designed in response to terrorism connected with the affairs of Northern Ireland ("Irish terrorism"), and some of its provisions had subsequently been extended to certain categories of international terrorism. It did not apply to any other terrorism connected with UK affairs ("domestic terrorism"). Under the Act these restrictions have been lifted, so that counter-terrorist measures are to be applicable to all forms of terrorism: Irish, international, and domestic.

The Act's Parts and Schedules are as follows.

- Part I (Introductory) sets out the definition of terrorism for the purposes of the Act, repeals the PTA and, with Schedule 1, deals with the continuation of certain temporary provisions of the EPA until Part VII of the Act is brought into force.
- Part II (Proscribed organisations) provides a power for the Secretary of State to proscribe organisations and sets out the associated offences. Schedule 2 lists the organisations which are currently proscribed and Schedule 3 details the functions of the Proscribed Organisations Appeal Commission (POAC) which the Act sets up.
- Part III (Terrorist property) provides offences relating to fund-raising and other kinds of financial support for terrorism, together with power for a court to order forfeiture of any money or other property connected with the offences. Schedule 4 gives details of forfeiture procedures.
- Part IV (Terrorist investigations) provides the police with a power to set up cordons. Schedule 5 sets out further powers to investigate terrorism by searching premises and seeking explanation of items found; and Schedule 6 provides a power to investigate

terrorist finance based on an existing Northern Ireland power to investigate proceeds of crime.

- Part V (Counter-terrorist powers) provides the police with powers to arrest and detain suspected terrorists, and broader powers to stop and search vehicles and pedestrians, and to impose parking restrictions. Schedule 7 provides examination powers at ports and borders; and Schedule 8 provides for the treatment of suspects who are detained and for judicial extension of the initial period of detention.
- Part VI (Miscellaneous) provides ancillary offences of
 - weapons training for terrorist purposes, including recruitment for such training,
 - directing a terrorist organisation,
 - possessing articles for terrorist purposes,
 - possessing information for terrorist purposes, and
 - incitement of overseas terrorism.

Part VI also includes provisions on extraterritorial jurisdiction and extradition which will enable the UK to ratify the UN Conventions for the Suppression of Terrorist Bombings and for the Suppression of the Financing of Terrorism.

- Part VII (Northern Ireland) provides for the system of non-jury trials in Northern Ireland for the offences listed in Schedule 9. Together with Schedules 10-13, this Part also provides additional police and Army powers for Northern Ireland, and regulates the private security industry in Northern Ireland.
- Part VIII (General) contains further technical provisions and includes a list of terms defined in the Act. Schedule 14 provides general powers for police, customs and immigration officers including powers for them to exchange information. Schedules 15 and 16 list consequential amendments and repeals.

Under the PTA, terrorism "means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear" (section 20). The definition in the PTA is limited in that the powers and offences in that Act only apply to terrorism connected with the affairs of Northern Ireland ("Irish terrorism") or Irish and

international terrorism. The Act, as suggested in the consultation document, adopts a wider definition, recognising that terrorism may have religious or ideological as well as political motivation, and covering actions which might not be violent in themselves but which can, in a modern society, have a devastating impact. These could include interfering with the supply of water or power where life, health or safety may be put at risk. *Subsection (2)(e)* covers the disrupting of key computer systems. *Subsection (3)* provides that where action involves firearms

or explosives, it does not have to be designed to influence the government or to intimidate the public or a section of the public to be included in the definition. This is to ensure that, for instance, the assassination of key individuals is covered.

Subsection (4) provides for the definition to cover terrorism not only within the United Kingdom but throughout the world. This is implicit in the PTA definition but the Act makes it explicit."

C A S E N O T E S

● **Criminal Law – Theft – whether credit balance in bank account is “property” belonging to another for purposes of the offence of theft – Penal Code (1995 Revision), s. 223**

● **Criminal Procedure – Sentence – parity of sentence for co-accused tried in higher Court with greater jurisdiction to sentence than Magistrate Court which tried the other accused – (Cayman Islands)**

P and M were friends. M worked for a bank as a loans account assistant. P was the guardian of Katrina McLaughlin who was 15 years old at the time. M was in financial difficulties. She devised a scheme to steal money from her employers to ease her financial strain. She opened an account in a fictitious name that was very similar to Katrina McLaughlin into which she transferred money from the accounts of some of the bank's customers. She then obtained bank drafts from the bank drawn on the account and gave them to P who then paid them into Katrina's accounts held with other banks. M also obtained ATM cards from her employer bank to enable her and P to withdraw cash from the fictitious account. Between August and September 1995, they were able to steal from the bank a total of US\$257,285.71.

Katrina McLaughlin was initially charged as a co-conspirator with P but she was subsequently discharged. M pleaded guilty in the Magistrate's court and was sentenced to 18 months' imprisonment, six of which were suspended. She was ordered to repay all the un-recovered amounts. This was the maximum that the

summary court could lawfully impose. P pleaded not guilty to the charge of conspiracy to steal and was tried in a higher court, the Grand Court.

At P's trial M gave evidence for the prosecution and the evidence of the conspiracy was found to be overwhelming. P was found guilty and sentenced to two and a half years imprisonment and ordered to pay compensation and costs.

She appealed to the Cayman Islands Court of Appeal, arguing the following:

1. The prosecution had failed to establish that what P and M obtained from the Bank was “property belonging to another” as required by the Penal Code. They submitted that theft is defined in the Code as the dishonest appropriation of property belonging to another. Relying on the decision of *R. v. Preddy*, P's counsel argued that because it is not possible to obtain a credit balance by deception, by parity of reasoning, it was also not possible to commit theft of a credit balance in a bank. The old credit balance was extinguished and was incapable of being obtained as property of another and the new credit balance was not property belonging to another.

2. The sentence imposed on P was manifestly excessive having regard to the sentence imposed on M.

Held: allowing the appeal in part;

1. The decision in *R. v. Preddy* was not applicable in the Cayman Islands. The requirements of the Theft Act in England on the basis of which *R. v. Preddy* was decided are

different from those of the Cayman Islands Penal Code requirements for the offence of theft. "Property" in the Interpretation Law of the Cayman Islands is defined as including "things in action" "The dishonest appropriation of property belonging to another with intent permanently to deprive the other of that property is the essence of theft. It is sufficient appropriation of the property of another if the actor destroys that property with the necessary intent. Therefore if a person does an act which had the effect of extinguishing the Chose in action of another person, he has appropriated the property of that other within the meaning of s. 223 of the Penal Code (1995 Revision): see *R. v. Kohn*".

Besides, the charge against P was conspiracy to steal, and all the elements of a conspiracy to commit an unlawful act had been proved by the prosecution, thereby not raising the issue decided in *R. v. Preddy*; *R. v. Shivpuri*.

2. M was the main instigator and perpetrator of the fraud against the bank. The Court of Appeal appreciated that the Magistrate imposed the maximum allowed by the jurisdiction of the court, but did not consider that M should have been tried at the Magistrate's court in the first place. The Court had consistently advised themselves that it must not interfere with sentences imposed by superior courts except where the sentence is manifestly excessive in the given circumstance.

"Aggravating and mitigating circumstances of whatever character can affect the sentence in a given case, but the cardinal principle is that the sentence imposed should not be arbitrary and should not leave a defendant with a justifiable sense of grievance due to the disparity of the sentence imposed in any given case. Moreover, P could not be punished for choosing to take her case to trial instead of pleading guilty in a summary trial.

On any assessment of the respective roles played by the two accused persons, M's role was the major one without which the fraud would not have been executed. P's sentence of two and a half years as compared to M's eighteen months with six suspended, was disproportionate and excessive. P's sentence was therefore reduced to 18 months imprisonment and the order for compensation set aside since there was already an order for M to repay the money.

C.A. Pearson v. R [2000] CILR 413

Intercept Evidence – Intercepts and recordings made in European country in accordance with national law – whether that evidence admissible in trial of appellants on drug charges in England – whether breach of human rights under European Convention – whether public policy rule excluding intercept evidence – Police and Criminal Justice Act (PACE) 1984; Articles 6 and 8 of the European Convention on Human Rights and Fundamental Principles – (United Kingdom)

The defendants were accused of drug trafficking. The prosecution's case was that the defendants, British citizens, were involved with X, a national of Country A, and Y a national of country B in the smuggling of drugs into a particular country in the European Union, country A. It was alleged that their ultimate intention was to smuggle the drugs into the United Kingdom. It was alleged that P was the ringleader in the United Kingdom and Q and R were employed by him. The authorities in country A had suspected X of being involved in drug trafficking and had obtained judicial authority to intercept his telephone calls. X used a mobile phone amongst others which used a network in country A. The authorities in Country A were able to monitor X's calls even if X made or received them from outside country A. These intercepts resulted in recordings being made of various telephone conversations between X and each of the accused persons in the United Kingdom. Country A's authorities sought the assistance of the English authorities and their co-operation led to the arrests of P and others, in the United Kingdom and the seizure of drugs in country B.

The English authorities sent a request for mutual assistance pursuant to the Criminal Justice (International Co-operation) Act 1990, asking inter alia, for officers of the Crime Squad to travel to country A to obtain all interception material and evidence relating to X which concerned P and other defendants in England. As required by the laws of country A, the recordings were released to the British officers following an order of a judge of country A.

Back in England, the prosecution disclosed the recordings together with other evidence which it intended to rely on at trial. At preliminary hearings, the defence objected to the admission of the recordings, and urged the judge to exercise his discretion in that regard. The judge

refused and they appealed to the Court of Appeal which dismissed the appeal. He appealed further to the House of Lords.

The defendants argued before the House of Lords that although the intercept evidence was properly obtained in accordance with the European Convention on Human Rights and the law of country A, its use in the English trial would be contrary to the policy of English law and to the Convention. They relied on *R. v. Preston* [1994] 2 AC 130 and *Morgan v. DPP* [2000] 2 WLR 386, and Articles 8 and 6 of the Convention.

Held: dismissing the appeals;

1. The Convention: Article 8

The interception of the calls received and made by X on his mobile phone did not involve any breach of article 8. The intercepts were made in country A by the authorities of that country under proper judicial supervision and as required by the laws of country A. Judicial authority to hand the recordings over to the British authorities was duly obtained. Any criticism that could be made of the tapping laws of the United Kingdom were irrelevant since they did not apply to anything occurring in country A, nor did they need to have been invoked in order to justify what occurred there.

Relying on *Amann v. Switzerland*, (Application No. 27798/95 of 16 February 2000), the defendants contended that the use that the United Kingdom intended to make of the intercepts offended Article 8 of the Convention. There was no doubt that the use made of an intercept could amount to an infringement of Article 8, but the facts of the present case were distinguishable from *Amann*. Here the relevant information, having been lawfully obtained for the purpose of assisting the prosecution of alleged smugglers of drugs, had not been used for any other purpose and had not been kept for longer than was necessary for that purpose. What had been done was according to statutory authority and subject to judicial supervision. There was therefore no breach of Article 8.

2. The Convention: Article 6

This Article relates to the right to fair hearing and involves the same criterion as that applied in section 78 of the Police and Criminal Evidence Act 1984. *R. v. Khan* [1997] C 558, decided that section 78 requires a judge to have regard inter alia to the circumstances in which the evidence was obtained. "The judge must take into account that the evidence was

obtained by intercepting telephone conversations but he must base his decision upon the effect the admission of the evidence would have on the fairness of the trial"

The interrelation between Article 8 and 6 was explained in much the same way in *Schenk v. Switzerland* (1988) 13 AHRR 242 in which the Court said:

"While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole is fair"

This decision provided a highly persuasive authority in favour of the prosecution that the critical issue for determination was the fairness of the trial and that questions of admissibility are not governed by Article 8. "The fair use of intercept evidence at a trial is not a breach of Article 6 even if the evidence was unlawfully obtained."

3. The policy of English Law

The defendants also argued that there was a rule of policy of English law as demonstrated by legislation and *R. v. Preston* and *Morgan v. DPP*, that intercept and surveillance evidence should not be used at criminal trials. In the opinion of the House, any developed society must have a scheme for the surveillance of troublemakers, and these schemes have always included the interception of communications. The British Home Secretary therefore has the authority to authorise the interception of communications for "purposes of preventing or detecting serious crime"

Section 9 of the Interception of Telecommunications Act 1985 prevents any questions being asked in court which tend to suggest that an official may or may not have had the authority under the Act to intercept a communication. "The oblique wording of section 9 is clearly directed to preserving the secrecy of any surveillance operation covered by the Act. Section 9 does not say that the intercept evidence may not be used. ...Neither *R. v. Preston* nor *Morgan v. DPP* support any principle of exclusion of evidence independently of the 1985 Act. Where, as here, the intercept was made in a foreign country by the authorities of that country and the 1985 Act

accordingly has no application, the reasoning in *R. v. Preston* and *Morgan v. DPP* does not apply either. The law of country A under which these intercepts were made does not treat secrecy as paramount; it permits, subject to judicial supervision, the use of intercepts in evidence. There is no basis for the argument that there is a rule of English public policy which makes this evidence, which is admissible in country A, inadmissible in England.”

R. v. P [2001] 2 WLR 463 (House of Lords Decision)

Money Laundering - Bank informed police of suspicious transactions – police already investigating company for money laundering – police objecting to Bank disclosing information for fear of tipping off customer – Bank sought directions as to whether to make payments out of the Customer’s accounts – what was the appropriate procedure – Criminal Justice Act 1988 as amended – (United Kingdom)

A Ltd. incorporated in 1997, opened a sterling and dollar account at the Royal Bank of Scotland (the Bank). Thereafter, substantial sums of money were deposited into the account. Bank officials became increasingly suspicious about the amount of funds. They were concerned that if they did not do anything, the bank might be regarded as a constructive trustee of the funds in the account and be held liable. Bank officials contacted the police, the ICC Commercial Crime Bureau and the British Bankers Association. As a result of these consultations, the bank officials were made aware that there were investigations being conducted into the affairs of A Ltd and T who was closely associated with A Ltd.

Bank officials faced a dilemma in that the bank could be liable to third parties as a constructive trustee if the moneys held in the account were paid out and if the moneys were not paid out, it could be sued and would be unable to defend itself as the police had objected to the bank revealing the fact that the company was being investigated, under section 93D of the Criminal Justice Act.

An application was made by the bank, *ex parte* to the High Court, seeking directions as to what it should do. The judge ordered an injunction restraining the bank from making any payments from the accounts, in the following terms:

“Until further order of the court ... the applicant ... shall be restrained from making any payment out of the trust funds the subject of this order, whose identity is stated in counsel’s skeleton argument, without the permission of the court ...” The order had the effect of freezing A Ltd’s accounts. The bank’s solicitors subsequently wrote to A Ltd. informing it that the Bank was unhappy with certain aspects of the transactions on the accounts and had therefore asked the solicitors to investigate the matter further and that in the meantime, the Bank would not allow any transactions on the accounts. A Ltd accepted this initially but eventually the company made application to the Commercial Court asking that the moneys be paid to its solicitors. At this stage A Ltd was not aware of the earlier restraining order. At the hearing of A Ltd’s application, counsel for the bank made submissions to the Judge in private after A Ltd’s Counsel had withdrawn. The judge ordered that unless the Bank made an application to the Court before a certain date, he would order the moneys to be paid to A Ltd’s solicitors. The result of this hearing was that A Ltd became aware that the Bank was trying to avoid tipping off. This could only mean that there was a serious criminal investigation involving A Ltd. This was the situation that both the bank and the Serious Fraud Office were anxious to avoid.

The bank then applied in private to the Chancery Division for an order that its costs be debited to A Ltd’s accounts, if as contended that account was subject to a constructive trust. A number of further applications were made and consequently the contents of the skeleton arguments and *ex parte* hearings were disclosed, and the bank released the money to A Ltd’s solicitors, leaving a small sum to cover any likely cost in favour of the bank.

The issue that remained to be determined was as to costs and guidance from the courts as to the proper practice that the banks should adopt in future in similar circumstances. Those matters were heard by Laddie J who held that the judge in the first instance was wrong to have granted the injunction and discharged it.

The bank appealed to the Court of Appeal. It argued that it was in a very difficult position and that the problem was created by the law of trusts and section 93D. It was argued the proper solution was to be found in the law of trusts, and in particular in the courts jurisdiction to guide and direct trustees as to the administration of

their trusts. The bank had a reasonable apprehension that it might be held liable as a constructive trustee, and that it had acted reasonably in invoking the court's jurisdiction to give guidance and directions to trustees.

Held:

1. In general the relationship between a bank and its customer is not a fiduciary one, but a commercial one founded in contract. When a bank account is in credit, the relationship to the customer is that of debtor. But if the debt owed to the customer is affected by any equitable interest or claim of a third party the bank may become accountable in equity if it dishonestly assists in any course of action which disregards the third parties interest or claim. The potential accountability in equity is sometimes referred to as a liability as a constructive trustee, but that expression is ambiguous and may be misleading: *Paragon Finance plc. v. D B Thakerar & Co.* [1999] 1 All ER 400.

It was impossible to envisage circumstances in which it was proper for a court to grant an injunction against the only party that was seeking relief

Although it was open to the bank to seek directions on the footing that it was at least a putative fiduciary, it did not need to establish that it was a constructive trustee of the money held in A Ltd's accounts in order for it to obtain relief. If there was a dispute with the police as to whether it could make payments from the accounts or disclose information relating to the investigations, the bank could apply for interim declaratory relief under the Civil Procedure Rules. In those proceedings, the appropriate defendant would be the Serious Fraud Office, not the customer and, in determining the terms of any declaration, the court would pay particular attention to what would prejudice the investigation.

Governor and Company of the Bank of Scotland v. A Ltd and Others [2001] 1 WLR 751.

Drug trafficking – dealing in Dagga - s 5(b) of Drugs and Drug Trafficking Act 1992 – Sentence: 14 years – whether court could have regard to previous conviction 20 years old (South Africa)

Two people were riding in a trailer pulled by a horse. They were stopped by drug enforcement officers and searched. The officers found 85 bags

of dagga weighing, in total, 1433 kg in a secret compartment in the roof and front of the trailer. M was the registered owner of the vehicle. He was subsequently arrested. The secret compartment spanned the whole roof of the trailer, forming an inverted "L" shape with another compartment at the front of the trailer. The investigators found that the conversion had been done by one Greyling on M's instructions. M was tried with the passenger in the vehicle, the driver having absconded. At his trial, M claimed that he was in the business of selling fruits and had no knowledge of the drugs in the hidden compartment. The magistrate rejected M's explanation and found him guilty and sentenced him to 14 years' imprisonment.

M appealed against his sentence unsuccessfully to the High Court. He appealed further to the Court of Appeal.

It was argued on behalf of M, that his testimony that he had the secret compartment built in the trailer at the request of a third party, who wished to convey therein illegal immigrants into the country, should have been accepted as being reasonably possibly true.

M also contended that the magistrate misdirected himself in three respects with regard to sentence, in that (i) he attached undue weight to M's previous conviction for dealing in dagga in 1976; (ii) he treated the appellant as the "Mafia-type organiser of a large network of dealers" and that in so doing the magistrate over-emphasised the seriousness of the offence and the interests of society; and (iii) he discounted his personal circumstances and the effect which a long period of imprisonment would have on him, his financial losses due to his vehicle being forfeited to the State and the destruction of his family life, with a view to imposing an exemplary punishment.

Held: dismissing the appeal;

1. M's explanation regarding the use of the vehicle was correctly rejected by the magistrate. In the absence of any credible evidence to the contrary, the only reasonable inference that could be drawn from the facts was that M had the secret compartment built for the specific purpose of conveying dagga therein.

2. Section 271 A of the Criminal Procedure Act 51 of 1977 makes provision for the lapse of certain previous convictions upon expiry of a period of 10 years after the date of conviction. M's previous conviction did not fall within that

category and had accordingly not lapsed. The magistrate was perfectly entitled to have regard to M's previous conviction, to the limited extent that he did. White J, with whom Beck CJ concurred, said in *S v Nkombini*, [1990] 2 SACR 465, at 469 i:

"In my opinion terms of imprisonment of 10 to 15 years are reserved for the very serious cases, eg the Mafia-type organiser of a large network of dealers."

This case clearly concerned someone operating in drugs on a large scale. The crime was meticulously planned. Much time and attention were devoted to it. A huge sum of R28,000.00 was expended in converting the trailer into one with a secret compartment capable of holding an enormous quantity of dagga. The appellant even went back to Greyling to have the front part of the secret compartment enlarged. Access to the secret compartment was gained by way of a panel in the roof, situated towards the rear of the trailer and operated by means of a cable, which ran along hooks inside the secret compartment. It was not visible from outside. Taking these factors into consideration, it was doubtful that the conveyance of dagga would have been a one-off operation. Whether the appellant was a one-man dealer or formed part

of a gang made little difference, regard being had to the quantity of dagga involved. On the facts of this case the appellant was an actual dealer in dagga.

4. It was clear to the Court that the magistrate duly considered M's personal circumstances and in fact highlighted the heavy financial losses he suffered. The thrust, however, was that M, not being a first offender, was well aware of the consequences of his deeds and chose to take the risk in spite of such awareness. Again, regard being had to the quantity of dagga involved there was no fault with the magistrate's approach.

5. There being no irregularity or misdirection committed by the magistrate, the only ground upon which the Court could interfere with the sentence imposed was if the sentence induced a sense of shock, i.e. "if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed". *S v De Jager and Another* 1965 (2) SA 616 (A) at 629 A-B. The sentence of 14 years' imprisonment might be said to be a robust one, however, there was no proper basis upon which the Court could interfere with it.

Molefe Pius Morebudi v. the State [1999]
Supreme Court of Appeal of South Africa.