Privy Council Appeal No. 11 *of* 1962

Almon Eugene Hardtmann – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST APRIL, 1963

Present at the Hearing:

LORD EVERSHED.
LORD MORRIS OF BORTH-Y-GEST.
LORD HODSON.

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

On the 6th February, 1961, the appellant pleaded guilty in the Supreme Court of Bermuda to six counts of an indictment. They related to offences which were all committed in the City of Hamilton in the month of December, 1960. The first of these offences, which was committed on or about the 14th December, was that of breaking and entering a Furniture Store with the intention of stealing. The second was the offence of arson. The appellant set fire to part of the Furniture Store. Apart from the damage to the building itself the damage to furniture in the Store was to the extent in value of £47,500. In an oral statement made after his arrest some days later the appellant said, " When I didn't find any money I set fire at the back of the part that burnt down ". The third offence, committed on or about the 18th December, was that of breaking and entering a shop (where electrical goods were displayed and sold) with the intention of stealing. In the course of a later oral statement the appellant said that having entered the premises he searched for money but failed to find any. He said: " I then decided as I got nothing to set it on fire since I got nothing I decided to give him something ". As a result of his setting fire to furniture in the premises which was so situated that the building was likely to catch fire (which constituted the fourth offence) damage (to the building and its contents) was caused to the extent of about £3,000. The fifth and sixth offences were committed on or about the 20th December. The appellant broke into a store. He stole the sum of £57 10*s.* and also a 9mm. automatic pistol and other property consisting of two pen-knives and some cigarettes and beer. He also broke into a bonded warehouse with the intention of stealing. When committing those offences on the 20th December he was accompanied by his younger brother. The younger brother, who doubtless played a minor part in the affair, appeared before the Juvenile Court on the 28th December, 1960, and, being convicted, was sentenced to undergo Corrective Training at the Junior Training School.

In respect of the charges against him the appellant appeared in the Magistrate's Court and the depositions of witnesses were taken. On varying dates (4th January, 1961, 10th January, 1961, and 13th January, 1961) he was remanded in custody in the Senior Training School to stand his trial at the Assizes. He appeared at the Assizes on the 6th February, 1961, before the then-acting Chief Justice and he pleaded guilty to the six offences. A police sergeant then gave evidence in regard to the accused. To the extent recorded by the learned Judge in his notes the evidence showed that

the appellant had had one previous conviction. That was for stealing a bicycle. At the time of that offence the appellant was a juvenile and he was sentenced to undergo corrective training. The further evidence of the police sergeant was that the appellant was then (i.e., on the 6th February, 1961) seventeen years old.

It was material to ascertain the age of the appellant in view of the provisions of section 6 (2) of the Young Offenders Act, 1950. That sub-section provides as follows:—

> " 6. (2) No court shall impose imprisonment on a person who (though not a child) is under the age of eighteen 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."

It was further material in view of the provisions of section 43 (1) of the same Act. They are as follows:—

> " 43. (1) Where a young person is convicted before the Supreme Court of an offence punishable with imprisonment, the Supreme Court may sentence him to undergo corrective training."

A male young person sentenced to undergo corrective training is detained in the Senior Training School (*see* sections 45, 56) which is maintained under section 52. The maximum period of corrective training for a young person is three years (*see* section 64). A " young person " is one who has attained the age of sixteen but is under the age of twenty-one (*see* section 2(1)(i)). A " child " is one who is under sixteen (*see* section 2(1)(*a*)). Any question in relation to the age of a person charged is determined as provided in section 81 of the Act the terms of which are as follows:—

> " 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 enquiry to be the age of that person shall for the purposes of the proceedings be deemed to be his true age and—
>
> (*a*) the court shall not be deprived of 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.
>
> (2) Where a person who appears or is brought before a court under the provisions of this Act is a child when he first so appears or is brought before the court but during the course of the proceedings attains the age of sixteen years, then the proceedings may nevertheless be completed as if that person were still a child.
>
> (3) For the purpose of the last foregoing sub-section any proceedings in which a person is committed by a Children's Court to the Supreme Court for sentence shall, together with the subsequent proceedings before the Supreme Court, be deemed to be continuous proceedings before one court."

The position at the trial on the 6th February, 1961, was therefore that there was sworn police testimony that the appellant was then seventeen years of age. It is apparently now accepted that the police evidence was erroneous in that the appellant had in fact had his eighteenth birthday just a few days before

the 6th February, 1961—though it is accepted that he was seventeen when he committed the offences. It seems reasonably clear however that the Court proceeded upon an acceptance of the evidence as to age that was given and so " presumed " that the appellant was seventeen years of age. It followed that for the purposes of the proceedings that was " deemed to be his true age ". The provisions of section 6 (2) were therefore applicable. From the note of the learned Judge it would appear that there was no further information before the Court concerning the appellant other than what had been given by the police sergeant and what appeared from the depositions. The note shows that the appellant was then called upon. He did not wish to say anything. It would seem as though the Judge was about to pass sentence. If this is a correct deduction then no adequate regard was being paid to the provisions of section 6 (2). However, at that stage, learned Counsel for the appellant made an application for an adjournment in order to have time to " get information about the accused ". The application was acceded to: the case was adjourned to the 8th February for sentence.

On the 8th February, learned Counsel for the appellant addressed the Court and presented much information in regard to the appellant. The learned Judge's note (which may not set out all that was said) recorded the following:—

> " Hardtmann has made a girl pregnant and wants to marry her. Earning £13 10*s*. 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."

The learned Judge then passed sentences. They were as follows:— For the first offence 3 years imprisonment and for the second 7 years imprisonment, those two to run concurrently: for the third offence 3 years imprisonment and for the fourth 7 years imprisonment, those two to run concurrently but to be consecutive to the previously mentioned period: for the fifth offence 3 years imprisonment and for the sixth 3 years imprisonment, those two to run concurrently but to be consecutive to the previously mentioned periods. The total period of imprisonment which was imposed was therefore one of seventeen years. Their Lordships must state that they have had feelings of surprise and great concern that such a long period of detention was considered to be necessary or appropriate.

At the time when sentence was passed it was the rule that a young person who was sentenced to imprisonment served his sentence in the Senior Training School unless the Court directed otherwise. That was the result of the additions to section 56 of the Young Offenders Act, 1950 which were introduced by the Young Offenders (Prison Sentences) Act, 1960. In fact the learned Judge directed that the appellant was to serve his sentence in prison. He also made a restitution order in regard to certain property recovered.

Their Lordships were informed that at the end of 1961 a new prison was brought into use in which there is a separate part available for the detention of young persons. It was as a consequence of this that the additions to section 56 of the Act of 1950 introduced by the Act of 1960 were repealed by the Young Offenders (Prison Sentences) Act 1962.

There being no procedure available to the appellant for appealing in Bermuda he sought and obtained special leave to appeal to Her Majesty in Council against the order of the Supreme Court of Bermuda.

On behalf of the appellant two main submissions were made to their Lordships. In the first place it was said that the provisions of section 6 (2) of the Act of 1950 were applicable and that there was a failure to comply with them with the result that there was no power to impose a sentence of imprisonment upon the appellant: it was said that the learned Judge failed to seek such information as might have been made available with reasonable expedition as to the character and (more particularly having regard to the fires which he started) as to the mental condition of the appellant; or to consider whether any other way of dealing with the appellant than by imprisonment was appropriate. In the second place it was said that the learned Judge erred in principle in imposing the sentences which he did impose and it was said that the total of the sentence was excessive and was so harsh and oppressive and inappropriate as to amount to a grave and substantial miscarriage of justice.

On behalf of the respondent it was submitted that the Court had power and jurisdiction to pass a sentence of imprisonment upon the appellant and that so far as the appeal was based upon a challenge to that power and jurisdiction it should be dismissed. The respondent did not seek to challenge the submission that the total of the sentences which were passed was excessive.

Had sentence been passed on the 6th February, it would indeed have been difficult for the respondent to resist the contention that the Court, who were presuming the appellant to be under eighteen, had not then got adequate information before them and that the Court was failing to fulfil the requirements of section 6 (2). Their Lordships must stress the importance of a faithful observance of the provisions of that sub-section. The Court in acceding on the 6th February, to the application for an adjournment did not, as it well might have done, direct that information concerning the appellant should be obtained at the instance of the Court itself. The position on the 8th February, was however different from what it had been on the 6th February. At the conclusion of the address of learned Counsel for the appellant the Court had undoubtedly got appreciable information in regard to the appellant. The prosecution did not seek to challenge anything that was said and the facts which were stated can be assumed to have been correct. In the result the learned Judge had before him not only reasonably full information relevant to circumstances of the offences but he had also information in regard to the appellant obtained from the appellant's own Counsel, a source not unfavourable to him, after an adjournment obtained for the purpose. It was for the learned Judge to decide whether he could appropriately deal with the appellant other than by imposing imprisonment. Although there might well have been further sources of information upon which the learned Judge could without difficulty have drawn, had he felt that before coming to a conclusion he needed more information, it was no doubt within the learned Judge's discretion to decide as to the methods by which and the sources from which the information denoted by the sub-section should be obtained.

The offences committed by the appellant were undoubtedly serious. The fact that premises were set on fire and the alarming irresponsibility of the appellant's statements as to what prompted him to such wanton and dangerous conduct would naturally suggest the enquiry as to whether there was any form of mental aberration. The statements concerning the appellant and concerning his work and his conduct at work did not however suggest any mental defectiveness. Nor did either the prosecution or the defence submit that any further enquiry as to the appellant's mental condition was called for. Although therefore their Lordships have felt some anxiety whether the learned Judge applied himself to obtaining all the information which section 6 (2) indicates, they feel that they are unable to say that before the conclusion of the hearing on the 8th February, the learned Judge, before deciding to pass a sentence of imprisonment, had not obtained all the information that he considered that he needed in order to comply with section 6 (2). The learned Judge's note shows that the section was specifically mentioned by Counsel and that the submission was made that imprisonment was " not the answer " and that the " emphasis should be on his reform ". In these circumstances their Lordships have felt unable to accept the contention

that on the 8th February, the learned Judge failed to consider section 6 (2) and failed to consider whether any way of dealing with the appellant other than by passing a sentence of imprisonment was appropriate. It is also to be remembered that the learned Judge made the specific direction that the sentence of imprisonment was to be served in prison. Furthermore having regard to the gravity of the offences no one could assert that the view which the learned Judge in his discretion must undoubtedly have formed that a longer period of detention was necessary than would have been involved in a sentence of corrective training was not a view that he could properly hold. For these reasons their Lordships do not accept the submission that the learned Judge was wrong in imposing a sentence of imprisonment.

Their Lordships pass therefore to the second submission made on behalf of the appellant. While there is power in all cases both criminal and civil humbly to tender such advice to Her Majesty as will ensure the due administration of justice it has long been recognised that in criminal cases the circumstances in which advice to interfere will be tendered are limited. (See *The Queen v. Joykissen Mookerjee* 1 Moore's P.C. Cases (N.S.) 272, *The Falkland Islands Company v. The Queen* 1 Moore's P.C. Cases (N.S.) 299, *Reg. v. Bertrand* L.R. Vol. 1 P.C.520, *In re Dillet* L.R. 12 A.C. 459, *Arnold v. The King-Emperor* L.R. [1914] A.C. 644.) It has frequently been pointed out that their Lordships are not a Court of Criminal Appeal. In 1941 Viscount Simon L.C. directed attention (*see Muhammad Nawaz v. The King-Emperor* L.R. 68 I.A. 126 at p. 127) to the limits of the jurisdiction exercised in criminal appeals by the Judicial Committee. In the course of his observations he said:—" The Judicial Committee is not a revising court of criminal appeal: that is to say, it is not prepared, or required, to re-try a criminal case, and does not concern itself with the weight of evidence, or the conflict of evidence or with inferences drawn from evidence, or with questions as to corroboration or contradiction of testimony, or whether there was sufficient evidence to satisfy the burden of proof. Neither is it concerned to review the exercise by the previous tribunal of its discretion as to permitting cross-examination of a witness as hostile or in awarding particular punishments." He also observed that broadly speaking the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice.

Questions as to what sentences are appropriate in particular cases (provided always that the sentences are within the limits laid down by law) are essentially questions of judgment and discretion. It is relevant to understand local conditions and by a knowledge of a country or community to have a perspective by which to assess what sentences are necessary, reasonable, and just. In the present case there were maximum sentences laid down by law. (*See* sections 354(*a*), 419(1)(*a*), 419(1)(*c*), and 353(*a*) of the Criminal Code.) The sentences which were imposed were within the limits so laid down. There was no disregard of the forms of legal process. The sentences were such as could lawfully be imposed. The sole question which here arises is whether having regard to the youth of the appellant and to all other relevant considerations they were unnecessarily harsh and severe and so were excessive.

It must be recognised that the acts of setting fire to premises in Hamilton were acts that might have caused loss of life as well as great material damage. The learned Judge doubtless thought that it was necessary to prevent the appellant from repeating conduct fraught with such danger for the community.

Serious indeed though the offences were their Lordships have nevertheless been caused much uneasiness and concern by the length in total of the sentences which were imposed and feel compelled to express the view that the sentences were excessive. Having regard however to the principles which have been laid down as those which guide the Board in criminal cases their Lordships do not feel able to tender other humble advice than that the appeal should be dismissed. They are confident however that at some time in the future the Governor will wish to receive reports in regard to the appellant and will wish to consider whether he should exercise some of the powers which are delegated to him. Their Lordships have felt it right to make these observations so that the case may in the future receive such consideration.

(87375) Wt. 8004/82 90 4/63 Hw.

In the Privy Council

ALMON EUGENE HARDTMANN

v.

THE QUEEN

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1963