[HIGH COURT OF AUSTRALIA.]

CRANSSEN . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW GUINEA.

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SYDNEY, *Aug.* 10, 19.

Starke, Dixon Evatt and McTiernan JJ.

Criminal Law—Territory of New Guinea—Burning of native huts—Arson—Plea of guilty—Conviction—Sentence—Severity—Appeal to High Court.

A priest established a mission in a wild and uncivilized area of the Territory of New Guinea, amidst natives who carried arms and were by nature treacherous and revengeful. A missionary of another religious faith later entered the area, left native "boys" at villages near the priest's mission and departed. Subsequently the priest learned that these "boys" were stirring up disaffection against him amongst the local natives. He warned them, but shortly afterwards he again learned that they were stirring up disaffection against him. He organized an armed party of his own natives, who with some violence expelled the "boys" and burned their shelters and huts. The priest was charged with arson. His solicitor advised him that if he pleaded guilty he would avoid publicity and would only be fined a small sum. He pleaded guilty and was sentenced to five years' imprisonment with hard labour. He appealed to the High Court against the conviction and sentence.

Held that the conviction must stand, but that the sentence was excessive and should be reduced.

APPLICATION for leave to appeal and APPEAL from the Supreme Court of the Territory of New Guinea.

Anthony Cranssen, a priest of the Roman Catholic Church, was charged before the Supreme Court of the Territory of New Guinea that on or about 25th December 1935, in the Territory of New

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Guinea, he wilfully and unlawfully set fire to a dwelling house. He pleaded guilty to the charge and was sentenced to five years' imprisonment with hard labour.

Cranssen applied to the High Court for leave to appeal against the conviction and sentence.

In an affidavit sworn by Cranssen he stated that "I consulted my solicitor and told him I wanted to plead not guilty. My solicitor said 'No, it would be better to plead guilty because if you plead not guilty we will have to go all over this evidence again and if you plead guilty it will be over to-day and you will be fined a little sum of five or ten pounds and nothing will be in the newspapers. If you plead not guilty the papers will be full of it.'"

The application for leave to appeal was, without objection, treated as an appeal.

Further facts appear in the judgments hereunder.

Gorman K.C. (with him *Evatt* K.C. and *O'Sullivan*), for the applicant. It is clear from the evidence that the applicant had no intention of tendering a plea of guilty to a charge of arson, and that he did not even apprehend the nature of the charge preferred against him. The evidence did not establish the charge. The difficulty of reducing to the written word the evidence given in "pidgin English" by the native witnesses, as well as their difficulty in expressing their thoughts, resulted in an exaggeration or distortion of the real facts to the prejudice of the applicant. The accuracy of the evidence given by the native witnesses is open to question. The applicant was also handicapped by his own imperfect knowledge of the English language. The full facts were not before the trial judge, as a result of which he was led into error. There is no evidence that the structures that were burned were "dwelling houses." A "dwelling house" is the sleeping place of the owner, or the members of his family. Although the area was an "uncontrolled area," the applicant had official permission to be there. During the time he was in the area many inter-tribal fights occurred, and, as a result, many natives were killed. As a result of the intrusion of the Lutheran missionary and his "boys," the peaceful conditions which the applicant had established in the area were

disturbed, and the natives, who were, and are, in a very primitive state, became considerably agitated. This unhappy state of affairs afforded ample foundation for the applicant's apprehensions for his safety, and—being, as he was, the only white man in the area, and several days' journey from the nearest white man—justified the remedial measures undertaken by him, or on his behalf. The information before the court shows that the applicant's apprehensions were very real and were well founded. The position in which he found himself was the result entirely of the wrongful and provocative acts of the Lutheran "boys," who were in the area without official permission. For a long time the applicant endeavoured to persuade the Lutheran "boys" to leave the area before trouble ensued, but his efforts were fruitless. The whole of the applicant's evidence is a negation of guilt. The history of the applicant shows that he is a very quiet, pleasant, kindly man who at all times used his best endeavours to avoid strife and to bring about and maintain peaceful conditions. Some of the remarks made by the trial judge are without justification and, in the circumstances of the case, are altogether too violent. In all the circumstances the trial judge should have taken a lenient view of what was a technical offence created by the application of laws of a more or less civilized community to an uncontrolled area, but, on the contrary, he assumed an attitude which was quite unwarranted and was not supported by the true facts of the case. Both as regards the facts and the law the trial judge was in no better position than are the members of this court. His Honour's judgment contains numerous inaccuracies. There is no evidence that the applicant caused or fomented ill-will between his "boys" and the Lutheran "boys," who were in the area in contravention of the law. The applicant's actions and conduct under peculiar and difficult conditions were in accord with prudence and good and peaceful government. The conviction should be quashed. Alternatively, the sentence imposed is excessive and should be considerably reduced, especially having regard to the history and work of the applicant and the fact that he has no criminal inclinations. This court should not surrender its power to draw its own inferences (*Coghlan* v. *Cumberland* (1)).

(1) (1898) 1 Ch. 704.

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Badham, for the respondent. The evidence supports the view of the trial judge that the offence of which the applicant was charged was not the result of a sudden outburst of temper, or frenzy, or misunderstanding on his part, but was a premeditated attempt, the carrying out of which had been contemplated by the applicant for some considerable time. The applicant's action was unjustifiable. He was not entitled to take the law into his own hands and forcibly and violently expel the Lutheran "boys" from the area merely because they were not permitted under the law to be there. Conduct of that nature by a person of the applicant's position and training can only operate as a disturbing influence upon the natives, and embarrass the Administration. The time, the place and the occasion were most inopportune. Even assuming that the fears of the applicant had some foundation in fact, the method employed by him was ill-conceived and could only result in disaffection and unrest among the natives. A method less likely to ensure peace could hardly be conceived. In awarding punishment the trial judge was entitled to take all these matters into consideration. It has not been shown that the trial judge proceeded on some wrong principle, or erroneously accepted something as a fact. Where there was a conflict of evidence the trial judge was entitled to accept whichever version he chose. His Honour had the advantage of seeing and hearing the applicant (*Skinner* v. *The King* (1); also he had the advantage of knowing the local conditions. The conviction should not be quashed, nor should the case be sent back for a new trial. In all the circumstances of this case the sentence imposed upon the applicant is not manifestly excessive; therefore it should not be disturbed. Had any difficulty been experienced as regards the obtaining of evidence from native witnesses the trial judge could, and doubtless would, have availed himself of the provisions of sec. 28 of the Papuan *Criminal Procedure Ordinance* 1899.

Gorman K.C., in reply.

Cur. adv. vult.

(1) (1913) 16 C.L.R. 336, at p. 339.

The following written judgments were delivered :—

STARKE J. The appellant is a priest of the Roman Catholic Church, born in Holland, and thirty-one years of age. He was charged, before the Supreme Court of the Territory of New Guinea, that in or about December 1935, in the Territory of New Guinea, he did wilfully and unlawfully set fire to a dwelling house, and to this charge he pleaded guilty. The Chief Judge of the Supreme Court of the territory, before whom the appellant was charged, sentenced him to imprisonment for five years with hard labour. He now appeals to this court against both his conviction and the sentence.

The main ground for the appeal, against both conviction and sentence, is that the appellant desired to plead not guilty but that his solicitor said that it would be better to plead guilty, because if he pleaded guilty the evidence given before the committing magistrate would not require to be given again and he would be fined " a little sum of five or ten pounds," and nothing would be in the newspapers. It was strange advice, but the appellant accepted it and took the risk. It affords no ground for the interference of this court, for the appellant, according to his own statements, directed his native boys to set fire to three shelters or huts occupied by some native boys from Kekaru and the coast, who were attached to a Lutheran mission, and the appellant's boys burnt down the shelters or huts in accordance with the directions given to them.

The sentence is another matter. It is one of great severity. But the sentence imposed upon a prisoner is, as I said in *House* v. *The King* (1), a matter " peculiarly within the province of the judge who hears the charge : he has a discretion to exercise which is very wide, but it must be exercised judicially, according to rules of reason and justice, and not arbitrarily or capriciously or according to private opinion." The want of knowledge in this court of the conditions affecting the administration of criminal justice in the territory, and its general lack of experience in the administration of criminal justice, render interference on its part peculiarly difficult if not dangerous. Moreover, interference with sentences imposed by the Supreme Court of the territory is undesirable because it may react

(1) *Ante*, p. 503.

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upon its authority in a more or less uncivilized community. But jurisdiction has been conferred upon this court to grant leave to appeal against sentences of the Supreme Court of the territory, and we must exert it when application is made for that purpose.

The facts of the case can be shortly summarized. The appellant, about 1932, established a mission at Guyebi, in a wild and uncivilized area of the territory, and amidst natives or Kanakas, who carry arms, such as spears and bows and arrows, and are by nature treacherous and revengeful. He also established fifteen out-stations. One of these is at Kekaru, and another at Tiginan. About 1935, a Lutheran missionary came to Kekaru and to Tiginan, with some native boys from the coast. The missionary did not stay, but left the native boys at these villages. At the time the Lutheran missionary came to Kekaru and Tiginan, the area had been proclaimed "uncontrolled" and "closed," and no one was allowed to enter it without the authority of the Administration. The appellant heard that the Lutheran boys were stirring up disaffection against him amongst the Kanakas, and he told them they had no right to be there and would be put in gaol if they stayed. But they stayed, and in December 1935 the appellant again heard that they were stirring up disaffection against him. The appellant was annoyed that the Lutherans had established a station so near to him, and, isolated as he was, without support or opportunity for consultation, he resolved that it was necessary in the circumstances to make a show of force, and get the Lutheran mission boys at Kekaru out of the district. So he organized a party of his own native boys to expel the Lutheran boys and to burn their shelters and huts. He armed them with two rifles and two shot-guns, but he explained that the arms were not to be used against the Lutheran boys, but to protect his own boys against the Kanakas if they attacked them. The expedition descended upon the Lutheran boys, assaulted them, and burnt down their shelters or huts, three in number, and they were expelled from the appellant's district. It was a high-handed and wholly indefensible act, contrary to law and calculated to weaken the authority of the Administration in the territory. The Chief Judge said that the appellant's acts rendered the work of the

Government "more hard and more dangerous." They might easily have led to loss of life and the rising of the treacherous and savage Kanakas.

I agree with the learned Chief Judge that the appellant was guilty of a serious and dangerous breach of the law of the territory which should be firmly and sternly repressed so that others may be deterred from like conduct. The sentence was intended by the learned judge, I should think, as a warning to persons in the uncivilized parts of New Guinea against taking the law into their own hands and doing acts which might excite dangerous savages and arouse them into action; it is as a deterrent rather than as a punishment of the appellant that the sentence was imposed.

But, having all these considerations in mind, I think the sentence is so especially severe upon the appellant that this court may justly mitigate it. He, it need not be said, does not belong to the criminal class. He is a priest of the Roman Catholic Church, who has devoted his life to civilizing and educating the savages of the territory, and, so far as I can judge, at great sacrifice and with some success. He is not a wicked man, but a good man who has blundered, seriously and dangerously, but who is never likely, if he returns to the territory, to repeat his mistake. I cannot, however, approve of a reduction in the sentence on the footing that the appellant's breach of the law was nominal or trivial, or that the learned Chief Judge acted in an arbitrary or capricious manner. I am sure that he acted unwillingly, and from a stern sense of his duty. It is, indeed, a difficult duty that this court is called upon to discharge. But I find no little guidance for its performance in the case of *R.* v. *Foege* (1), lately before this court. In that case, a Lutheran missionary was charged with unlawfully depriving an uncivilized native of his personal liberty by holding him in custody against his will. It appeared that some articles belonging to the Lutheran mission had been stolen by uncivilized natives, and the missionary despatched an armed expedition of native mission boys against the uncivilized natives to recover the stolen goods and to demand redress. In the course of the expedition, one of the uncivilized natives was seized and bound, and detained for some time. Later, he was released,

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and most of the stolen property was recovered, but the uncivilized natives were required to deliver over four of their pigs as reparation for the theft. Happily the expedition ended peacefully and no lives were lost. But the Chief Judge sentenced the Lutheran missionary to two years' imprisonment, with hard labour, and this court, upon consideration, refused leave to appeal from that sentence. Now the acts of the appellant in this case were certainly as high-handed as those of the Lutheran missionary, and much more dangerous. No reason can be found for differentiating in marked degree between these two cases. It is important that we should have some regard to the opinion of the Chief Judge as to the seriousness of the breaches of the law of the territory with which the Lutheran missionary and the appellant were respectively charged. In my opinion, the sentence imposed in the circumstances proved in *R.* v. *Foege* (1) was not unreasonable, having regard to the conditions of the territory, known to the Chief Judge but of which this court is really ignorant. Perhaps I might add that *Phillips* J., also a judge of the Supreme Court of the territory, recently sentenced a planter, for raping a native woman, to two and a half years' imprisonment with hard labour. That offence is quite different in character from the one now before the court, but the case serves to illustrate how seriously the learned judges of the Supreme Court of the territory regard offences that may arouse or inflame the passions of the natives.

Accordingly, in my opinion, the sentence upon the appellant might be reduced by three years, without endangering the peace, order and good government of the territory, but the serious nature of the appellant's acts precludes, I think, any further reduction of his sentence. Beyond the reduction mentioned, the appeal should be to the clemency of the Crown, and not to a court, whose duty is to mete out even-handed justice.

DIXON, EVATT AND MCTIERNAN JJ. At the age of twenty-six the applicant, who is a native of Holland, was ordained priest of the Roman Catholic Church and sent by the Society of the Divine Word, in whose seminary he had been entered at the age of thirteen,

(1) Unreported.

to the mission of the society at Alexishafen in the Territory of New Guinea. He remained there for a few months and was then sent into an uncontrolled area of the Madang District. This is an outlying district of the mainland far removed from the centre of authority. To enter an uncontrolled area a permit is necessary. If a permit is obtained, conditions must be observed which are laid down by the Administrator of the territory. One condition requires that a person entering an uncontrolled area must be accompanied by at least ten boys, four of whom are capable of using firearms. He must take " not less than four serviceable and approved firearms and sufficient ammunition for the same." Another condition provides that labourers and native personnel, that is, coast boys, shall not be allowed to enter or remain in the uncontrolled area unless under the control and supervision of a European.

The applicant with two other missionaries went into an area called Iwam. They took with them about thirty coast boys. They established a station about ten days travel from Madang at a place called Guyebi. The natives of the locality had not before come into contact with Europeans. The applicant's fellow missionaries did not remain at the station more than two or three months and when they left him there was no other white man nearer than two days' travel. In the course of time he established outstations in places lying around the station within about two hours' journey.

Almost two years after he came to the district the priest in charge of a mission station about two days from his was killed by natives. The applicant went at once to the station where the murder had taken place and there he met other missionaries who had also come there. He says they were all attacked by the natives but made their way back to safety. This occurred in December 1934.

In January 1935 another missionary, a similar distance away, was shot with native arrows and killed. The applicant went there accompanied by a large number of natives of Guyebi, but he says that they returned before he did, broke into his house and, on his return, surrounded it for some days with arms.

As a result of these incidents the Administration treated the Iwam area as closed. It appears, however, that in the following

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June a Lutheran missionary obtained a permit to enter. He visited, amongst other places, two where the applicant had out-stations, Tiginan and Kekaru. After a day or two he departed, leaving two or three Lutheran boys at each of these places. It was, of course, contrary to the conditions for him to leave coast boys in an uncontrolled area. Grass and bamboo huts were built by or for them close to the native village, closer, indeed, than the conditions allow. There they dwelt for some months. But in November 1935 he was informed, he says, that the Lutheran boys at Kekaru were causing disaffection among the natives. He told one of them that they must leave the area, that his master must be mad to leave them there, and that they would be put in gaol if they remained. He says that he saw that native weapons, which after his arrival had been laid aside, were again being carried and that the natives brought their arms to his station. According to his narrative, on Friday, 13th December, he heard that the Lutheran boys, two in number, had plotted with a particular native, whom he considered dangerous, to make an attack when his natives were at church. He obtained some confirmation of this report and on the following Sunday, although no attack was made, he took measures to get rid of the two Lutheran boys at Kekaru.

He did not interfere with the two boys at Tiginan, where, he says, no trouble had arisen.

He sent six of his coast boys to Kekaru with instructions to turn out the two Lutherans and burn their huts which had been constructed there. They took two rifles and two shot-guns and he instructed them to use them against the natives if they were attacked by them, but not against the Lutheran boys. No occasion arose for the use of the firearms. They partly burnt the huts and brought the two boys to the applicant, after first hitting them.

The applicant is stated to have commended his boys' acts and to have ordered the Lutherans to leave. They did so, and, as a result of their report, the applicant was called upon for an explanation, which he gave in a composition of very imperfect English. The effect of what he wrote is that he acted in self-protection ; that the Lutheran missionary had unwarrantably come into the field of his

work and there left his boys without supervision; that with the feeling between natives of different missions this course would be the source of danger and in fact, according to his information, he was to be attacked; that to expel them it was necessary to burn their huts, otherwise they would return.

He was then prosecuted for wilful and unlawful destruction of native dwellings. He was committed for trial on that charge. At the sessions of the Supreme Court of the territory at Rabaul, beginning on 1st May 1936, he was indicted on a more serious charge, namely, arson. He was advised by his solicitor to plead guilty and he did so. But it is now suggested that he was unaware of the exact charge to which he so pleaded.

The Chief Judge, who presided, took a most adverse view of the applicant's conduct and sentenced him to five years' imprisonment with hard labour. He now seeks leave to appeal to this court.

Sec. 24 of the *Judiciary Ordinance* 1921-1927 expressly mentions convictions and sentences among the judicial orders from which an appeal by leave shall lie to this court. It is evident that these words refer to convictions on indictment and sentences of imprisonment or other punishment. This court is thus specifically given a jurisdiction to hear appeals from sentences of the Supreme Court of the territory. But, although this consideration may distinguish the power it is called upon to exercise from the general appellate power invoked in *House* v. *The King* (1), it remains true that the appeal is from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or

(1) *Ante*, p. 499.

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been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority. Moreover, this court has always recognized that, in appeals from courts of the territories, there may be many matters upon which the court appealed from is in a better position to judge than we can be. It is familiar with the special conditions which obtain in the territory and thus should be better able to estimate the importance of considerations arising out of them, or the significance of facts associated with them. In accordance with these principles this court recently refused leave to appeal in a case in which the same learned judge inflicted a severe sentence upon a missionary who made a punitive raid upon natives in his district, took one of them captive and kept him bound, and behaved towards the natives in a harsh and provocative manner. To estimate the gravity and consequences of such an offence appea red to be peculiarly within the province of the Supreme Court of the Territory of New Guinea and this court refused to interfere, not because it approved of the sentence, but because it was unable to say that the sentence so exceeded the occasion as to be unreasonable, or to find any circumstances vitiating the exercise of the learned judge's discretion.

In the present case it appears manifest that a sentence of five years' imprisonment is out of all proportion to any view of the seriousness of the offence which could reasonably be taken. Moreover, we are not without knowledge of the views which actuated the learned judge in inflicting so great a punishment. His Honour stated at length his opinion of the facts, of the applicant's behaviour

and of the consequences to which it might tend. No purpose is served by traversing this statement. But it contains many observations which support and confirm the conclusion that his Honour took altogether too extreme a view of the matter. It may be granted that in no circumstances could the applicant be justified in causing the Lutheran boys' three huts to be burnt, that he ought not to have sent out his boys with arms upon any such enterprise, that such actions endanger the relations with the natives, and that in the motives which actuated him he was not free of resentment at the intrusion of the Lutherans in what he regarded as his field of missionary work. Allowing all this and allowing too that others must be deterred from following such an example, yet a term of five years' imprisonment appears a crushing punishment bearing no proportion either to the impropriety of the applicant's conduct or the kind of penalty which would suffice as a deterrent. After all, the offence consisted in burning three flimsy structures readily replaced. It is impossible completely to disregard the circumstantial account given by the applicant of the conditions of actual and apprehended danger in which he stood, and it is not denied that the Lutheran boys ought not to have been left in the area alone without white supervision, and that their continued presence there was unwarranted.

In these circumstances the sentence must be quashed and some other substituted.

The facts proved do not require or enable the court to set aside the applicant's plea of guilty. He must be taken to have given an intelligent assent to the advice he received so to plead. But the difficult duty now devolves upon this court of imposing upon the applicant such sentence as appears to be just in lieu of that which has been set aside. In discharging the duty of fixing a sentence the court should pay attention to the substance of the views expressed by his Honour the Chief Judge as to the tendency and significance of such actions in relation to the natives in uncontrolled areas.

Giving full effect to the considerations which depend upon the conditions prevailing in the Territory of New Guinea, it is difficult

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to believe that a greater sentence than six months' imprisonment is consistent with justice.

A sentence of six months from 1st May 1936 should be substituted.

Order that leave be granted to the applicant to appeal against the sentence of five years' imprisonment with hard labour imposed by the Supreme Court of the Territory of New Guinea. Further order that such appeal be treated as instituted and be dealt with forthwith. Allow appeal and reduce sentence to six months' imprisonment from 1st May 1936 with hard labour.

Solicitors for the applicant, *Frank Brennan & Co.*, Melbourne.

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.