1955 *Present :* **Basnayake, A.C.J., and Weerasooriya, J.**

THE ATTORNEY-GENERAL, Applicant, *and* H. N. DE SILVA, Respondent

S. C. 457—Application in Revision in D. C., Kandy, No. 602/7467

Sentence—Assessment of it—Governing considerations—Conditional release of offenders—Applicability to grave offences—Criminal Procedure Code, s. 325 (2).

In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender.

The accused-respondent, a clerk in the Food Control Department, pleaded guilty to charges of forging certain documents. He had forged the documents in order to enable two non-citizens to obtain residence permits. Having regard to the age, antecedents, and previous good character of the accused, the trial Judge, purporting to act under section 325 of the Criminal Procedure Code, ordered the accused to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years.

Held, that the offence was far too grave to be dealt with under section 325 of the Criminal Procedure Code.

Per BASNAYAKE, A.C.J.—" A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail. "

APPLICATION to revise an order of the District Court, Kandy.

J. G. T. Weeraratne, Crown Counsel, for Attorney-General.

G. G. Ponnambalam, Q.C., with *Cecil Goonewardene*, for Accused-Respondent.

Cur. adv. vult.

November 8, 1955. BASNAYAKE, A.C.J.—

This is an application by the Attorney-General for the revision of the order made by the learned District Judge in respect of the first accused, a clerk in the Food Control Branch of the Kandy Kachcheri (hereinafter referred to as the respondent). He pleaded guilty to two out of three charges of forgery made against him along with another (hereinafter referred to as the second accused) who was indicted with abetting the respondent.

The learned District Judge, instead of inflicting any punishment on the respondent, ordered him to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years purporting to act under section 325 (2) of the Criminal Procedure Code. The second accused was acquitted as there was no evidence against him.

It is submitted by learned Crown Counsel on behalf of the Attorney-General that the learned District Judge should have punished the offender, and that, in the circumstances of this case, the course adopted by him was wrong.

The evidence established the charges of forgery of surrender certificates in respect of a barber of Indian nationality holding an Indian passport named V. Manickavasagam and an Indian Muslim named Mohamed Ibrahim Saibo. Of the persons who received forged certificates of surrender, only V. Manickavasagam gave evidence at the trial. He made an application on 16th February, 1953, for the extension of his Temporary Residence Permit which was due to expire on 19th February, 1953, and was asked to furnish further proof of his having been in Ceylon in the years 1944 and 1945. In order to furnish the further proof he was required to provide, he applied to the Deputy Food Controller, Kandy, for a certificate of the fact that he had surrendered his rice ration books in those years. He was requested to call over at the Office of the Deputy Food Controller, and the respondent handed him two certificates, one for 1944 and another for 1945. These certificates were forwarded by Manickavasagam to the Assistant Controller of Immigration and Emigration. One of those certificates referred to in the proceedings as P5 was sent by the Assistant Controller of Immigration and Emigration to the Deputy Food Controller for verification. The Deputy Food Controller, Kandy, replied that P5 was a forgery. After this and other forgeries had been detected, the respondent went to the residence of Mr. Kodikara, Assistant Food Controller, and confessed his crime and asked for his intercession. He also requested that the matter be hushed up, and even suggested that Mr. Kodikara should destroy the Register by reference to which the forgery had been detected. He was naturally turned out of the house by Mr. Kodikara who resented the suggestion. The next day he formally called upon the respondent to explain the irregularity, and he admitted that he had no explanation to give and that he had issued extracts which were not genuine. He said :

" I confess that I have issued an extract for 1944 for which there is no entry in the Register ".

The evidence of the Assistant Controller of Immigration and Emigration and of the Examiner of Questioned Documents, reveals that other forged documents were received from the source from which P5 came including the document referred to in the third charge. The evidence disclosed a very serious offence. The respondent had forged very important documents in order to enable non-citizens of this country to obtain residence permits. What is more, when the crime was detected he had the audacity to suggest to his superior officer that he should destroy all evidence of his crime and save him.

I cannot escape the conclusion that the respondent has been too leniently treated by the learned trial Judge. The offence is far too grave to be dealt with under section 325 (2) of the Criminal Procedure Code. That section was never intended to be applied to grave offences involving deliberation [1]. When in 1919 the Legislature introduced these provisions based on the Probation of Offenders Act, 1907, it was intended that they should be applied to the class of offence to which the corresponding provisions of the English Act were applied. Such lenient treatment of an offender for so serious a crime is bound to defeat the main object of punishment, which is the prevention of crime. Other persons, similarly placed, will not be deterred from acting in the same way. The learned District Judge has indicated the considerations that influenced him. Here are his very words :

> " As regards the 1st accused he is about 22 years old and has lost his job as a temporary clerk, and although he has passed the General Clerical Examination he will not be taken in. Seeing that he is a young man, I do not wish to send him to jail. "

It is clear that the learned District Judge has only looked at one side of the picture, the side of the respondent : his age, his youth, his previous good character, that he has lost his employment, and will not be taken into the Clerical Service even though he has passed the qualifying examination. These are certainly matters to be taken into account ; but not to the exclusion of others which are of greater importance. He has failed to take into consideration the gravity of the offence and the circumstances in which it was committed, the degree of deliberation involved in it, the trusted position which the respondent held, the punishment provided by the Code for the offence, the difficulty of detection of this kind of offence, and the reprehensible conduct of the respondent after the offence was detected showing his criminal mind. These are all matters which far outweigh the considerations on the offender's side.

This Court has power in the exercise of its revisionary jurisdiction to increase or reduce a sentence, and it is not contrary to the rules which apply to appellate tribunals that it should exercise its independent judgment in a matter which is brought up before it in review and increase a sentence if it thinks it should be increased. Learned Counsel for the respondent urged that the quantum of sentence is a matter for the discretion of the trial Judge and that the Court of Appeal ought not to interfere, unless it appears that the trial Judge proceeded upon a wrong principle. He cited a number of cases which state the principles which should guide an appellate tribunal in altering a sentence passed by a Court of subordinate jurisdiction. Those cases quite properly lay down the rule that an appellate Court will interfere only when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly.

It may not always appear as in this case how the Court below has reached its decision, but, if upon the facts the appellate Court may reasonably infer that in some way there has been a failure properly

[1] *Gardner v. James (1948) 2 All E. R. 1069 ; Pickett v. Fesq. (1949) 2 All E.R.705.*

to exercise the discretion which the law reposes in the Court of first instance, the exercise of the discretion may be reviewed.

The rules that should be observed by an appellate tribunal in interfering with the discretion of the Judge below are the same whether it be in a question of sentence or in any other matter. They have been stated over and over again and it is unnecessary to repeat them here. On the material before me I am satisfied in this case that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to the relevant considerations enumerated above. The order made by the learned trial Judge in respect of the respondent is therefore one that falls properly to be revised.

The all too frequent use of section 325 of the Criminal Procedure Code in cases to which it should not be applied requires that the considerations that Judges of first instance should take into account in the imposition of punishments on offenders should be laid down by this Court. Primarily the punishment for crime is for the good of the State and the safety of society [1]. It is also intended to be a deterrent to others from committing similar crimes [2]. There must always be a right proportion between the punishment imposed and the gravity of the offence.

In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty [3] and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.

A Government servant would invariably be a person of good character for he would not be in the service if he were not so. The fact that a Government or other servant would lose his employment by the conviction is not a sound reason for not imposing a term of imprisonment where his offence merits it. It is of vital importance that the confidence of the public in the services managed by the State should be preserved.

[1] *Rex v. Nash (1950) 1 D. L. R. 543; Kenneth John Ball (1951) 35 Cr. A. R. 164.*
[2] *Rex v. Dash (1948) 91 Can. C. C. 187 at 191.*
[3] *Rex v. Boyd (1908) 1 Cr. App. Rep. 64.*

In the same way in the case of a professional man the fact that the conviction would deprive him of membership of the professional body to which he belongs affords no valid ground for not sentencing him to imprisonment for a grave crime involving his honesty or integrity.

It should be remembered that the public are entitled to place their trust in professional men by virtue of the fact that they belong to honourable professions which enjoy public confidence. It would be extremely detrimental to the public interest that the betrayal of that trust should not be met with such punishment as will safeguard the interests of the public and the honour of the profession to which the offender belongs. The reformation of the offender in so far as it appears as a matter of practical consideration and such extenuating circumstances as appear from the evidence, though proper considerations in the assessment of punishment, are not overriding considerations.

It is not out of place to state here that in England, the provisions of the Probation of Offenders Act (1907)—(since repealed and replaced by the Criminal Justice Act 1948)—from which section 325 of the Criminal Procedure Code is derived, were rarely applied to cases of offenders in positions of trust who betray their trust.

Offences committed in the course of their duties by post office officials [1], by those who defraud the Post Office Savings Bank [2], by police officers [3], bank clerks [4], solicitors [5], and other persons, whether professional men or not, in positions of trust are invariably, on grounds of public policy, dealt with severely. Age, previous good character and antecedents are of little avail in such cases.

Another matter that should be borne in mind by Judges of first instance is that a heavy fine is not a substitute for a term of imprisonment when the appropriate punishment for the offence is imprisonment. Heavy fines are generally meant for such offences as profiteering, etc. where such fines are specially prescribed partly for the purpose of depriving the offender of his ill-gotton gains.

Applying to this case the considerations governing punishment above enumerated, the respondent should, in my opinion, despite his age, antecedents, and previous good character, be sentenced to a term of one year's rigorous imprisonment on each count of the indictment, the sentences to run concurrently. I accordingly set aside the order of the learned District Judge under section 325 (2) of the Criminal Procedure Code and sentence the respondent to undergo a term of one year's rigorous imprisonment in respect of each charge to which he has pleaded guilty, the sentences to run concurrently.

WEERASOORIYA, J.—I agree.

Sentence enhanced.

[1] *Henry Charles Victor Turner (1947) 32 Cr. App. Rep. 45.*
[2] *Thomas Elliott 32 Cr. App. R. 36 (1947).*
[3] *Ernest Moore (1910) 4 Cr. App. Rep. 135.*
[4] [5] *R. C. Mason & J. J. A. Soper (1908) 1 Cr. App. Rep. 73 at 77.*