1988 September 27

(MALACHTOS PIKIS, PAPADOPOULOS, JJ)

NIKI FILIMONIDES,

Appellant,

v.

IMPROVEMENT BOARD OF STROVOLOS,

Respondents.

(Criminal Appeal No. 4989).

Sentence — Variation, on review of by Court that imposed it — Prohibited, if judgment has been signed (The Criminal Procedure Law, Cap. 155, section 113(2)) — Otherwise, there exists power to do so, in case of an Assize Court, before the end of a session, and in case of other inferior courts, before the end of sitting — Such power should be sparingly exercised — Conviction for suffering erection of a building without a permit and suffering use of such building without a certificate of approval — Imposition of a fine and order for costs — Sentence varied on another day by issuing a demolition order — Quashed

Judgments and orders — Rectification of omission — Principles applicable — Omission to issue a demolition order upon conviction for suffering the erection of a building without a permit and suffering its use without a certificate of approval — It cannot be rectified.

The appellant was found guilty for suffering the erection of a building without a permit, and suffering the use of the building without a certificate of approval.

The Judge proceeded and passed a sentence of a fine and awarded £60.- costs in favour of the prosecution.

Before leaving the Court room counsel was recalled by the Court and asked to raise her submissions, if any, concerning the application for a demolition order. Counsel declined the invitation and asserted that the sentencing process had come to an end.

When further similar efforts of the Judge failed to persuade her to address the Court on the matter, the Judge directed the

resummoning of the appellant on another day On such a day the Judge issued a demolition order

Hence this appeal

Held, *allowing the appeal* (1) An order may be readily rectified if it aims to remedy an omission of a character that would have been, in the words of Judge Rubin in *R v Michael** «supplied as a matter of course without further argument»

(2) At common law power was acknowledged to the Assize Court and inferior Courts to vary a sentence after pronouncement, provided the power was exercised in the case of the Assize Court before the end of the session and, in the case of other Courts, before the end of the sitting of the Court

(3) The power of a Court is further limited by the provisions of s 113(2) prohibiting a variation or review of the judgment of the Court after it is signed

(4) Moreover, the power to vary a sentence, limited as it is, must be very sparingly exercised

Appeal allowed

Cases referred to

R v Menocal [1979] 2 All E R 510,

R v Corr [1970] Cr L R 238,

R v Maylam (27 2 1970, unreported),

R v Newsome [1970] 3 All E R 455,

R v Michael [1976] 1 All E R 629,

Golden Sea-Side Estate Co Ltd v The Municipal Corporation of Famagusta (1973) 2 C L R 58,

Salamis Holdings Ltd v Municipality of Famagusta (1973) 2 C L R 239

Appeal against sentence.

Appeal against sentence by Niki Filimonides who was convicted on the 21st April, 1988 at the District Court of Nicosia (Criminal Case No 11509/86) on one count of the offence of suffering the

---

* *[1976] 1 All E R 629 632*

erection of a building without a permit contrary to sections 3(1)(b) and 20(1)(a) and 3(a) of the Streets and Buildings Regulation Law, Cap. 96 and on one count of the offence of suffering the use of a building without a certificate of approval contrary to sections 10(1) and 20(1)(a) and (3)(a) of the above Law and was sentenced by E. Papadopoulou (Mrs.), Ag. D.J. to pay £10.- fine in count 1, £5.- fine on count 2 and was further ordered to demolish the premises within two months unless in the meantime a permit is obtained.

E. Vrahimi (Mrs.), for the appellant.

P. Lysandrou, for the respondents.

Cur. adv. vult.

MALACHTOS J.: The judgment of the Court will be delivered by Pikis, J.

PIKIS J.: The power, if any, of a Court of summary criminal jurisdiction to vary or review a sentence after it is pronounced in open court, is the central issue in this appeal.

The appellant was found guilty on two charges, namely -

(a) suffering the erection of a building without a permit, and

(b) suffering the use of the building without a certificate of approval.

Before the Court passed sentence, counsel for the prosecution made a formal application for the issue of a demolition order. Also, he claimed £132.-- prosecution costs. For her part, counsel for the defendant confined her address to the question of costs, stressing that only once was the case adjourned owing to the non appearance of the accused.

The trial Judge then proceeded to pass sentence, drawing attention, as it appears from a note preceding judgment, to the fact that both the appellant and her co-accused (due to come up before the Court on a future date) were likewise responsible for the many adjournments. And for that reason she adjudged the appellant to pay, in addition to monetary sentences of ten and five pounds on each count respectively, £60.-- costs, noting that costs form part of the sentence. The matter of costs is ordinarily the last question that the Court addresses. Though to all outward appearances the sentencing process appeared to have come to an end, counsel for the prosecuting authority asked addressing

himself to the Court: «The order of demolition is issued?» («Το διάταγμα κατεδαφίσεως εκδίδεται»;)

According to counsel for the appellant the trial Judge made a remark that does not appear on the printed record, to the effect that the making of an order of demolition is presumed. Counsel for the respondents confirmed that something had been said though his recollection did not help him reproduce exactly what had been said. He gained the impression that the remark was to the effect that the question of demolition order had been overlooked. Of course, no application was made to have the record corrected, a course which should have been followed if counsel were minded to invite us to take into account something that does not appear on the printed record. It suffices to note that on a subsequent occasion, when the trial Court addressed itself to the question of demolition, it was acknowledged that the matter had been overlooked.

It is necessary to return to the events that followed in order to define and debate in its proper context, the complaint of the appellant. After the pronouncement of sentence the appellant walked towards the exit of the Court to be followed by her counsel. Before leaving the Court room counsel was recalled by the Court and asked to raise her submissions, if any, concerning the application for a demolition order. Counsel declined the invitation and asserted that the sentencing process had come to an end. Fifteen minutes later, she was called once more before the Court, unaccompanied by the appellant, for the same purpose. She persisted in her stand that the Judge was overstepping the limits of her jurisdiction. Faced with the refusal of counsel to address her on the issue of demolition, she adjourned the case to 4.4.88, coupled with a request to counsel to notify her client to attend, too. On the adjourned hearing counsel appeared without her client. Once more she submitted that the sentencing process had ended and that it was not open to the Court to deal with the question of sentence anew. Thereupon, the Court directed that the appellant be re-summoned to appear on 21.4.88. In response to the summons she appeared before the Court on the appointed day.

In a fairly detailed judgment the Court directed itself to the principles affecting the exercise of the Court's discretion to make a demolition order, to conclude that a demolition order was warranted by the facts of the case; and in exercise of her

discretionary powers she ordered the appellant to demolish the premises. Counsel for the appellant submitted that the order of demolition amounted, in essence, to the imposition of a second sentence. Counsel for the respondents acknowledged that the sentencing process appeared to have been completed with the imposition of the fine and the order for costs. Counsel for the appellant invited us to set aside the order for demolition as wholly irregular.

We took time to consider the issue for to our knowledge none of the decided cases answers directly the question raised in this appeal. Fortunately, the matter is not free of authority. The power of criminal courts to vary a sentence after it is pronounced in open court, was debated by the House of Lords in *R. v. Menocal.** At common law power was acknowledged to the Assize Court and inferior Courts to vary a sentence after pronouncement, provided the power was exercised in the case of the Assize Court before the end of the session and, in the case of other Courts, before the end of the sitting of the Court. The power to review sentence was sparingly exercised and only on the rarest of occasions was the power invoked to increase sentence. In two cases, the freedom of the Court to increase a sentence of imprisonment by invocation of this power, was doubted. *R. v. Corr*** and *R. v. Maylam****; though in *R. v Newsome***** the Court of Appeal upheld the decision of *Parker, C.J.* to vary a sentence by increasing a sentence of six months' imprisonment to seven months' imprisonment in order to make sentence immediately enforceable. In a moment of momentary aberration the Judge had overlooked the provisions of s.39 of *Criminal Justice Act 1967*, that provided that a sentence of six months' imprisonment attracted mandatory suspension.

In none of the cases traced did the Court reopen the question of sentence, as the trial Judge had done in this case. One is apt to form the impression that the Court felt free to reconsider sentence on a subsequent date notwithstanding the earlier pronouncement of sentence in open Court. An order may be readily rectified if it aims to remedy an omission of a character that would have been, in the words of *Judge Rubin* in *R. v. Michael****** «supplied as a

---

* *[1979] 2 All E.R. 510.*

** *[1970] Cr. L R 238*

*** *(27th February, 1970, unreported)*

**** *[1970] 3 All E R. 455*

***** *[1976] 1 All E R 629, 632*

matter of course without further argument». Evidently, we are not concerned with such a situation. A demolition order is, as the Judge described the punishment, a sentence of a drastic character, involving the exercise of discretionary powers on the part of the Court*. Section 113(2) of Criminal Procedure Law prohibits the alteration or revision of a judgment after it is signed, except for correcting a clerical error.

To sum up, a court of summary criminal jurisdiction has no power to vary or review a sentence after the end of the sitting of the court in which it is pronounced; the power is further limited by the provisions of s.113(2) prohibiting a variation or review of the judgment of the court after it is signed.

Subject to the above, there is no power to vary or reconsider sentence. Moreover, the power to vary a sentence, limited as it is, must be very sparingly exercised. Extention of the right to vary a sentence after it is pronounced in open Court would inevitably subvert certainty in the sentencing process, so vital for the sustenance of the rights of the accused. In this case, the sentence was varied after the end of the sitting of the District Court in which it was pronounced and, for that reason, it was wholly impermissible. We are not faced with the rectification of an error but with the reconsideration of sentence after its pronouncement. There was no authority to review and vary the sentence on a date subsequent to the date on which it was pronounced in open court.

We must, therefore, set aside the order of demolition and we so direct.

Appeal allowed.

Note: After hearing counsel, the respondents are adjudged to pay £40.-- costs.

* *(See, inter alia, Golden Sea-Side Estate Co. Ltd. v. The Municipal Corporation of Famagusta (1973) 2 C.L.R 58; and Salamis Holdings Limited v. Municipality of Famagusta (1973) 2 C.L.R. 239).*