ATTORNEY-GENERAL *v.* DUKHU

[Appellate Jurisdiction (Hyne, C.J.) November 15th, 1953]

S. 38 (1) *of the Penal Code—dismissal of charge—trivial circumstances.*

The respondent made a false report at Ba Police Station on 31st May, 1953. He was then charged with the offence of giving false information to a public servant contrary to section 128 of the Penal Code.

Due to a misunderstanding as to what was said by the Prosecutor and defending Counsel, the 1st Class Magistrate at Ba at the trial recorded the fact that the accused was mentally deficient. Part of his judgment read as follows:—

> "It is obvious that this man is not of a violent disposition. He merely caused inconvenience to the police. They will know him in future and can deal with him accordingly. Order is that although case is proved it will be dismissed in accordance with section 38 of the Penal Code.
> Case dismissed."

The prosecution appealed, one ground of appeal being that the Magistrate erred in holding that the offence was trivial.

HELD.—When an offence has been deliberately committed it cannot be trivial.

Cases referred to:—
Eversfield v. Story [1942] 1 K.B. 437.
Gardner v. James [1948] 2 A.E.R. 1069.
Rennie v. Boardman, 111 L.T.R. 714.

B. A. Doyle, Q.C., Attorney-General, for the appellant.

K. P. Mishra for the respondent.

HYNE, C.J.—Section 38 (1) of the Penal Code, as amended by the Penal Code (Amendment) Ordinance, No. 21 of 1950, reads as follows:—

> "Where, in any trial before a Magistrate's Court, the Court thinks that the charge against the accused person is proved but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or the trivial nature of the offence or to the extenuating circumstances in which the offence was committed, it is not expedient to inflict any punishment, the Court may, without proceeding to conviction, make an order dismissing the charge."

It is not clear from the learned Magistrate's decision as to what particular condition set out in section 38 was the cause of the dismissal of the charge. The Attorney-General therefore very properly in his grounds of appeal dealt with all possibilities, although he did say that presumably the learned Magistrate based his dismissal on the mental condition of the accused.

It is desirable, I think, that the section should be considered at some length, as was done by the learned Attorney.

He addressed himself, in the first place, to the question of triviality and cited the case of *Rennie v. Boardman,* 111 L.T.R. at p. 714. In this case the Education Authority of the Borough of Oldham obtained an order against the parent of a defective child requiring him to send the child to school until it attained the age of sixteen years. The parent disobeyed the order and upon information being preferred against the parent for non-compliance with the order there was urged on his behalf, amongst other things, that the offence was of so trifling a nature that the parent ought not to be convicted. The Justices were of the opinion that the contentions of the parent, including the one to which I have made special reference, were well founded, and dismissed the information.

On a case stated by the Justices of the Peace for the County Borough of Oldham it was held that since there had been a wilful disobedience of the order the Justices were not entitled to treat it as a trifling offence of such a character as to dismiss it under section 1 of the Probation of Offenders Act, 1907. The provisions of this section are similar to the provisions of section 38 of our Penal Code.

Mr. Justice Avory in the concluding portion of his judgment said as follows:—

> " In my opinion the whole of these contentions were bad, and there then remains but one question for us to consider—namely, whether the justices were warranted under section 1, sub-section 1, of the Probation of Offenders Act, 1907, in dismissing the information. On more than one occasion it has been pointed out by this Court that the provision in the Statute of 1907 does not allow the justices to go to the length of saying that a particular offence created by a statute is, in their opinion, a trifling one, and that therefore they will not put the law into force. It only entitles them to say that when an offence has been committed the circumstances surrounding the whole affair make it an offence of a merely trifling nature. In the present instance the offence consists in a kind of disobedience which, unless it is checked, will go on increasing from day to day, and will, no doubt, increase in frequency, and it is not right, therefore, for the justices to say that it is an offence of so trifling a nature that they ought not to convict the person charged with it."

In this case of *Gardner v. James* [1948] 2 A.E.R. p. 1069, the respondent was charged with driving a motor cycle on the road without there being in force in relation to the use of it by him a policy of insurance or security for the third party risks. The Justices dismissed the charge under the *Probation of Offenders Act,* 1907, section 1 (1) on the ground that the respondent was of good character and having regard to the extenuating circumstances in which the offence was committed. The Court held that this was not a case of an offence of a trifling nature and there were no reasons constituting special circumstances entitling the Justices to suspend the licence.

Lastly, reference was made to the case of *Eversfield v. Story* [1942] 1 K.B. at p. 437. This was a case in which a person had refused to submit to medical examination under the National Service Act, 1941.

The head note contains the following:—

> "The discretion vested by the Act"—that is to say the Probation of Offenders Act, 1907—"in Courts of summary jurisdiction is wide and the High Court will not interfere with the lawful exercise of that discretion, but the Act is not to be used as a means of evading the law or of encouraging persistent offenders in their contumacy."

The learned Attorney-General submitted, therefore, that where there is a deliberate commission of an offence the offence cannot be trivial. With this submission I entirely agree.

In the present case the respondent gave information to the police as a result of which the man Mannu might have had to appear before the Court on the very serious charge of arson, the maximum punishment for which is imprisonment for life. There was no question of a mistake on the part of the accused. Reporting to the police was a deliberate act on his part. That the charge against the respondent is of a trivial nature cannot therefore be sustained.

It is necessary now to consider the question of extenuating circumstances. As the Attorney-General says, if the Magistrate based his finding on extenuating circumstances it can only have been based on the remark of the Magistrate that the accused merely caused inconvenience to the police.

If this were the extenuating circumstance it should have been considered in conjunction with all the facts of the case. It is true the accused was soon found out, but this cannot be regarded as an extenuating circumstance weighed against the circumstances of the case.

Case remitted to the Magistrate for re-hearing.