1951 *Present:* **Gratiaen J.**

In re ABDUL KUTHOOS

IN REVISION

M. C. Batticaloa, 11,669

Sentence—Juvenile offender—Strict proof of age necessary—Importance of Borstal detention, wherever practicable—Youthful Offenders (Training School) Ordinance, No. 28 of 1939, S. 4 (2).

When dealing with juvenile offenders the Courts should always insist upon strict proof of age.

So long as the youthful Offenders (Training School) Ordinance, No. 28 of 1939 is in operation it is the duty of a sentencing Court to make orders for Borstal detention, wherever practicable, in the case of all lads suitable and qualified for this special form of penal treatment. It is the duty of the Court to take action under section 4 (2) of the Ordinance and in the first instance to call for the required report from the Commissioner of Prisons as to the matters relevant to a decision in connection with the case of the particular individual. The availability or suitability of accommodation in a Training School is one of the factors to be taken into consideration by the Court.

THIS was a case which was dealt with in revision under section 356 of the Criminal Procedure Code.

April 2, 1951. GRATIAEN J.—

I have called for the record in these proceedings in order to satisfy myself as to the legality and propriety of the orders made by the learned Magistrate of Batticaloa, and I have come to the conclusion that this is a case which calls for the exercise of the revisionary powers vested in me under Section 356 of the Criminal Procedure Code.

The accused is a youthful offender who was convicted by the learned Magistrate on a charge of house-breaking and theft of various articles, including a bicycle, of the aggregate value of Rs. 753.50. The proceedings were instituted on 7th January, 1951, and the accused was continuously in Fiscal's custody until 21st February when sentence was passed on him. Since then he has been an inmate in an adult prison. He was tried by the learned Magistrate in his capacity as District Judge.

The evidence for the prosecution is that a trader named Abubacker woke up one morning in his boutique to find that his bicycle, the sound box of a gramophone, an alarm clock, a cash box and a till containing about Rs. 300 were missing. The police were informed and the missing bicycle was traced to the possession of a person who had purchased it from the accused. The learned Magistrate rejected the explanation of the accused as to how the bicycle had come into his possession. In this state of things, I am satisfied that the conviction of the accused on the charge of having stolen the bicycle was justified. In my opinion, however, the uncorroborated evidence of Abubacker was insufficient to justify a confident decision that the accusel had also stolen the other articles which were not traced to his possession. Nor am I convinced that the charge of house-breaking has been established beyond reasonable doubt. The accused had admittedly been Abubacker's servant until the night before he and the bicycle disappeared, and it may well be that the theft was committed without resorting to burglary. I accordingly quash the conviction on the charge of house-breaking and on the charge of theft of the other articles alleged to have been stolen. I affirm the conviction on the charge of theft of Abubacker's bicycle.

There remains the propriety of the sentence passed on the accused. After conviction the learned Magistrate remanded him for identification and sentence and also called for a report from the Probation Officer. No previous convictions were proved against the accused. The Probation Officer submitted a report to the effect that probation treatment was not suitable in the case of the accused, who, in his opinion was the victim of an unsatisfactory home environment and had, largely for this reason, become addicted to petty thieving. In these circumstances the learned Magistrate, expressing regret that there was no available accommodation for the accused at the Maggona Reformatory, sentenced him to an aggregate term of *one year's rigorous imprisonment*. This is not the first instance when a Magistrate has found himself frustrated by the lack of accommodation for juvenile offenders in suitable institutions.

An adult prison is a most unsuitable institution for the reformation and rehabilitation of young delinquents. The accused stated at the trial that he was 16 years old. This evidence was not challenged by the prosecuting authority. The Probation Officer apparently assessed his age as 18 years, but on what material he based his assessment is not indicated in his official report. It is a matter for regret that when dealing with juvenile offenders the Courts do not always insist upon strict proof of age. I decided to direct the prison authorities to ascertain the true age of the accused and have now received a report, supported by expert medical opinion, that the accused is in fact not more than 16 years old.

The only penal institutions (apart from adult prisons) to which Magistrates are empowered under the existing law to send a convicted lad who is 16 years of age is (*a*) the Maggona Reformatory which is a "certified industrial school" under the Youthful Offenders Ordinance and (*b*) the Borstal Training School at Watupitiwela established under the Youthful Offenders (Training School) Ordinance, No. 28 of 1939. Unfortunately the manager of the Maggona Reformatory has recently notified all Courts that there is no further accommodation available

there at the present time. This is an approved institution voluntarily maintained by private persons, and clearly it would be improper for any Court of Criminal jurisdiction to insist on sending youthful offenders to Maggona despite the lack of accommodation there. In regard to the remaining alternative penal establishment, the Courts have similarly been notified by an official circular that " there is no accommodation at present at the Training School for Youthful Offenders, Watupitiwela ". I am not prepared to construe the terms of this circular as *an unqualified prohibition, having the force of law,* against judicial orders for Borstal detention in the case of youthful offenders who are found to be suitable for such detention under the provisions of the Youthful Offenders (Training School) Ordinance, No. 28 of 1939. The Training School at Watupitiwela has been specially established by statute for the purpose of giving " such training and instructions to youthful offenders and subjecting them to such discipline and moral influence as will conduce to their reformation and the repression of crime ". So long as this Ordinance is in operation it is the duty of the sentencing Court to make orders for Borstal detention, *wherever practicable,* in the case of all lads suitable and qualified for this special form of penal treatment. It is a matter of common knowledge that adult prisons are very much more over-crowded than the Training School at Watupitiwela. The odious alternative of sentencing a lad to *imprisonment* instead of to *Borstal detention* should never be selected *automatically* and without giving prior consideration to all matters relevant to the welfare of society and of the delinquent concerned. *General directives issued from an administrative source cannot alone be permitted to decide such grave issues.* Section 4 (2) of the Ordinance required a Court, before deciding to order Borstal detention to " call for and consider "—but not to be ruled by—a report from the Commissioner of Prisons as to the suitability of the particular youthful offender for Borstal treatment *and as to the accommodation available in* any such school. The lack of ideal accommodation is *one* of the relevant factors for consideration but it is not the only factor which is relevant, and the problem cannot be *predetermined in the abstract.* I do not see why an offender suitable for Borstal treatment should not with greater profit to the community be sent to a *slightly over-crowded Borstal School* rather than to an *admittedly over-crowded adult prison.* Persons charged with the administration of penal institutions are not authorised and would never presume to *forbid* Courts of law to sentence convicted men or women to any penal establishment owing to lack of suitable accommodation or (if one carries the principle further) to sentence murderers to death owing to lack of the implements required to carry out judicial orders for execution. Similarly with regard to Borstal detention, I think it is the duty of a Judge or a Magistrate, notwithstanding any circular such as that to which I have referred, to take action under Section 4 (2) of Ordinance No. 28 of 1939, and in the first instance to call for the required report from the Commissioner of Prisons as to the matters relevant to a decision in connection with the case of the particular individual. In some cases the available accommodation might be found to be so inappropriate as to preclude an order for detention at Watupitiwela. In other cases, the accommodation, though not ideal, may well be considered adequate.

I quash the order of *imprisonment* on the ground that it was prematurely made. In order that I might decide whether an order for detention in the Training School at Watupitiwela would be justified or not, I direct the Commissioner of Prisons to submit to me a report under Section 4 (2) (*a*) of the Ordinance within 14 days. In the meantime the accused must be detained in a suitable remand jail which should be selected by the Commissioner of Prisons. I trust that during this period of detention all possible steps will be taken to prevent the accused from making undesirable associations with adult criminals.

Order of imprisonment quashed.