1964 *Present :* **Sri Skanda Rajah, J.**

M. GOMES (S. I. Police, Crimes) *v.* W. V. D. LEELARATNA

S. C. Apn./Gen./5/64—Revision in J. M. C. Colombo, 27,178 and 27,374

Sentence—Grave offence—Conditional release of offender—Inadequacy—Factors for consideration in assessment of sentence—Penal Code, ss, 367, 394—Criminal Procedure Code, s. 325.

In a prosecution for theft of a motor car, speedy disposal of the case followed, if the accused is convicted, by adequate punishment is necessary, especially at the present time.

The provisions of section 325 of the Criminal Procedure Code are not applicable to grave offences.

Observations on factors that should be taken into consideration in regard to the sentence that should be passed on an offender.

REVISION of proceedings in two cases in the Joint Magistrate's Court, Colombo.

D. R. Wijeygoonewardene, for accused.

D. S. Wijeyesinghe, Crown Counsel, as *amicus curiae*.

(Accused present on notice.)

February 28, 1964. SRI SKANDA RAJAH, J.—

I consider these two cases together because the Joint Magistrate, Colombo, himself dealt with these cases together on the same date viz., August 6, 1963, and thereafter.

In order to effectively deal with them I should set out certain details in chronological order. In case No. 22178 a car worth over Rs. 10,000 was stolen from the Fort on 11.2.1963 and the accused was detected in possession of this car on 31.3.1963. This car originally had the number plates 2 Sri 6014, but at the time of detection it had the number plates 3 Sri 8694. The detection took place as a result of information received. The police ambushed at Norton Bridge at 3.25 p.m. and at the time of detection two number plates bearing No. EN 9804 were found in the luggage boot of the car. The accused was driving the car. The accused was produced in Court on 3.4.1963 and he was bailed out in a sum of Rs. 3,000 (certified bail) on 16.4.1963.

Car No. 1 Sri 8439, which is the subject-matter of case No. 27,374, was stolen from the Fort on 22.4.1963, i.e., six days after the accused was bailed out. That car was worth also about Rs. 10,000. On information, the Fort police ambushed at Borella on 24.5.1963 at 5.30 p.m. and, while the accused was driving this car out of a garage, viz., the Baseline Motors, he was caught. The car still bore the same number plates. A diary was found in that car and the dates on which the accused had stolen cars had been noted in it. This diary was a production in the Magistrate's Court, and the Magistrate, without even investigating as to what the contents of this diary were, accepted a plea of guilt from the accused in both cases and he proceeded to deal with that plea as a plea for the retention of stolen property, though in each case the accused was charged with committing theft or in the alternative with retention of stolen property.

Though this Court called for these records on certain information that I had received the Magistrate did not send this diary and then the diary was called for because I thought that there must be some information in this diary. This has been justified by the information given in this Court by the Inspector of Police and the entries in it.

In the first of these cases the revenue licence, which was issued in the name of Messrs Aitken Spence, to whom this car belonged and which was used by Ronald Law, an executive working in that firm, was also found to be tampered with.

In the second of these cases the accused was bailed out in a sum of Rs. 500 with his wife as surety, though he was out on bail in a sum of Rs. 3,000 in the earlier case. This, to my mind, is either an invitation or an encouragement to the accused to commit further offences of this type. The Magistrate would have realised, if he had referred to the Schedule to the Criminal Procedure Code, that charges under Sections 367 and 394 are non-bailable offences. I am not unmindful of the fact that even in non-bailable offences accused are bailed out, but that is done in the discretion of the Magistrate. In bailing out this accused in the second case the Magistrate did not exercise his discretion at all.

In the first of these cases, evidence was led on 27.5.1963, the Magistrate assumed jurisdiction under Section 152 (3), the accused pleaded not guilty and the case was fixed for trial. In the second of these cases, evidence was led on 25.6.1963, the Magistrate assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code, the accused pleaded not guilty and that case was also fixed for trial. Both cases were before the Magistrate on 6.8.1963. In both these cases the accused pleaded guilty. The Magistrate purported to consider these pleas of guilt in the two cases as pleas of guilt for retaining stolen property, knowing or having reason to believe that these cars were stolen property.

It might also be mentioned that the punishment for offences punishable under Sections 367 and 394 of the Penal Code is three years. The Legislature in its wisdom had not made any distinction between these offences. Had the Magistrate only taken the trouble to find out what was in this diary he would not have treated the pleas as pleas in respect of retaining stolen property, because there was ample evidence in the hand-writing of the accused himself giving the dates of his stealing cars.

In each of these cases the Magistrate made order : " Identification and sentence on 9.8.63."

Then on 9.8.1963, he called for a report from the Probation Officer, and the Probation Officer's report is of considerable interest. But, the Magistrate does not appear to have considered the report at all. The Probation Officer reported that the accused was not a fit case for being placed on probation. He reported : " *The wife seems to be living in fear of the offender* ". He further reported : " The investigations revealed that it was about one year back that he began to drive taxis and it was while working in this capacity that he got involved in this present offence. Apart from being dishonest in his dealings towards the latter part of his life he had been *keeping company with undesirable friends who are said to be engaged in stealing cars.* The investigations also revealed that he is very untruthful in providing information regarding his past, and this is an unsatisfactory basis where probation

supervision is concerned. In fact, it was discovered during the latter part of the investigations that there is a pending case against the offender. This, however, was discovered from sources other than the offender. In view of the offender's uncooperative attitude and since there is a pending case against him, namely, case No. 12,283/M. C. Kandy, where he had been charged of dishonestly using a forged cheque and which case has been sent up for trial to the District Court, it is not possible to recommend probation in this case. Probation is therefore not recommended in this case."

Though this report was staring the Magistrate in the face he proceeded to deal with this accused under Section 325 of the Criminal Procedure Code. He accepted his wife, "*who is living in fear of this accused*", as surety in a sum of Rs. 500 and bound him over to be of good behaviour for a period of three years, and in the first case he ordered him to pay Rs. 250 as Crown costs by monthly instalments of Rs. 20 and in the second case a sum of Rs. 100 as Crown costs to be paid by monthly instalments of Rs. 5.

Mr. Wijeygoonewardena who appeared for the accused and pleaded for clemency cited the case of *Fernando, Detective Inspector v. Alwis and another* [1], and drew attention to a passage at p. 112 to the effect that a revisional Court will interfere only when the sentence passed was manifestly inadequate and not merely on the basis that it would have passed a heavier sentence.

I am in respectful agreement with that observation: but, are these sentences manifestly adequate ? I would hold that these sentences are manifestly and scandalously inadequate.

It has been repeatedly pointed out that Section 325 of the Criminal Procedure Code would not be applicable to grave offences. It is perhaps useful to set out the terms of that Section.

> 325 (1): "Where any person is charged before a Magistrate's Court with an offence punishable by such Court, and the Court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to discharge the offender conditionally as hereinafter provided the Court may without proceeding to conviction. . . . "

In dealing, at least with the second case, the antecedents of the accused should have influenced the Magistrate. Besides, these were not trivial offences, as I have already pointed out, and there was evidence which was properly admissible before the Magistrate, but he did not proceed to receive, that it was this accused who had stolen these cars. The report made by the Probation Officer would have shown the Magistrate

[1] *(1939) 4 Ceylon Law Journal, p. 111.*

that these were not proper cases to be dealt with under Section 325. Therefore, I would proceed to conviction in each of these two cases under Section 367 of the Penal Code.

I would also indicate what factors should be taken into consideration by Judges on the matter of sentence. I proceed to quote from the case of *The Attorney-General v. H. N. de Silva*[1]. At page 124 Basnayake, A.C.J., (as he then was) says this : " In assessing the punishment that should be passed on an offender the 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 in determining the proper sentence should 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.

(2) He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective . . .

(3) The incidence of crimes of the nature of which the offender has been found to be guilty.

(4) 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." (The numbering is mine).

To these I would respectfully add :

(5) Nature of the loss to the victim.

In this case the loss to him was irreparable, especially in view of the prohibition on the importation of cars into this country. The victim would have been put to a great deal of inconvenience if he had to use the public modes of transport.

(6) Profit that may accrue to the culprit in the event of non-detection.

In view of the shortage of cars in this country and the prohibitive prices of second-hand cars and also the demand for spare-parts, the profits to the culprit would be immense.

(7) Also the use to which a stolen article could be put.

Stolen cars, it is well-known, are used for committing other offences, like burglary, abduction, and so on.

These are all matters that the Magistrate should have taken into consideration. He has failed to discharge his duty properly in dealing with these two cases. Therefore, in each one of these cases I would sentence the accused under Section 367 to a term of two years' rigorous imprisonment. The sentence in the later case will begin to run at the expiration of that in the earlier one. The amounts paid as Crown costs to be returned to the accused.

[1] *(1955) 57 N. L. R. 121.*

Before I part with these cases I must also indicate the circumstances under which I came to send for these cases and to act by way of revision.

These cases were brought to my notice by a pseudonymous petition, copies of which had been forwarded to the Chief Justice and the Judicial Service Commission. Such petitions normally find their way into my waste-paper basket, of course, after I have read them. But when I read this petition I felt that there must be some substance in the allegations and that they should be verified.

Having been a Judicial Officer for a number of years, I was moved to make representations, over a decade ago, to the Criminal Courts Commission, presided over by Gratiaen, J., and of which Pulle, J., was a member, that there should be inspections of Magistrates' Courts by competent persons, not with a view to finding fault with their work, but with a view to assisting them in discharging their duties properly. This I did because I was aware of a growing public dissatisfaction regarding the manner in which cases were disposed of in Magistrates' Courts and an increasing tendency to make use of Section 325 of the Criminal Procedure Code even in the case of very grave offences, this being done with an eye on the Quarterly Returns of disposals. This tendency, I felt, was not conducive to proper administration of justice.

Inspections of Courts would not be necessary if an Utopian state of affairs prevailed in our Courts. People concerned with the proper administration of justice should regard it as their duty to improve the administration of justice, so that there may be a feeling in the public mind that justice is being administered well and truly. Inspections should be carried out by a *competent* person, as I told the Criminal Courts Commission, competent not merely in the eye of the law, but competent to find out what is actually happening in Magistrates' Courts. I trust I will not be misunderstood if I say that it is not everybody who can put his finger at the proper place.

I know that once a Judge of this Court, who was holding Sessions in Jaffna was requested by the Chief Justice to inspect the District Court there and the District Court was inspected ; but, unfortunately, no copy of the report made by the Judge was sent to the District Judge. That sort of thing should not take place, for the reason the Judge whose Court is inspected is entitled to know in what way he could improve the administration of justice. Besides, common courtesy would demand that a copy of the report should be sent to him. Whenever I inspect a Court I make no report to anyone but merely draw the Judge's attention to how the work could be improved.

The Quarterly Returns are useful only if they reflect the actual state of affairs in the Court. But often they do not. I am aware of a Court from which there was not even a single appeal for a period of over two years. The quarterly returns must have revealed that to anyone who looked into them. If anyone looked into them he should have realised that there was a Magistrate who was either perfect and infallible

or that there was something radically wrong in that Magistrate's Court. A proper inspection would have revealed that what was happening in that Court should not happen at all.

It is common knowledge that even grave crime cases are disposed of in an unconscionable manner, as in the two cases now before me. This state of affairs should be remedied as early as possible.

I have questioned the two Inspectors of Police who were in charge of these prosecutions and tried to ascertain from them as to why they had not taken steps to get the Attorney-General to move by way of revision. They informed me that they had submitted their reports about the sentence to their superior officers ; but, anyway, they do not seem to have indicated to their superiors that these punishments were inadequate. I can understand the reluctance of police officers, who have to appear in this Court day in and day out, to incur the displeasure of the Magistrate ; but, it is their duty, regardless of consequences, to see that adequate punishment is meted out in such cases, specially in view of the numerous thefts of cars that have gone undetected in recent years. They should know that speedy disposal followed by adequate punishment is a sure deterrent.

Sentence enhanced.