[COURT OF CRIMINAL APPEAL]

1951 *Present:* **Dias S.P.J. (President), Gratiaen J and de Silva J.**

MARTIN, Appellant, *and* THE KING, Respondent

APPEAL No. 16 OF 1951

S. C. 50—M. C. Tangalla, 3,378

Court of Criminal Appeal—Sentence—Borstal detention—Youthful Offenders (Training Schools) Ordinance, No. 28 of 1939—Section 4—" Criminal habits and tendencies "—Evidence on the question of sentence.

Section 4 of the Youthful Offenders (Training Schools) Ordinance, No. 28 of 1939, empowers a Court, in passing sentence on a youthful offender convicted of an offence triable only by the Supreme Court, to make an order for Borstal detention instead of an order for imprisonment if it appears to the Court that " by reason of his criminal habits and tendencies " it is expedient that the offender should be subject to detention in a Training School established under the Ordinance.

Held, that, where an accused is a youthful offender, the very nature of the offence committed by him would justify a Court in drawing the inference that he has " criminal habits and tendencies " within the meaning of the enactment.

Observations by Gratiaen J. as to the desirability of evidence being placed before the court after conviction, in order to assist the Judge in passing sentence on the accused.

[1] *(1946) 47 N. L. R. 45.* [2] *(1904) 7 N. L. R. 205.*

APPEAL, with leave obtained, against a sentence passed in a trial before the Supreme Court.

M. M. Kumarakulasingham, for the accused appellant.

H. A. Wijemanne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 7, 1951. GRATIAEN J.—

This was an appeal, with leave obtained, against sentences of ten years rigorous imprisonment and twelve years rigorous imprisonment (to run concurrently) imposed on the appellant for offences of robbery and attempted murder respectively. The appellant and the first accused, who was his elder brother Podi Appu, were jointly tried and convicted of these offences at the Kandy Assizes, and identical sentences were passed on both of them. Podi Appu's application for leave to appeal against his convictions and sentences was refused. The appellant was granted leave to appeal, but only against the sentences passed on him.

When one examines the evidence for the prosecution, it is apparent that the appellant had in a sense played a secondary part in the concerted attack on the injured man Hendrick. It was the appellant's elder brother Podi Appu, the first accused, who had first set upon Hendrick and caused him grievous injury which, but for medical skill, would necessarily have caused his death. Nevertheless, the appellant's conduct, both by reference to his individual acts and the common intention which the jury must have deemed to have imputed to him, clearly justified his conviction on both charges. We think that, under normal circumstances, the learned presiding Judge, in passing sentence, would have been entirely justified in refusing to differentiate between the cases of the appellant and Podi Appu. Our sole reason for varying the sentences passed on the appellant is that one particular circumstance of fundamental relevancy to the determination of the question of sentence had not been brought to the learned Judge's notice by either the prosecution or the defence. Had the learned Judge been aware of this circumstance, we do not doubt that he himself would have been influenced by it to the same extent as we have been. We emphasise this point because we have not sought in any way to depart from the well-established principle that " in exercising its jurisdiction to review sentences the Court of Criminal Appeal should not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. *The sentence must be manifestly excessive in view of the circumstances of the case or be wrong in principle before the Court will interfere* ". (*R. v. Sherkewsky, 28 T. L. R. 364; R. v. Gumbs, 19 C. A. R. 74;* and *Archbold, 32nd Edition, page 328.*)

The relevant circumstance which had not been brought to the learned Judge's notice was that whereas Podi Appu, the chief author of the crime, was 24 years of age, the appellant (whose birth certificate was produced before us by learned Crown Counsel) was only 15 years and 9 months old at the time of the commission of the offence, and under 17 years of age at the date of his conviction. The appellant did not

give evidence at the trial, and the learned Judge could have had no opportunity of even making his own assessment of the lad's age before passing sentence unless his attention was directly drawn to the matter by either the prosecution or the defence. This was not done.

Section 4 of the Youthful Offenders (Training Schools) Ordinance, No. 28 of 1939, empowers a Court, in passing sentence on a " youthful offender " (as defined in the Ordinance) convicted of an offence triable only by the Supreme Court, to make an order for Borstal detention instead of an order for imprisonment if it appears to the Court that " by reason of his criminal habits and tendencies " it is expedient that the offender should be " subject to detention under such instruction, training and discipline as would be available in the Training School " established under the Ordinance. When the case first came up before us for disposal, we decided to call for a report from the Commissioner of Prisons in terms of section 4 (2) (*a*) of the Ordinance. The Commissioner in due course reported to us that in his opinion the appellant was medically and otherwise suitable for Borstal detention and training " *if found by the Court to be eligible under the Ordinance for such detention* ". He also confirmed that accommodation could be found for the appellant at the Training School at Watupitiwella.

In our opinion the appellant is clearly eligible for Borstal detention under the Ordinance. He is now only 17 years old, and the requisite qualification of being addicted to " criminal habits and tendencies " has been sufficiently established, we think, by his proved conduct in the present case *taken by itself*. As Hewart L.C.J. pointed out in *R. v. Walding (1931), 22 C. A. R. 178 at page 179,* " the very nature of the offence committed would justify a Court in drawing the inference that the accused had criminal tendencies " qualifying him for Borstal detention. In these circumstances we decided that the order for imprisonment, involving as it does, association with adult criminals, was not expedient, and we accordingly substituted in its place an order for Borstal detention under section 4 (1) of the Ordinance. The judgment which I now pronounce on behalf of the Court sets out the grounds for our decision. We believe that, had he been informed of the relevant circumstances which have influenced us, the learned Judge would have shared our view that a prolonged period of training and discipline in a Training School for youthful offenders is better calculated to give the appellant an opportunity of rehabilitating himself as a useful member of society.

This concludes the appeal, but I desire to add, on my own account, that this case seems to illustrate how desirable it is that the prosecuting authorities should, in fairness both to the accused and to the presiding Judge, adopt the practice, long since established in England, of placing all the relevant material before the Court, after conviction, " as an aid to determining the appropriate punishment ". (*Archbold, 32nd Edition, page 211.*) In *R. v. Campbell, 6 C. A. R. 131,* the Court of Criminal Appeal considered that " in all trials, after conviction there should be given accurate information to the sentencing Court as to the general character and other material circumstances of the prisoner—and that

such information should be taken into consideration by the Judge in determining the question of punishment". (*Vide* also *R. v. Stratton, 10 C. A. R. 35; R. v. Bright (1916), 2 K. B. 441.*) The gravity of the offence committed is of course a very important factor but is no longer regarded as the *sole* factor which should guide a Court. I take the liberty of quoting certain observations by Caldecote L.C.J. in *R. v. Van Pelz (1943), K. B. 157,* as to the manner and form in which such evidence should be placed before the Court by prosecuting counsel:—

"When a police officer is called to give evidence about a man who has been convicted, he should in general limit himself to such matters as previous convictions, if any, and antecedents of the prisoner, including anything that has been ascertained about his home and upbringing in cases where the age of the person convicted makes this information material. *It is the duty of the police officer,* we think, to inform the Court also of any matters, whether or not the subject of charges, which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the Court. Police officers should inform the Court of anything in the prisoner's favour. We think that it is *the duty of counsel for the prosecution* to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner. It must not be taken that we are attempting to lay down a rule in such wide, and at the same time such exact terms, as would cover every case, for the simple reason that this would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observation we need to make is this, and I hope it is unnecessary. Nothing I have said is intended to affect in the least degree the right of the Court to inquire into any matter in any individual case upon which the Court itself thinks it right to ask for information".

Sentence altered.