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CRIMINAL LAW AND PROCEDURE - POWER OF APPELLATE COURT TO MODIFY SENTENCE

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CRIMINAL LAW AND PROCEDURE — POWER OF APPELLATE COURT TO MODIFY SENTENCE — It is generally conceded that when a sentence is illegal in the sense that it exceeds the maximum prescribed by statute, it may be modified by a reviewing court,[1] although it is not clear that common-law courts were always regarded as having such power.[2] Power to modify in such cases is now recognized in federal courts as well as in state courts.[3] Quite another question arises when the sentence appealed from is within the limits allowed by law but is urged to be unduly severe. The decision in the recent case of *Beckett v. United States*[4] that the federal circuit court of appeals is without

[1] Rex v. Jackson, 19 Cr. App. Cases 159 (1926); 29 A. L. R. 313 at 314 (1924); Indian Fred v. State, 36 Ariz. 48, 282 P. 930 (1929); Thompson v. State, 153 Miss. 593, 121 So. 275 (1929); State v. Starkey, (Mo. 1929) 26 S. W. (2d) 956.

[2] Orfield, "The Scope of Appeal in Criminal Cases," 84 UNIV. PA. L. REV. 825 at 835-836 (1936): "One might suppose offhand that an appellate court could certainly correct an illegal sentence. Such seems not to have been the early view, however. All that the appellate court might do was to affirm or reverse . . . it could not itself impose a legally correct sentence but must send the case back . . . for retrial."

[3] Millich v. United States, (C. C. A. 9th, 1922) 282 F. 604; Spirou v. United States, (C. C. A. 2d, 1928) 24 F. (2d) 796.

[4] (C. C. A. 6th, 1936) 84 F. (2d) 731.

authority to reduce sentences which it may regard as excessive but which are within the statutory limits is in accord with modern federal precedents.[5] It is noteworthy that before the creation of the circuit courts of appeals, under the older organization of the federal judiciary, the federal circuit courts assumed the power on appeal to alter too lenient or too severe sentences in criminal cases.[6] This assumption was based on a statute which gave those courts appellate jurisdiction in certain criminal cases in which the sentence included imprisonment or a fine of at least three hundred dollars. The language on which the decisions relied was, "And in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon."[7] That a court within the federal system may be given power to review sentences is illustrated by the practice of the Supreme Court of the Philippine Islands.[8] That court customarily exercises its authority to reduce or increase sentences on appeal.[9]

Thus it is seen that the modern federal rule prohibiting modification of sentence by the reviewing court is not an inevitable feature of Anglo-American jurisprudence. The English courts operate under an exactly contrary rule. The basis for the English practice is found in the following statute:

> "A person convicted on an indictment may appeal under this Act to the Court of Criminal Appeal . . . (c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."[10]
>
> "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."[11]

[5] Wallace v. United States, (C. C. A. 7th, 1917) 243 F. 300; Freeman v. United States, (C. C. A. 9th, 1917) 243 F. 353, cert. den. 249 U. S. 600, 39 S. Ct. 258 (1919); Peterson v. United States, (C. C. A. 4th, 1917) 246 F. 118; Gurera v. United States, (C. C. A. 8th, 1930) 40 F. (2d) 338; 42 YALE L. J. 453 (1933).

[6] Bates v. United States, (C. C. Ill. 1881) 10 F. 92; United States v. Wynn, (C. C. Mo. 1882) 11 F. 57.

[7] Act of March 3, 1879, c. 176, § 3, 20 Stat. L. 354.

[8] 49 AM. L. REV. 284 (1915).

[9] Trono v. United States, 199 U. S. 521, 26 S. Ct. 121 (1905); Flemister v. United States, 207 U. S. 372, 28 S. Ct. 129 (1907); Ocampo v. United States, 234 U. S. 91, 34 S. Ct. 712 (1914), discussing influence of Spanish law.

[10] The Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 3 (c).

[11] The Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4 (3).

An early comment on this statute seemed to indicate that the Court of Criminal Appeal would be slow to exercise the power thereby given it,[12] but this has not proved to be true.[13] Typical factors which lead the English court to reduce the sentence are the relatively trivial nature of the offense or value of the property stolen,[14] fear that the trial judge was too much influenced by the prevalence of a given type of crime in a particular district,[15] the non-violent character of the crime,[16] the fact that the crime is a first offense,[17] and the age[18] or youth[19] of the defendant. The appellate court may be induced to be lenient on the ground of the defendant's general good behavior,[20] or on the ground of evidence not before the trial court.[21] The power to increase the sentence has been less liberally exercised. Although the court has stated that it will use this power to discourage frivolous appeals,[22] it seems never to have gone further than to order that the sentence imposed by the trial court be regarded as running from the date of the dismissal of the appeal, thus adding to the period of imprisonment the interval between the original sentence and the date of dismissal of the appeal.[23] This same rule permitting alteration of sentence by an appellate court is followed in other British dominions.[24]

The courts of the various states of the United States entertain a variety of views on the problem of alteration of sentence on appeal. There is some indication that some few courts have undertaken such

[12] 72 JUST. P., pt. 1, p. 567 (1908).

[13] For a collection of cases, see 29 A. L. R. 313 at 331 (1924).

[14] Rex v. Roath, 20 Cr. App. Cases 138 (1927), reduced from eighteen months to nine months; Rex v. Jones, 23 Cr. App. Cases 69 (1931), from five years to eighteen months.

[15] Rex v. Withers, 25 Cr. App. Cases 53 (1935), from four years to eighteen months.

[16] Rex v. Dealer, 21 Cr. App. Cases 165 (1929), sentence of defendant convicted of being an incorrigible rogue reduced from twelve months to three months.

[17] Rex v. Chick, 19 Cr. App. Cases 57 (1925), from nine to three months.

[18] Rex v. Watson, 20 Cr. App. Cases 119 (1927), from five years to three months.

[19] Rex v. Boreham, 20 Cr. App. Cases 182 (1928), from twenty-one months to twelve months.

[20] Rex v. Martin, 23 Cr. App. Cases 52 (1931), from three years to eighteen months.

[21] Rex v. Ward, 17 Cr. App. Cases 65 (1922), sentence of death for murder reduced to eighteen months for manslaughter. The Court of Criminal Appeal is by statute given power to hear evidence not before the trial court. The Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 9 (b).

[22] Rex v. Cotton, 15 Cr. App. Cases 142 (1921).

[23] Rex v. Pickering, 15 Cr. App. Cases 175 (1921).

[24] Bermuda Laws, The Appeals Act of 1905, § 14 (b) 1 Bermuda Laws (1923) 22; 9 Stat. New South Wales, Criminal Appeal Act of 1912, Part III, § 6 (3); 2 Victorian Stat. (1929), Crimes Act of 1928, § 594 (4); Gardiner, "The South African System of Automatic Review in Criminal Cases," 44 L. Q. Rev. 78 (1928).

alteration unaided by any local statute comparable to the English statute quoted above,[25] but apart from statutory provisions the usual position is similar to that adopted by the federal courts.[26] Often there is express reference to the power of the executive department of the state government to reduce the sentence.[27] The question of alteration of sentence by an appellate court is now controlled by statute in many states and these statutes in turn take varying shapes. A common form gives the appellate court power to reverse, affirm or modify the judgment.[28] To this is sometimes added the direction that the cause must be remanded to the trial court with proper instructions.[29] At least one statute specifically prohibits any increase of punishment by the appellate court.[30] The law sometimes in terms gives the appellate court power to render such judgment as the court below ought to have given.[31] In one state power of revision is given only in cases of conviction of a capital offense.[32] The state courts have not hesitated to revise and reduce sentences under these statutes.[33]

[25] Orfield, "The Scope of Appeal in Criminal Cases," 84 UNIV. PA. L. REV. 825 at 836 (1936); 13 VA. L. REV. 337 (1927); State v. Hayden, 45 Iowa 11 (1876); Montalto v. State, 51 Ohio App. 6, 199 N. E. 198 (1935). An interesting comparison is found in the cases of Hall v. State, 113 Ark. 454, 168 S. W. 1122 (1914), and Davis v. State, 155 Ark. 245, 244 S. W. 750 (1922), noted in 32 YALE L. J. 619 (1923). In the former case Justice Hart in the course of the opinion said [at 463], "this court is not at liberty to reduce the punishment, even though we might think it too severe." In the latter case Justice Hart again delivered the opinion of the court and said [at 251], "we are of the opinion that, taking all the circumstances together, the sentence of punishment by death is excessive, and that we have the power to reduce it to life imprisonment." Perhaps the explanation lies in the Arkansas statute noted below.

[26] Brown v. State, 149 Ga. 816, 102 S. E. 449 (1920); May v. People, 77 Colo. 432, 236 P. 1022 (1925); Messer v. Commonwealth, 145 Va. 872, 134 S. E. 565 (1926); Garner v. State, 184 Ark. 1093, 44 S. W. (2d) 1092 (1932).

[27] State v. Van Waters, 36 Wash. 358, 78 P. 897 (1904); People v. Huff, 72 Cal. 117, 13 P. 168 (1887); Colvin v. Commonwealth, 247 Ky. 480, 57 S. W. (2d) 487 (1933); State v. Schaffer, 59 Mont. 463, 197 P. 986 (1921); Haase v. State, 91 Ind. App. 516, 171 N. E. 811 (1930).

[28] Ariz. Rev. Code (1928), § 5148; Cal. Penal Code (Deering 1931), § 1260; Idaho Code Ann. (1932), § 19-2721; 5 Nev. Comp. Laws (1929), § 11101; Ore. Code Ann. (1930), § 13-1226; Tex. Stat. (1928), Code Crim. Proc., art. 847; Utah Rev. Stat. (1933), § 105-43-3.

[29] 4 Ind. Stat. Ann. (Burns 1933), § 9-2321; Kan. Rev. Stat. Ann. (1923), § 62-1716; 5 Mont. Rev. Code (1935), c. 89, § 12127; 2 N. D. Comp. Laws (1913), § 11,015; 1 Okla. Stat. (1931), § 3204.

[30] Iowa Code (1931), § 14010. No instance of increase has been found even without such specific prohibition. 25 MICH. L. REV. 671 (1927).

[31] Fla. Comp. Gen. Laws Ann. (1927), § 4637; 2 N. J. Comp. Stat. (1910), p. 1867, § 144; N. M. Stat. Ann. (1929), § 105-2520.

[32] Ark. Dig. Stat. (1921), § 3414.

[33] People v. Kelley, 208 Cal. 387, 281 P. 609 (1929); People v. McIntyre,

With these state statutes may well be compared the very explicit provisions bearing on this problem of the Code of Criminal Procedure drafted by the American Law Institute. Section 459 (1) of that document permits correction of an illegal sentence, and section 459 (2) provides:

> "(2) Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the appellate court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken."[34]

It would seem desirable that some method of review of sentence be provided in the federal appellate courts,[35] especially in the light of the practical success of the plan in jurisdictions in which it has been tried. Such review tends to obviate reversals on technicalities and to fix standards of punishment. The final word is given to a court much less apt than the trial court to be swayed by the prejudice and emotion excited by a particular case.

Emma Rae Mann

213 Cal. 50, 1 P. (2d) 443 (1931); State v. Ramirez, 34 Idaho 623, 203 P. 279 (1921); State v. Ringdahl, 191 Iowa 748, 183 N. W. 332 (1921); State v. Owen, 196 Iowa 285, 194 N. W. 187 (1923); People v. Kaplan, 217 App. Div. 252, 217 N. Y. S. 763 (1926); People v. LaFace, 148 Misc. 238, 266 N. Y. S. 458 (1933). The Nebraska court at first disclaimed the power in Barney v. State, 49 Neb. 515, 68 N. W. 636 (1896), and Fanton v. State, 50 Neb. 351, 69 N. W. 953 (1897), but later exercised it in Palmer v. State, 70 Neb. 136, 97 N. W. 235 (1903); Fox v. State, 106 Neb. 537, 184 N. W. 68 (1921); Lillard v. State, 123 Neb. 838, 244 N. W. 640 (1932). The Oklahoma Court of Criminal Appeal has reduced sentences freely. Bridges v. State, (Crim. App. Okla. 1928) 264 P. 640; Giles v. State, (Crim. App. Okla. 1933) 28 P. (2d) 600; Cummings v. State, (Crim. App. Okla. 1935) 48 P. (2d) 879; Deal v. State, (Crim. App. Okla. 1936) 60 P. (2d) 408.

[34] American Law Institute Code Criminal Procedure (Official Draft 1930), commented on in Orfield, "Appeal Under the American Law Institute Code of Criminal Procedure," 2 UNIV. CHI. L. REV. 437 at 451 (1934). Note that this section specifically prohibits increase of sentence by the appellate court.

[35] For favoring comments, see Orfield, "Appeal Under the American Law Institute Code of Criminal Procedure," 2 UNIV. CHI. L. REV. 437 (1934), suggesting that power to increase sentence should also be given and that appeal should be to a board of experts not necessarily judges; Orfield, "The Scope of Appeal in Criminal Cases," 84 UNIV. PA. L. REV. 825 (1936); 9 WIS. L. REV. 172 (1934); 42 YALE L. J. 453 (1933); Gemmill, "Criminal Procedure," 3 J. CRIM. L. 566 (1912).