1979 December 12

[A. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

MOHAMED EL-SAYED OSMAN,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 4081).

Criminal Law—Sentence—Burglary and theft—Concurrent sentences of two years' imprisonment—And one month's concurrent imprisonment for malicious injury to property—Not manifestly excessive—Primary responsibility of evaluating the facts and curcumstances relevant both to the offences and the offender and impose the appropriate sentence lies with the trial Judge.

Criminal Procedure—Imprisonment—Commencement of sentence of imprisonment—Not taking into consideration period that imprisoned person has been in custody prior to his trial—Clear indication and some reasons for doing so should appear in the record—Section 117 *of the Criminal Procedure Law, Cap.* 155 (*as amended by Law* 2/75).

The appellant, an Egyptian sailor 26 years of age who was temporarily living in Limassol, pleaded guilty to three counts for the offences of burglary and theft and was sentenced to two years' imprisonment and to one count for the offence of malicious injury to property and was sentenced to one month's imprisonment, all sentences to run concurrently. These sentences were recorded to commence as "from to-day", that is the day they were pronounced.

Section 117 of the Criminal Procedure Law, Cap. 155 (as amended by Law 2/75) provides that a sentence of imprisonment commences from the date on which it is pronounced, but its length is, unless the Court otherwise directs, reduced to the extent of the period that the imprisoned person has been in

custody. When the word "to-day" is inserted in the relevant warrant of commitment to prison upon conviction the Prison Authorities take it as a direction by the Court that the period of imprisonment should not be reduced by the period during which the convicted person had been in custody under the provisions of the Criminal Procedure Law.

Prior to his trial on the 21st September, 1979, the appellant had been in Police custody since the 2nd July, 1979.

Upon appeal against sentence:

Held, (1) that the trial Judge correctly appreciated the situation when he felt that he would be justified in imposing the sentences against which this appeal is lodged; and that there is no reason to interfere with the sentence imposed by the trial Judge who had the primary responsibility of evaluating the facts and circumstances relevant both to the offences and the offender and impose the appropriate sentence.

(2) That it cannot be ascertained from the record if the trial Judge intended that the sentence should not be reduced by the period of almost 2 1/2 months the appellant had been in police custody prior to his trial; that, moreover, as nothing in the record shows that the trial Judge was informed that the appellant was in such custody and that he did exercise his discretion in the circumstances against the application by the Prison Authorities of section 117 of Cap. 155 (as amended by Law 2/75) the imprisonment of the appellant should be calculated in such a way as to include therein any period he served in Police custody and as if no direction to the contrary had been made by the trial Judge; and that, accordingly, the appeal must be allowed to that extent.

Appeal partly allowed.

Per curiam:

We take this opportunity to draw the attention of Courts exercising criminal jurisdiction to this matter, so that if they do really wish the period that a person had been in custody prior to his trial not to be taken into consideration in computing the period of sentence, a clear indication and some reasons for doing so should appear in their records.

Appeal against sentence.

Appeal against sentence by Mohamed El-Sayed Osman who was convicted on the 21st September, 1979 at the District Court of Limassol (Criminal Case No. 9510/79) on three counts of the offence of burglary and theft, contrary to sections 292(a), 255 and 262 of the Criminal Code, Cap. 154 and on one count of the offence of malicious injury to property, contrary to section 324(1) of Cap. 154 (as amended by Law 4/74) and was sentenced by Eleftheriou, D.J. to two years' imprisonment on each of the burglary and theft counts and to one month's imprisonment on the malicious injury count, the sentences to run concurrently.

M. Iacovou, for the appellant.

R. Gavrielides, Counsel of the Republic, for the respondents.

A. Loizou J. gave the following judgment of the Court. This is an appeal against sentence on the ground that same is manifestly excessive. It was filed by the appellant personally. But when it came up for hearing before us, at his request, an advocate was assigned and afforded facilities to appear on his behalf as in view of the gravity and the other circumstances of the case, including the fact that he is a foreigner this course was considered to be desirable in the interests of justice.

The appellant was found by the District Court of Limassol guilty on his own plea on four counts, three of them being offences of burglary and theft, contrary to sections 292(a), 255 and 262 of the Criminal Code, Cap. 154, for which he was sentenced to two years imprisonment on each one of them, and the fourth count being for the offence of malicious injury to property, contrary to sections 324(1) of the Criminal Code, Cap. 154, as amended by the Increase of Fines (Certain Statutory Provisions) Law, 1974 (Law No. 4 of 1974), and sentenced to one month's imprisonment. All terms of imprisonment were ordered, however, to run concurrently.

The particulars of the said offences, as they appear from the charge-sheet, are that on the 1st April, 1979, at Limassol, at night time, the appellant did break and enter into rooms Nos. 4, 6 and 8, of the "REX" Pension, used as human dwellings, and stole therefrom:

(a) The sum of £65.100 mils in cash, four coins of Philippines and a chain with two keys, the property of the occupant of the first room.

(b) £100.–in cash, the property of the occupant of the second room.

(c) £2.–in cash, 12 U.S.A. dollars, five necklaces, valued at £15.–and a wallet valued at £1.–, a note-book containing one U.S.A. dollar and a broach, valued at £1.–, the properties of the two occupants of the third room.

(d) He destroyed the glass–pane of a door of the Pension valued at £5.–

The facts of the case as they appear from the record are these:

On the night of the 1st April, 1979, at about 3.30 a.m. the son of the proprietor of Rivoli Cabaret and a friend of his, accompanied one of the complainants in this case to the said Pension which is situated at Eleni Paleologinas Street in Limassol. When they arrived there, two of them went into the Pension and when the said occupant tried to get into his room, he noticed that a stranger was therein and called out for help. They gave chase and caught the appellant on the roof of the house next door. He was holding in his hand various articles which were seized from him. He was brought back to the verandah of the Pension and detained there until the arrival of the Police who arrested the accused and took up the investigation of the case. The articles which the appellant was holding, together with those which were found on him and on the verandah of the house, were seized by the Police and eventually identified by the occupants of the rooms as above set out. Whilst there the appellant broke the glass–pane of the door nearer to him. He was kept in Police custody from the time of his arrest to the date of his conviction.

The appellant, an Egyptian, is 26 years of age, a sailor and was temporarily living in Limassol at the time.

Having given our best consideration to what has been stated on behalf of the appellant and bearing in mind the totality of the circumstances of this case, as well as the circumstances personal to the appellant, we have come to the conclusion that the trial Judge correctly appreciated the situation when he felt that he would be justified in imposing the sentences against which this appeal is lodged. We see no reason whatsoever to interfere with the sentence imposed by the learned trial Judge

who had the primary responsibility of evaluating the facts and circumstances relevant both to the offences and to the offender and impose the appropriate sentence. There is, however, one matter that merits our consideration.

Section 117 of the Criminal Procedure Law was amended by the Criminal Procedure (Amendment) Law 1975 (Law No. 2 of 1975) so that a sentence of imprisonment commences from the date on which it is pronounced, but its length is however, unless the Court otherwise directs, reduced to the extent of the period that the person imprisoned has been in custody under the provisions of this Law.

The sentences of imprisonment imposed on the appellant are recorded to have been as from "to-day", that is, the day they were pronounced. The warrant of commitment to prison upon conviction—Criminal Form 50—was duly filled and signed, and in the space recording the date as from which the Officer in-charge of the Prison was to receive the convict, the word "to-day" was inserted. Upon inquiry with the Prison Authorities through the kind services of learned counsel for the Republic appearing before us, we have been informed that when the word "to-day" is inserted as above, the Prison Authorities take it as a direction by the Court that the period of imprisonment should not be reduced by the period during which the convicted person had been in custody under the provisions of the Criminal Procedure Law.

We cannot ascertain from the record if the trial Judge intended that the sentence imposed by him on the appellant should not be reduced by the period he had been in Police custody prior to his trial, namely, from the 2nd July, 1979, to the date of conviction. As moreover nothing in the record shows that the learned trial Judge was informed that the appellant was in such custody for almost 2 1/2 months and that he did exercise his discretion in the circumstances against the application by the Prison Authorities of section 117 as amended by Law No. 2 of 1975, we feel that the imprisonment of this appellant should be calculated in such a way as to include therein any period he served in Police custody and as if no direction to the contrary had been made by the trial Judge. The appeal, therefore, is allowed to that extent.

We take this opportunity to draw the attention of Courts exercising criminal jurisdiction to this matter, so that if they do really wish the period that a person had been in custody prior to his trial not to be taken into consideration in computing the period of sentence, a clear indication and some reasons for doing so should appear in their records.

Appeal partly allowed.