A

SOSIVETA AND OTHERS

v.

REGINAM

B

[SUPREME COURT, 1967 (Hammett J.), 3rd, 10th, 17th March]

Appellate Jurisdiction

Criminal law—sentence—arson—mitigating circumstances—act of arson committed upon instructions of person to whom obedience habitually rendered on religious grounds C *—purpose and theory of punishment—Penal Code (Cap. 8) ss.35, 36—Criminal Procedure Code (Cap. 9) s.160.*

The twenty-one appellants were sentenced in the Magistrate's Court to terms of imprisonment for the crime of arson in that they had set fire to the house and kitchen of a fellow villager. The buildings were completely destroyed and the owner's loss was assessed at £300. On the D appeal against sentence it was shown that the appellants had acted upon the instructions of the leader of the community whose claim to be a prophet of God was believed by the villagers, who were prepared to do anything that the leader ordered.

The appellants, the great majority of whom were young men, had all been of excellent character and had subscribed £220 towards the loss; E they had been in custody for more than two months.

Held: 1. The sentences of imprisonment would be set aside.

2. The two eldest appellants were next in authority to the leader and bore the greater responsibility; a fine of £40 would be imposed on each (to be paid to the complainant as compensation together with the £220 subscribed) and they would be bound over to keep the peace for two F years.

3. The remaining appellants would be released under section 35 of the Penal Code on a bond to come up for sentence at any time within two years and in the meantime to be of good behaviour and keep the peace.

Case referred to: *Fleming v. Commissioner of Transport* [1958] N.Z.L.R. 101.

G

Appeals against sentences for arson imposed in the Magistrate's Court.

Sir Maurice Scott for the appellants.

T. U. Tuivaga for the respondent.

HAMMETT J.: [17th March 1967]—

H The facts sufficiently appear from the judgment.

This is an appeal against sentence by twentyone appellants who pleaded guilty and were jointly convicted of arson by the Magistrate's Court sitting at Suva.

The facts giving rise to the charge were as follows.

The accused all live at Daku where the Turaga-ni-koro is one Ratu Emosi Saurara. A

On 31st December, 1966, Ratu Emosi requested the complainant, Esala Delana who lives in the adjacent village of Antioki, to let him have 30 sheets of corrugated iron which Esala had in his possession. Esala did not agree to this but felt unable to refuse the request owing to the force of custom and the standing in the village of Ratu Emosi. On 1st January, 1967, on the orders of Ratu Emosi villagers went to Esala's house and brought these 30 sheets of iron to Daku. On 2nd January Esala plucked up his courage and went to Ratu Emosi and asked for the return of his corrugated iron. Ratu Emosi became angry and he spoke to Esala in a threatening manner. Esala left him and went to the Roko to report the matter. B C

Ratu Emosi felt insulted and on 3rd January he called the villagers of Daku together and ordered them to burn down Esala's house. Without demur, these twentyone appellants and others not charged, went to Esala's house and having poured kerosene on both his house and kitchen set fire to them. They were both burned to the ground. His home and all its contents were completely destroyed in the fire. As a result of this outrage Esala has decided not to return to live in the village and he is setting up house elsewhere. Although his house which was destroyed was built for him by communal effort he is still faced with the problem of finding himself a new home. It is agreed by the prosecution and Counsel for the appellants that Esala's loss, in so far as it is capable of monetary assessment amounts to £300. D

In the Court below Ratu Emosi, who was charged with arson separately from these appellants, pleaded guilty and was sentenced to 2½ years' imprisonment. E

Seventeen of the present appellants were sentenced to 2 years' imprisonment, one to 2½ years' imprisonment and three to 18 months' imprisonment.

Sir Maurice Scott who appeared for them at the hearing of the appeal has argued that this is not an ordinary case of arson and has urged that the sentences be reviewed in the light of the peculiar circumstances of the case. F

Ratu Emosi for the past 25 years or more has been the leader of the people in Daku village and the two nearby villages which he has established and named Antioch and Galilee. He is a man of remarkable intelligence, ability and personality. Under his energetic and industrious powers of leadership he and his people have built up model villages. He was so successful in organising their work and energies on a communal basis that in paragraph 451 of the 1959 Report to His Excellency the Governor by Professor Spate on the Economic Problems and Propects of the Fijian People, Daku was described as "undeniably one of the most impressive villages in Fiji." Professor Spate there referred to the personal magnetism and religious fixation of Ratu Emosi and in reference to Daku said — G H

> "It is in fact a perfect example of theocratic authoritarian socialism — its practice is the rigorous personal control of Ratu Emosi."

It is not disputed that the main source of his power is not only that he believes himself to be a prophet of God and that he works under the A directions of the Almighty but that his people in Daku also believe this. As a result, they have been willing to do, quite literally, anything he commands them to do. Unfortunately, Ratu Emosi does at times become worked up into a state of morbid excitement when he apparently loses his sense of proportion and his self-restraint. He has a history of mental instability and in 1947 was admitted to St. Giles Mental Hospital for a B period of five years for treatment. After his discharge he again resumed his leadership in the village but he is, at this present moment, again a patient in St. Giles Hospital for observation and treatment.

Counsel for the appellants urges that their actions, outrageous and criminal though they have been, be viewed in the light of these circumstances. He urges that all the appellants are men of good character and C none, save one, have any previous convictions. This one was convicted over 20 years ago, whilst similarly acting under Ratu Emosi's orders and was then bound over.

Sir Maurice assures me that the appellants now realise, as they did not at the time, that their conduct amounted to a very serious criminal offence. He states that as an indication of their contrition and an ack- D nowledgement of the wrong they have in fact done they have already collected together the sum of £220 out of £300 which they wish to pay to Esala as compensation for his loss. This money has in fact been deposited in Court for this purpose.

Without in any way excusing their conduct, he urges in this appeal against sentence that consideration be given to the fact that they acted E under the orders of a man they believed to be possessed of special divine authority at a time when he was, unknown to them, undoubtedly in a disturbed state of morbid excitement.

The Crown does not accept this view of the case. Learned Crown Counsel has pointed out that this was a very serious crime, aggravated F if anything, by the fact that the appellant all acted in concert in a violent and totally unjustified breach of the criminal law of the land. It is urged that the sentences imposed in the Court below are, if anything, lenient and if the Court is minded to vary them at all it should do so by enhancing the sentences of imprisonment rather than the contrary.

I have given careful and most anxious consideration to this case which G discloses a disturbing state of affairs. It is a very serious matter of considerable public concern for any group of persons to hold the view that they may carry out the orders of any person even if to do so amounts to a serious crime under the Criminal Law. Nevertheless this case is clearly a most unusual one. I have, therefore, called for and studied with interest a Probation Officer's report on each of the appellants before me. Copies of these reports have been supplied to both the Crown and the Defence H and they have not been challenged in any way but have, in fact, been accepted by both sides.

What has impressed me about these reports has been the uniformity of the excellent characters given to each appellant.

For example, of the 1st appellant the Probation Officer reports :—

> "He is spoken well of by the villagers for his behaviour. He is said to be quiet and a humble person. He is a member of the church choir." A

Similar remarks are made about each appellant. Several hold such positions in their community as Church Steward, local preacher, member of the choir and Sunday School teacher. In no instance, save one, is there any history of previous bad conduct or character. In general the Probation Officer reports each of the appellants to be a person of previous good character who would never have considered doing such a thing as setting fire to a man's house unless Ratu Emosi himself had personally ordered it. B

There is support for the argument that these men would not have done what they did had they not believed Ratu Emosi to be divinely inspired by the fact that the 1st appellant who is the brother of Esala, (whose house was burned down) actually poured the kerosene over it before it was burned and there is no evidence of any friction or enmity between these brothers. C

Again I observe that nine of the appellants are aged between 18 and 22 whilst the four eldest are between 40 and 48 years of age. Amongst the eldest of the accused are the two next leaders in the village after Ratu Emosi. They are all respectable married men with families holding positions of responsibility in their community. D

It seems clear to me that the moral guilt and responsibility of the youngest of the appellants who obeyed and followed the example of their elders bear little relation to the much greater responsibility of others who are the leaders in their community. E

The offence of arson is a very serious one especially in this country where many people live in easily combustible thatched houses. The sentences passed in the Court below were not at all excessive for the normal case of arson. This is not however a normal case. I have had the advantage not enjoyed by the Court below, of having the assistance of Counsel and of having before me detailed reports from the Probation Officer on each of the accused. F

In the particular and most unusual circumstances of this case I have come to the conclusion that the sentences passed must be reviewed in the light of the additional information now before me.

In this connection I find the words of Sir George Finlay in *Fleming & Ors. v. The Commissioner of Transport* [1958] N.Z.L.R.101 at p.102 to be most pertinent — G

> "Such appeals as these invite, too, some consideration of the purposes of punishment and a consideration of the features which enter into the determination of its quantum. Any previous theory of the moral justification of punishment which has found a place in the philosophical thought of the past has now surrendered to the conception that its moral justification lies in the necessary self-defence of society against the wrong-doer. ..... there has evolved the conception that the primary purpose of punishment H

is deterrence; that is, deterrence of the individual, and deterrence of all others who might be prompted by inadequacy of penalty to offend similarly. It is unnecessary to advert to any question of reformation because any such question is foreign to the type of offences involved in these appeals.

In considering penalty from the point of view of deterrence, however, a proper appreciation of its application demands recognition of the historical fact that cruel penalties have proved inefficacious. Certainty of conviction and of punishment has been demonstrated to be of much more importance than severity, as the Italian penologist, Peccaria, commented many years ago. Then, too, it has become accepted that the Benthamite view is right — that only the minimum penalty which will operate as a deterrent is justified and that any excess is, if not cruel, then certainly unjustified. This is the fundamental principle upon which, as I conceive it, all penal sentences are today imposed. What evolves is that, in the reformed view of today, the least penalty that will operate as a deterrent is the penalty that will operate as a deterrent is the proper penalty. Such a conception operates as a restrain upon excess.

That these principles are subject to modification to some degree by other considerations is, of course, undeniable, but the principles remain fundamental and extend to every penalty imposed by way of punishment."

What is required in this case is, of course, that the rule of law should be upheld and vindicated and that future similar breaches of it by these appellants and others be deterred. It is essential that it be made abundantly clear that no person, of whatever standing in the community, has any authority to order others to commit acts of violence in breach of the criminal law of the land.

This can undoubtedly be done by sentencing all these twentyone men to lengthy sentences of imprisonment. In certain cases it may well be that this is necessary as the only way in which the rule of law can be upheld.

I have however come to the conclusion that in the particular circumstances of this case this is not the only way in which the desired result may be achieved.

I have taken into account the fact that every one of the appellants is a man of good character. Further all, save one, are first offenders and many are comparative youngsters who followed their leaders in this criminal act and they have all been in custody for well over two months.

By the actual payment of the sum of £220 on account of compensation to the complainant for the material loss and damage they caused, the appellants have acknowledged that their conduct was criminal and wrongful and have done that they could to make amends. This is a considerable sum of money having regard to the earning capacity of a villager in this country.

In these circumstances I propose to take a course, which I would not wish to be regarded as a precedent to be followed in different circumstances, by which I think in the particular circumstances of this case the ends of justice may be met. The Criminal Procedure Code in section 160

provides the machinery whereby any Court may, where a fine is imposed, order the whole of it to be applied as compensation to an injured complainant. I intend to apply the principles embodied in section 160. A

I shall allow these appeals and set aside the sentences imposed in the Court below.

I shall regard the £220 already paid by the appellants as compensation for the complainant as if it had been ordered to be paid under section 160 of the Criminal Procedure Code and direct that it be paid out to him. B

Filipe Benui, the 12th appellant, and Viliame Saito, the 20th appellant who are the two leaders of the community next after Ratu Emosi bear the greater responsibility in this affair. You must have known that what Ratu Emosi ordered was wrong and unlawful. You knew he has suffered from mental disturbance in the past and it was your duty as leaders in your community to exercise a restraining influence on him in the interests of the whole community and of Ratu Emosi himself. I impose on each of you a fine of £40 and under the provisions of section 160 I also order that this money be paid to Esala as compensation. In addition under the provisions of section 35 of the Penal Code I order you each to enter into a recognisance in the sum of £200 to be of good behaviour and to keep the peace for 2 years. C

In respect of each of the remaining appellants I shall, intead of sentencing you at once, direct under section 36 of the Penal Code that you each be released upon entering into a bond in the sum of £200 to come up for sentence at any time within 2 years and in the meantime to be of good behaviour and to keep the peace. D

Appeal allowed.