R. v. J.W.H.CURTIS **Supreme Court Review Case No. 2 of 1994**
(Magistrate's Court Case No. MC/CRIM/85/93)

Judgment on Review

On the 29th November 1993 James Curtis, the defendant in this case, then aged 20, was charged before the Senior Magistrate, Mr. James Wood, as follows:-

"That you at Stanley on the 31st October 1993, without lawful cause damaged by fire a peat shed and storage shed containing the items listed on the attached schedule belonging to Kevin Connolly and the building and fixtures known as Kingdom Hall belonging to Arthur Nutter intending to damage such property or being reckless as to whether such property would be damaged contrary to sections 1 (1) and 1 (3) Criminal Damage Act 1971."

The defendant pleaded guilty to the charge and asked that two other offences of criminal damage committed at different times on the same day be taken into consideration. These comprised the breaking of a window in premises belonging to Kevin Connolly and the scratching of the paintwork of a Landrover belonging to a Mr. Vincent.

The damage to the peat shed, the storage shed and its contents and to Kingdom Hall was estimated at approximately £48,000. Compensation was not claimed for this damage. Compensation was, however, claimed for the broken window and for damage to the Landrover.

The Senior Magistrate sentenced the defendant to 2 years' detention in a young offender institution. He imposed no separate penalty for the two acts of criminal damage taken into consideration, and he stated that in view of the custodial sentence he made no order for compensation.

The warrant of commitment of the defendant to two years' detention in a young offender institution stated as follows:-

> "Offence: Criminal Damage (arson) Contrary to Sections 1(1) and 1(3) Criminal Damage Act 1971
>
> The accused was on 29th November 1993 convicted of the above offence, which is punishable with imprisonment in the case of a person aged 21 or over, and the court is satisfied -
>
> (a) that the circumstances, including the nature and the gravity of the offence, were such that if the accused were aged 21 or over the court would pass a sentence of imprisonment; and
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> (b) that the offender qualifies for a custodial sentence on the ground that the offence was so serious that a non-custodial sentence for it cannot be justified."

The defendant was represented by Mr. Henderson of Messrs. Ledingham Chalmers. No appeal against sentence was lodged by the defendant or his counsel; but on the 2nd June 1994 Mr. Alan Barker of Ledingham Chalmers, who had taken over from Mr. Henderson, with the agreement of the Attorney-General, wrote to the Registrar of the Supreme Court requesting a review of the Senior Magistrate's decision by a judge of the Supreme Court under section 53A of the Administration of Justice Ordinance on the grounds that, while a custodial sentence might have been appropriate, the term of sentence imposed by the Senior Magistrate in this case was harsh and excessive.

Accordingly the Senior Magistrate's file of the proceedings before him in this matter has been forwarded to me together with the representations thereon of the Attorney-General and Mr. Barker.

It appears from these representations that both the Attorney-General and Mr. Barker believe that the imposition of a custodial sentence by the Senior Magistrate in this case was justified. Both are of the view, however, that in the particular circumstances obtaining in this case and in the light of the much more lenient sentence imposed in a case of arson to Christ Church Cathedral, Stanley, in 1987 - R. v. Harris (Supreme Court Criminal Case No. 1 of 1988), where the defendant was sentenced to a fine of £200 and to pay £200 in compensation, the sentence of two years' detention in a young offender institution in the present case was harsh and excessive and should be reduced - in the view of the Attorney-General, to twelve months' detention, and in the view of Mr. Barker to such a period as would ensure the defendant's immediate release.

It is accepted that it is the facts of this case and the circumstances arising from them that have given rise to this request for a review of the sentence passed by the Senior Magistrate.

All that the Senior Magistrate was told after the defendant's plea of guilty to the charge of arson in the proceedings on the 29th November 1993 was as set out in the Police Summary contained in the court file. This states as follows:-

"1. During the weekend of the 30/31 October 1993, there were several incidents at Deano's Bar and Mr. Curtis the accused was involved with a couple of other young persons in some of these incidents. Some of these matters will be coming before this court in due course.

2. Mr. Curtis felt aggrieved at the way he and some of his friends had been treated by the owner of Deano's Mr. Connolly and one of his associates a Mr. Vincent during some of these incidents and he decided that he would take some revenge.

3. On the 31st October 1993, at 2230 hours approx., Mr. Curtis along with another young person went to the home of Mr. Vincent who had his Discovery Landrover index number F188 B outside his home on Endurance Avenue. Mr. Curtis took a coin and scratched the vehicle the whole length of the driver's side causing considerable damage estimated at £428.07, they were then disturbed by Mr. Vincent and ran off.

4. They ran down Dean Street and ended up in a peat shed behind Deano's Bar. Mr. Curtis noticed some cardboard boxes stacked up in the shed and he decided to set fire to them to get back at Mr. Connolly. He then told the other young person to go home and after he left he set fire to the boxes and ran off."

The summary goes on to state that the fire spread from the boxes to the peat shed, thence to the storage shed and then to Kingdom Hall.

According to the summary the defendant was arrested early on the 1st November and when cautioned he admitted starting the fire. He asked if the offences of criminal damage to Mr. Vincent's Landrover and in the breaking of a window at Monty's Restaurant could be taken into consideration. He had no relevant previous convictions.

The Senior Magistrate's record shows that on inquiring when "the incidents" referred to in the summary took place the court was told that these occurred late on Friday night/Saturday morning (29th/30th October); late on Saturday night/Sunday morning (30th/31st October), and on the evening of Sunday 31st October after 1800 hours.

Just above this there is a note that Inspector Morris for the prosecution referred to "T.I.C.'s" (i.e. the offences the defendant had asked to have taken into consideration).

It does not appear, however, that the Senior Magistrate was told what "the incidents" were, nor does it appear that there were any incidents on the night of Friday/Saturday (29th/30th October) as stated by Inspector Morris. It is not clear whether the Senior Magistrate was told how the window in Monty's Restaurant came to be broken by the defendant: nothing is said in the summary as to how this occurred.

Mr. Henderson, who appeared for the defendant, gave the court very little further information. According to the Senior Magistrate's notes Mr. Henderson told the court that a number of things happened that weekend that seemed to show a detiorating situation: one thing gave rise to something else which gave rise to yet more; he understood that the smashing of a window on the Saturday was unconnected with the argument that arose on Sunday night. He is then recorded as saying that the arson attack "took place as a result of the Sunday night event no premeditation".

Nowhere in his address, however, does Mr. Henderson tell the court what were the events of the weekend which culminated in the arson.

The Senior Magistrate did have before him a social welfare report on the defendant. This referred to the defendant's distress and anger when one of his close friends was beaten up; it refers to the defendant's poor relationship with Mr. Parr, his erstwhile landlord, and it states towards the end "There had been some trouble before the fire and when there was more trouble on the 1st November he (the defendant) 'flipped'."
(The reference to the 1st November should, it seems, be to the 31st October)

The Senior Magistrate had received no information, however, either from the prosecutor or Mr. Henderson as to there being any connection between the beating up of the defendant's friend and the defendant's relations with Mr. Parr and the events of the weekend.

It is not surprising therefore that the learned Senior Magistrate should have taken the view that he did: that this was a serious offence motivated by revenge.

If, in saying to the defendant: "Whilst you may not previously have considered committing the act, it is clearly something which had been simmering all that weekend", the learned Magistrate meant that the act of arson had been 'simmering' all the weekend, there was, as the Attorney-General has pointed out, no evidence before the Senior Magistrate to suggest such a statement.

Nevertheless, and accepting that the setting fire to the cardboard boxes was an unpremeditated act of revenge, it does not appear to me that the learned Senior Magistrate was wrong in finding that this was a serious offence for which on the facts as given to him a sentence of two years' detention was justified.

The Senior Magistrate was not referred to the case of R. v. Harris in which the defendant, a young serviceman of 18, serving with the military forces in the Falkland Islands, pleaded guilty to committing an act of arson in Christ Church Cathedral. He had been effectively in custody for the three months from the date of the offence to trial. He was sentenced to pay a fine of £200 and to pay £200 in compensation.

That was, however, a very different case from the present case. The defendant Harris was an expatriate serviceman who had only spent a few weeks in the islands. He was suffering from some psychiatric stress and appeared to have been motivated primarily in his act of arson in drawing attention to himself and his distress. The fire he caused in the cathedral in mid-afternoon of the 31st December 1987 caused a lot of mess but minimal damage and there was little risk of its spreading to other buildings in Stanley before it was detected.

The defendant in this case, however, has spent most of his life in Stanley; he should have been fully aware of the danger of lighting a fire near wooden buildings in the residential area of Stanley; motivated by revenge he lit a fire surreptitously late at night and then ran off leaving it to burn.

While it seems to me unlikely that the Senior Magistrate would have passed a different sentence had he been referred to Harris's case, it is likely that reference to the case would have led him to give more detailed reasons for imposing a sentence of considerably greater severity than that imposed in the earlier case.

The events which were not disclosed to the Senior Magistrate and which culminated in arson on the night of the 31st October are now set out in the representations made by the Attorney-General and Mr. Barker for the purposes of this review. These events appear to have been restricted to the night of Saturday, 30th/31st October and to the night of Sunday, 31st October, and were as follows.

Early on the evening of the Saturday the defendant was present at Deano's Bar where a group of people (whom he took to be service personnel) were singing a pro-Argentine song. This annoyed the defendant, who as a boy had experienced the conflict with Argentina in the Falklands; it also annoyed a number of the local people who protested but were ejected by the management. This angered the defendant.

Later that evening the defendant went to a local club where he discussed the incident at Deano's Bar with a group of friends. After the club closed, and in the early hours of Sunday morning, the defendant and German Lazo, a close Uruguayan friend, were returning to the YMCA. As they passed Deano's Bar, which was closed, they heard the sounds of a party going on within. Still angry at what had occurred there earlier that night, the defendant threw a stone through a small side window of the premises (comprising, I assume, Monty's Restaurant) and then ran off. Lazo had no part in this and it seems was told to run off by the defendant before he threw the stone. Lazo was seen by Mr. Parr who was behind the building and after the breaking of the window, Mr. Parr, Mr. Vincent and Mr. Connolly (the owner of the premises) chased Lazo and the defendant. They caught them but the defendant got away and returned to the YMCA where

he lived.

Lazo, however, was taken by the three men back to Deano's where he was questioned by them and, it seems, assaulted by Connolly.

Still in the early hours of Sunday morning Lazo was taken by the Police to the YMCA. He was very distressed. He told the defendant what had happened to him and his story enraged the defendant. (This is the incident referred to in the Social Welfare report referred to earlier).

That evening (Sunday) the defendant and another friend, a Mr. Simpson, went to Deano's Bar. As they entered they were seized by two of the men involved in the chase the previous night. The defendant was hit by Mr. Connolly and told to leave and as he and Simpson were leaving Connolly assaulted Simpson.

Later that night, accompanied by Simpson and still angry at the assaults on Lazo, Simpson and himself, the defendant went to Mr. Vincent's house and there deliberately scratched the paintwork of Mr. Vincent's Landrover. On being disturbed at this by Mr. Vincent the defendant and Simpson ran off and hid behind Deano's Bar. It was there that he found the cardboard boxes and decided to set them alight "to get back at Mr. Connolly" as the police summary puts it.

In my view all this information as to the events preceding the arson was relevant and should have been given to the Senior Magistrate after the defendant had pleaded guilty to the offence of arson and had asked that the offences relating to the breaking of the window and the scratching of Mr. Vincent's Landrover should be taken into consideration in sentencing him. Both Inspector Morris for the prosecution and Mr. Henderson for the defendant were under a duty to the court and to the defendant to give to the court a full account of the events relating to these offences.

It now appears that the Senior Magistrate was not supplied with a full account of what occurred on the Saturday and Sunday nights because Messrs. Connolly, Vincent and Parr had been charged with false imprisonment of the defendant's friend German Lazo on the night of the 30th/31st October and Mr. Henderson had accepted instructions to represent Mr. Vincent

when that matter came up for trial. It appears that the prosecution feared that divulgence of information relating to the offence against Mr. Lazo might prejudice the Senior Magistrate and disqualify him from trying the charge of false imprisonment and any other charges arising from the weekend's events.

This would account for the vague wording of the first paragraph of the Police Summary quoted earlier ending with the sentence: "Some of these matters will be coming before this court in due course."

It seems to me that this paragraph may well have led the Senior Magistrate to believe that there were other matters involving the defendant which were to come before him. This was not the case, but the paragraph may have had the effect of inhibiting the Senior Magistrate from inquiring more deeply into the facts. It behoved him on a plea of guilty to be fully apprised of the facts of the case before sentencing and it seems clear in this case that he was not fully apprised of the facts. There is nothing in his notes, for instance, to show how the window in Monty's Restaurant came to be broken by the defendant, which was an offence he was asked to take into consideration.

It was for the Senior Magistrate to decide, in consultation with the prosecution and the defence, if necessary, when the subsequent case or cases arising from the events of the 30/31st October came before him for trial, whether or not he was disqualified on the grounds of prejudice from dealing with the case in question. It was not for the prosecutor to withhold information relevant to the charges before the court because he feared such information might disqualify the Senior Magistrate from dealing with a later case arising from the same events, and it was for the Senior Magistrate to ensure that he was in possession of all the relevant facts relating to the charges before him, including the offences to be taken into consideration, before he came to sentence the defendant.

I can appreciate that in local circumstances, with only one Senior Magistrate, his disqualification from dealing with a case can cause difficulty. Nevertheless it is essential in the interests of justice that the prosecution supply the court with all the information in its possession relevant to the offence with which the defendant is charged and, as in this case, with offences to be taken into consideration.

As far as Mr. Henderson was concerned: his duty was to do the best he could for his client and if, as appears to have been the case in this case, Mr. Henderson found himself embarrassed in giving to the court the full facts of the defendant's case according to his instructions from the defendant because he was subsequently to defend Mr. Vincent in the same court, then it was his duty either to have relinquished the defendant's case before it came to court or to have relinquished his defence of Mr. Vincent. As it was he failed in his duty to the court and to his client in not giving the courta full account, according to his client's instructions, of the events relating to the offences before the court.

In the present case it is clear in my view that the learned Senior Magistrate was not aware of all the relevant facts in this case when sentencing the defendant. Had he been aware of all the facts and had his attention been drawn to the case of R. v. Harris it is possible that he would have passed a sentence less severe than that of two years' detention in a young offender institution.

While it does not appear to me with the information now available and bearing in mind the sentence passed in R. v. Harris that the sentence passed by the Senior Magistrate in this case was manifestly excessive or wrong in principle, I have decided in all the circumstances, in view of the representations made by the Attorney-General and Mr. Barker as to the severity of the sentence passed by the Senior Magistrate and having regard to the report on the defendant by Mr. Peck of the YMCA and the reports on the good behaviour of the defendant during the service of his sentence, to substitute for the sentence passed by the learned Senior Magistrate a sentence of one year's detention in a young offender institution, and I so order. If, however, the effect of this order, taking into consideration any remission of sentence due to the defendant under the Prison Ordinance, is that the defendant has served this sentence then (but not otherwise) I direct that he be released forthwith.

In concluding this judgment there are three procedural matters arising from this case on which I feel I should comment. These are as follows:-

(1) The correct charge for an offence contrary to section 1(1) and (3) of the Criminal Damage Act 1971

By section 6 of the Crimes Ordinance 1989 the English Criminal Damage Act 1971 is applied to the Falkland Islands. The defendant in this case was charged with the offence of damaging property by

fire contrary to section 1(1) and (3) of that Act.
Section 1(3) of the Act provides: "An offence committed under this section by destroying or damaging property by fire, shall be charged as arson".

The defendant should therefore have been charged with the offence of arson. An example of the correct form of charging this offence is set out in the current edition of Archbold Criminal Pleading, Evidence and Practice (1994 Re-issue Volume 2) paragraph 23-15. This should be followed.

(2) The correct procedure for taking offences into consideration

The defendant in this case pleaded guilty to the offence of arson and asked that two other offences be taken into consideration. There is a well-established procedure relating to offences which the defendant has asked should be taken into consideration which it would not appear from the record was followed in this case.

The procedure is fully described in the current edition of Archbold (1993 Volume 1, paragraph 5-52) citing Scarman L.J. in R. v. Walsh (unreported, March 8th 1973). From this it will be seen that the principal requirement is that the Police should have prepared a list of the offences the defendant has said he wishes to have taken into consideration. This list should be served upon the defendant and, after he has had an opportunity of studying it, he should be asked to sign it. It is then for the court when it comes to sentencing the defendant to make sure that the defendant has studied the list, understands it and agrees to have the offences listed taken into consideration for the purpose of sentencing.

None of this appears to have been done in this case, and it does not appear from the Senior Magistrate's notes that he ever asked the defendant whether he wished to have taken into consideration the two offences referred to by the prosecutor as being offences the defendant wished to have taken into consideration. It does not appear that the defendant was in any way prejudiced by

this omission in this case, but this may not always be the case, and the proper procedure should be followed in future.

(3) The statutory requirements in sentencing an offender to a sentence of detention in a young offender institution

It appears that the Senior Magistrate in sentencing the defendant to detention in a young offender institution failed to follow the somewhat complex provisions as to such a sentence laid down in the Criminal Justice Ordinance 1989 relating to the custody and detention of persons under 21. These provide in so far as relevant to this case as follows:-

"20.(1) No court shall pass a sentence of imprisonment on a person of or over twenty-one years of age on whom such a sentence has not previously been passed by a court in the Falkland Islands unless the court is of opinion that no other method of dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition.

(2) Where the Magistrate's Court or Summary Court passes a sentence of imprisonment on any such person as is mentioned in subsection (1) above, the court shall state the reason for its opinion that no other method of dealing with him is appropriate, and cause the reason to be specified in the warrant of commitment and to be recorded on the court file relating to the proceedings in question."

"22.(3)....the only custodial orders that a court may make where a person under twenty-one years of age is convicted or found guilty of an offence are -

(a) a sentence of detention in a young offender institution under section 23 below;....

(4) A court may not -

(a) pass a sentence of detention in a young offender institution... unless it is satisfied -

(i) that the circumstances, including the nature and gravity of the offence, are such that if the offender were aged twenty-one or over the court would pass a sentence of imprisonment; and

(ii) that he qualifies for a custodial sentence.

(5) An offender qualifies for a custodial sentence if -

(a) he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or

(b) only a custodial sentence would be adequate to protect the public from serious harm from him; or

(c) the offence of which he has been convicted or found guilty was so serious that a non-custodial sentence from it cannot be justified.

"23.(1)....where -

(a) a male offender under twenty-one but not less than fourteen years of age.... is convicted of an offence which is punishable with imprisonment in the case of a person aged twenty-one or over; and

(b) the court is satisfied of the matters referred to in section 22(4) above,

the sentence that the court is to pass is a sentence of detention in a young offender institution."

"26.(1) Subject to subsection (3), the provisions of sections 20 and 21 above shall apply in relation to a person under twenty-one years of age as they do to a person above that age with the modifications required by subsection (2) below.

(2) The modifications referred to in subsection (1) above are the substitution of a reference to a youth custody sentence... for any reference to a term of imprisonment.

(3) Where -

(a) ....

(b) the magistrate's court or the summary court passes a sentence of detention in a young offender institution,

it shall be its duty -

(i) to state in open court that it is satisfied that he qualifies for a custodial sentence under one or more of paragraphs 22(4) above, the paragraph or paragraphs in question and why it is so satisfied; and

(ii) to explain it to the offender in open court and in ordinary language why it is passing a custodial sentence on him."

The defendant was under twenty-one when he appeared before the Senior Magistrate and had never previously been sentenced to youth custody.

By virtue of section 22(3) as read with section 23(1) the only custodial sentence open to the court was therefore detention in a young offender institution.

Under section 22(4) (a)(i) (and assuming that the words from "unless" to the end of this subsection are intended to apply to paragraphs (a) and (b) - which in my view is the only possible interpretation in the construction of this paragraph) the Senior Magistrate had to be satisfied that if the defendant had been of or over twenty-one he would have sentenced him to imprisonment. This entailed referring to section 20(1) and deciding whether any method of dealing with the defendant (assuming he was of or over twenty-one and had never previously been sentenced to imprisonment) other than imprisonment was appropriate in his case.

After complying with the further provisions of section 20(1) (relating to the consideration of all the circumstances, the character and physical and mental condition of the defendant) and of section 21(1) (requiring the court to obtain a social inquiry report on the defendant), under section 22(4)(a)(ii) the Senior Magistrate had then to be satisfied that the defendant qualified for a custodial sentence under section 22(5).

In the case of the defendant the Senior Magistrate appears to have decided (rightly in my view) that the defendant qualified for a custodial sentence under section 22(5)(c).

Section 20(2) as read with section 26(1) and (2) required the Senior Magistrate to state the reason for his opinion that no method of dealing with the defendant other than a sentence of youth custody was appropriate. Section 26(3)(b) required the Senior Magistrate (i) to state in open court that he was satisfied that the defendant qualified for a custodial sentence, specifying under which paragraph of section 22(4) (sic - though this must be intended, I think, to refer to subsection (5) of section 22) he considered the defendant qualified and giving his reasons why he was satisfied that the defendant qualified and (ii) to explain to the defendant why he was passing a custodial sentence on him.

In passing sentence the learned Senior Magistrate gave his reasons for his opinion that the defendant's offence of arson was a serious offence deserving an exemplary sentence.

To fulfil the statutory requirements of section 20 as read with section 26(1) and (2), section 22(4)(a)(i) and section 23(1)(b), section 22(4)(a)(ii) and section 26(3)(b) it would have been sufficient in my view for the learned Magistrate merely to have gone on to say that having regard to the view he took as to the seriousness of the offence he was of the opinion that no method of dealing with the defendant other than by a custodial sentence was justified and that the defendant qualified for such a sentence under section 22(5)(c) of the Criminal Justice Ordinance 1989.

In my view the further requirement of section 20(2) that the court should cause the reason for its opinion that no method of dealing with the offender other than by passing a custodial sentence to be specified in the warrant of commitment was sufficiently complied with in this case.

The fact that the learned Senior Magistrate failed to comply with some of the procedural requirements of the provisions of the Criminal Justice Ordinance 1989 set out above resulted in no injustice to the defendant and did not in my view constitute a material irregularity in

any way invalidating his decision. Nevertheless care should in future be taken in cases such as this, where a custodial sentence is passed on an offender under twenty-one, to carry out the procedural duties imposed on the courts by these provisions of the Ordinance.

Renn Davis
Chief Justice

2nd September 1994