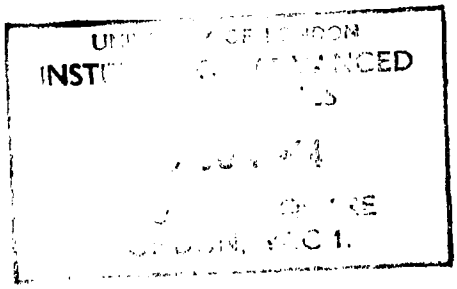
IN THE PRIVY COUNCIL No. 11 of 1962

ON APPEAL
FROM THE SUPREME COURT OF BERMUDA
(Criminal Jurisdiction)



B E T W E E N

ALMON EUGENE HARDTMANN Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment and sentence of the Supreme Court of Bermuda dated the 8th February, 1961, whereby the Appellant, on pleading guilty to 6 counts of an indictment charging breaking and entering and arson, was sentenced to terms of imprisonment totalling 17 years in all. p.31

2. The principal issues to be determined on this appeal are as follows :-

(i) Whether the Appellant was a person to whom section 6(2) of the Young Offenders Act 1950 (Statute Law of Bermuda (Revised Edition) Vol. I., p.605) applied;

(ii) If so, whether that section was complied with by the Court of trial before the Appellant was sentenced to imprisonment;

(iii) If the said section was not complied with, whether the Court had power to sentence the Appellant to imprisonment;

(iv) Whether in any event the sentence imposed upon the Appellant was so harsh and excessive as to amount to a grave and substantial miscarriage of justice.

3. The Appellant was arraigned upon an indictment pp.35-36

Record

containing 8 counts. He pleaded "Not Guilty" to counts 1 and 2, and "Guilty" to the remaining 6
p.37 counts. The Attorney-General entered a nolle prosequi in respect of counts 1 and 2.

p.37 4. The 6 counts of the indictment in respect of which the Appellant pleaded "Guilty" and was convicted, are summarized as follows :-

(1) That on the 14th December 1960, he broke and entered the Ideal Furniture Store with intent to steal therein;

(2) That at the same time and place he wilfully and unlawfully set fire to the Ideal Furniture Store;

(3) That on the 18th December 1960, he broke and entered the T.C. Electric Shop with intent to steal therein;

(4) That at the same time and place he wilfully and unlawfully set fire to furniture so situated that the building in which the T.C. Electric Shop is located was likely to catch fire;

(5) That on the 20th December 1960, being concerned with William Green Hardtmann (the Appellant's younger brother) he broke and entered Gosling Bros. Liquor Store and therein stole £57.10.0. cash, an automatic pistol, two pen-knives and a quantity of cigarettes and beer;

(6) That at the same time and place, being concerned with William Green Hardtmann, he broke and entered a bonded warehouses owned by Gosling Bros. Ltd., with intent to steal therein.

p.38 5. On the 6th February 1961, the Appellant appeared before the learned Judge to answer to the indictment, and pleaded as hereinbefore stated. The learned Judge heard no evidence as to the facts of the case, but had before him the depositions taken in the Magistrate's Court, including certain statements made by the Appellant under caution,
pp.44, 46 in which he admitted the substance of the charges.

6. A police officer was called, and his evidence, according to the Judge's note, was as follows :-

Record

"Accused has one previous conviction. Stealing cycle. Sentenced to undergo corrective training. Then a juvenile. Accused now 17 years old." p.38

The previous offence referred to by this witness was committed in November 1954 when the Appellant was 11 years old, and 6 years before the present proceedings. p.42

7. At this stage Counsel for the Appellant asked for time to get information about his client, and the Court adjourned until 8th February 1961. p.38
On the 8th February 1961, Counsel for the Appellant made a plea in mitigation, which was, according to the learned Judge's note, in the following terms: pp.38-39

"Mr. C. Williams:- Hardtmann has made a girl pregnant and wants to marry her. Earning £13.10.0. a week. Wanted more money and broke in to get more money. As to setting fire: he said he did not know why he had set fire to Ideal Furniture; he set fire to T.C. Electric because he did not find any money there.

He escaped from custody because he heard that his mother was in hospital with a fractured skull from a cycle accident. He concluded that she had had a blackout from worrying about him. He escaped so that he could see and help his mother.

He cannot read or write very well. He is the oldest of seven. Each has a different father. He lives at Smith's Hill. He contributes to family support. His mother is not living with her husband. The accused was working on the Board of Trade tug. I heard that he was a good workman there and gave no trouble.

Young Offenders Act. See 6(2). (Vol. I page 607).

Submits that imprisonment is not the answer. Emphasis should be on his reform."

8. The Court then imposed the following sentences:- p.39

Count 3 3 years imprisonment } concurrently
Count 4 7 years imprisonment }

Record

Count 5	3 years imprisonment)	concurrently, but consecutive with previous counts
Count 6	7 years imprisonment)	
Count 7	3 years imprisonment)	concurrently, but consecutive with previous counts
Count 8	3 years imprisonment)	

so that the Appellant was sentenced to serve a total term of imprisonment of 17 years, which the Court ordered to be served in prison.

9. It has been established since the Appellant was sentenced, that he was born on the 30th January 1943. Therefore, although he was 17 years old when the offences were committed, contrary to the evidence of the police officer, he attained the age of 18 about one week before the date of his conviction and sentence. This fact was not then known to the Appellant's Counsel, who accepted for the purpose of pleading in mitigation, that his client was still 17 years old.

10. The Young Offenders Act 1950 (Statute Law of Bermuda, Revised Edition, Vol. I, p.605) contains the following relevant provisions :-

Section 2(1)(a) The expression "child" means a person under the age of 16 years;

Section 2(1)(i) The expression "young person" means a person who has attained the age of 16 years but is under the age of 21 years;

Section 6(2) No Court shall impose imprisonment upon a person who (though not a child) is under the age of 18 years unless the Court is of the opinion that no other way of dealing with him is appropriate; and for the purpose of determining whether any other way of dealing with any such person is appropriate the Court shall obtain information relevant to the circumstances of the offence of which he has been convicted and such information as can with reasonable expedition be made available to the Court relevant to his character, environment and antecedents and to his mental and physical condition, and the Court shall take into account any information so obtained and any other information before the Court which is relevant to the matters aforesaid.

Record

Section 81(1) Where in any proceedings taken before a Court under this Act the age of a person is material, the Court shall make due enquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming, and the age presumed or declared by the Court as the result of such inquiry to be the age of that person shall for the purposes of the proceedings be deemed to be his age, and -

(a) the Court shall not be deprived of any jurisdiction to complete the proceedings by any subsequent proof during the course of the proceedings that the age so presumed or declared was not the true age of that person; and

(b) any conviction, sentence, order or other decision of the Court in connection with the proceedings shall not be invalidated by any subsequent proof that the age so presumed or declared was not the true age of that person.

11. The Appellant makes the following submissions:-

(1) The only evidence before the Court as to the Appellant's age was that he was 17 years old. In the absence of any express declaration or presumption by the Court, the Court must be taken to have presumed the Appellant's age as 17 years old, and by reason of section 81(1) of the Young Offenders Act, set out above, he was deemed to be that age for the purposes of the proceedings;

(2) The Court was therefore bound, by reason of section 6(2) of the said Act, to satisfy itself that no other way of dealing with the Appellant was appropriate, as a condition precedent to the imposition of a sentence of imprisonment upon him, and the Court did not so satisfy itself. Accordingly there was no power in the Court to impose a sentence of imprisonment;

(3) The said section 6(2) imposes upon the Court, for the purpose of reaching its opinion whether or not there is any alternative way of dealing with the convicted person other than imprisonment, a positive duty to obtain information about the offence and about him. The Court did not obtain information in accordance with the requirements of the section. The Court was therefore deprived of the materials upon which to base its opinion that there was no appropriate

Record

way to deal with the Appellant other than imprisonment, and accordingly had no power to impose a sentence of imprisonment.

(4) In all the circumstances of the case, the sentence passed was so harsh and excessive as to amount to a grave and substantial miscarriage of justice.

p.40 12. Special leave to appeal to Her Majesty in Council was granted on the 25th January, 1962.

13. The Appellant respectfully submits that this appeal should be allowed with costs and his sentence quashed or varied, or that such other order may be made as may be just for the following, among other,

R E A S O N S

(1) BECAUSE upon a proper construction of section 81(1) of the Young Offenders Act 1950, the Appellant ought to have been dealt with in accordance with the provisions of Section 6(2) of the said Act;

(2) BECAUSE compliance with the requirements of the said Section 6(2) is a condition precedent to the imposition of a sentence of imprisonment;

(3) BECAUSE the requirements of the said Section 6(2) were not complied with;

(4) BECAUSE there was no power to impose a sentence of imprisonment upon the Appellant;

(5) BECAUSE the learned trial Judge failed to consider whether any way of dealing with the Appellant other than imprisonment was appropriate;

(6) BECAUSE the learned trial Judge erred in principle in imposing the sentence which he did;

(7) BECAUSE the sentence imposed was so harsh and oppressive and inappropriate as to amount to a grave and substantial miscarriage of justice.

BERNARD MARDER.

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