[VASSILIADES, P., TRIANTAFYLLIDES, HADJIANASTASSIOU, JJ.]

POLYCARPOS A. POLYCARPOU,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3165).

Sentence—Disturbance in a public place and common assault—Sections 95 *and* 242 *of the Criminal Code, Cap.* 154, *respectively—Conviction affirmed—Sentence reduced* (*see* infra).

Sentence — Sentencing — Imprisonment — Sentencing is a very important and a very delicate part of a criminal Court's function—Imprisonment, as a sanction in a system of social defence should only be resorted to when no other sentence can fit the circumstances of the particular case—It should be avoided whenever such a course is possible—And if it cannot be avoided it must be made to serve one of the objects which such a sentence is intended to serve—See further infra.

Sentence—Three months' imprisonment on policeman for common assault and disturbance—Repercussions of such sentence on appellant's position in the police force—Punishment manifestly disproportionate in the circumstances of this case—Imprisonment not unavoidable in the circumstances of the case—Sentence modified under section 145 (2) *of the Criminal Procedure Law, Cap.* 155—*This is a case for a fine—Unfortunately the appellant had already served the whole term of imprisonment by the time the Supreme Court delivered its judgment—Therefore, instead of a fine, the Supreme Court bound over the appellant in the sum of* £100 *for one year to keep the peace.*

Imprisonment—When it should be resorted to—See supra passim.

The appellant, a young policeman, was convicted and sentenced by the trial Court to three months' imprisonment for common assault and disturbance in a public place. On appeal against sentence it was argued on his behalf, *inter alia,* that such a sentence may well inevitably mean the appellant's discharge from the police force.

After reviewing the facts and circumstances of this case, the Supreme Court allowing the appeal against sentence :—

Held, (1). If counsel's statement (*supra*) is correct, we certainly think that such a consequence (*viz.* the discharge of the appellant from the police force) would be a manifestly disproportionate punishment for the offences he committed in the circumstances of this case.

(2) Imprisonment, as a sanction in a system of social defence, should only be resorted to when no other sentence can fit the circumstances of the particular case. It should be avoided whenever such a course is possible ; and if it cannot be so avoided, it must be made to serve one of the objects which such a sentence is intended to serve.

(3) In the present case the only justification for a sentence of imprisonment would be its deterrent effect on the appellant and other policemen. But, in the circumstances of this case, we think that imprisonment was not unavoidable ; and that a fine would meet the case.

(4) Unfortunately the appellant has in the meantime served his sentence in full ; so, we do not propose to impose a fine. We think that the appropriate sentence in the circumstances at this stage of the proceedings is to bind him over in the sum of £100 for one year to keep the peace.

Appeal against sentence allowed. Order as aforesaid.

Cases referred to :

Psaras v. *The Police* (1968) 2 C.L.R. 8 ;

Tattari v. *The Republic* (reported in this Part at p. 6 *ante*) ;

Pullen and Another v. *The Republic* (reported in this Part at p. 13 *ante*; at p. 16).

Appeal against conviction and sentence.

Appeal against conviction and sentence by Polycarpos A. Polycarpou who was convicted on the 20th April, 1970, at the District Court of Famagusta (Criminal Case No. 2469/70) on two counts of the offences of disturbance and common assault contrary to sections 95 and 242, respectively,

of the Criminal Code, Cap. 154, and was sentenced by Pikis, D.J., to 3 months' imprisonment on the common assault count and no sentence was passed on him on the other count.

E. Efstathiou, for the appellant.

S. Nicolaides, Counsel of the Republic, for the respondents.

The judgment of the Court was delivered by :—

VASSILIADES, P.: This is an appeal against the conviction and sentence on a police constable, aged 28, who was prosecuted by the police in the District Court of Famagusta, on a charge containing three counts :

(1) for carrying arms to terrorize, contrary to section 80 of the Criminal Code, Cap. 154 ;

(2) for disturbance in a public place, contrary to section 95 of the Criminal Code ; and

(3) for common assault, contrary to section 242 of the Code.

After hearing four witnesses called by the prosecution, and after taking the evidence of the accused and the four witnesses called for the defence, the trial Judge acquitted the appellant on the first count ; and convicted him on the counts for disturbance and assault. The appellant was then sentenced to three months' imprisonment on the count for assault, the Court refraining from passing any sentences on the count for disturbance which arose out of the same facts.

The case for the prosecution was that the appellant provoked an incident in a cabaret at about 3.00 a.m. on March 10, 1970, during which he assaulted the complainant, exhibited a pistol which he was carrying at the time, and created a disturbance.

The version of the complainant—a Swedish sergeant in the United Nations Contingent stationed at Famagusta at the time—was that when, at about 2.30 a.m., he went together with his friends (two other Swedish servicemen and a girl) to the cabaret in question, the third one which they visited on that night, they ordered drinks and started a juke box to play Swedish music. The party had already had a few drinks of beer in the places visited earlier.

As the appellant (who was sitting at another table with his girl-friend and the manager of the cabaret) spoke rather loudly, the Swede sergeant asked him to lower his voice. The appellant got angry—according to the complainant—and threw a glass which broke on the wall near the complainant's party. The appellant, moreover, walked up towards the complainant and uttering some words, struck the complainant on the face, injuring his lip. The friends of the complainant then intervened, seizing the complainant's hands to stop a fight. Other people in the cabaret intervened to stop the quarrel. At that stage, the appellant exhibited a pistol which he was carrying under his pullover. The complainant and his friends were then taken out of the cabaret, where a taxi took them away to their camp.

The version of the appellant on the other hand, is that the Swedish soldiers started annoying his girl-friend which made him go up to their table to identify himself as a policeman and to request them to stop misbehaving. He was then attacked by one of them, a tall Swedish sergeant, whom he struck in retaliation. People intervened and that was all that happened.

The trial Judge accepted the version of the prosecution witnesses ; and rejected that of the defence. He was favourably impressed by the two Swedish servicemen whose evidence he accepted " without any hesitation ". He said he did not believe the accused ; and did not believe the three witnesses called for the defence, excepting for the evidence of the taxi driver which was apparently uncontested.

Upon that evidence, the trial Judge acquitted the appellant on the count of using his pistol, which he was carrying lawfully as a policeman, to terrorize other persons ; and convicted him on the counts for disturbance and assault.

The conviction was challenged mainly on the ground that the trial Judge's findings, resting entirely on the evidence of the complainant and his friend, and rejecting totally the evidence for the defence, were unsatisfactory, and should not be sustained. There is no suggestion, counsel for the appellant argued, that the appellant was under the influence of drink ; or that there was anything between him and the complainant prior to this incident ; on the other hand, it is beyond doubt that the three Swedish servicemen and their girl-friend had had some drinks in three other places earlier that evening; and they found the appellant there, sitting with his friends, and that they started the juke box which is,

admittedly, a rather noisy musical apparatus, often annoying people who are not interested in the tune being played at the time and wish to continue with their conversation.

Counsel for the appellant submitted, further, that the throwing of the glass against the wall by the appellant must have been the result of some kind of provocation on the part of the complainants ; and the intervention of his friends to hold complainant's arms, when he was struck by the appellant, indicates that he was in a fighting mood.

The incident at the cabaret has undoubtedly taken place ; but it is difficult to accept that the whole of the blame for such an incident goes exclusively to the one side ; and must in this case be placed on the appellant. He was, however, undoubtedly involved in the quarrel ; and he did use violence by striking first one of his opponents. We think that there was evidence upon which the trial Judge could convict the appellant for assault and disturbance ; but we also think that for the incident in question the blame cannot be placed entirely upon him without considering the surrounding circumstances ; especially those which started the incident. Subject to this, the appeal against conviction cannot, we think, be sustained.

Coming now to the question of sentence, we accept the submission on behalf of the appellant that the trial Judge misdirected himself when he considered that the cabaret incident, in the circumstances in which it took place, was a " very grave matter " because one of the parties involved was a police constable ; and that this made the case against him " highly aggravated ". He was not in uniform at the time ; and he was not the only one to blame for what happened.

As the trial Judge has rightly observed, a sentence of imprisonment will, no doubt, have serious repercussions on the appellant, other than the deprivation of his personal liberty. We are told that he is already facing disciplinary proceedings where we can assume that the authority concerned will impose the appropriate sanctions on the appellant as a police constable. Counsel on his behalf told us that a sentence of three months' imprisonment may well inevitably mean his client's discharge from the police force. If that is so, we certainly think that such a consequence would be a manifestly disproportionate punishment for the assault which he committed in the circumstances of this case.

As the learned trial Judge has readily recognized, this case differs " in many respects " from *Psaras* v. *The Police* (1968) 2 C.L.R. 8. We have no doubt in our mind that this was not a case for a sentence of imprisonment. It has already been said that sentencing is a very important and a very delicate part of a criminal court's function. (*Chariklia Tattari* v. *The Republic* (reported in this Part at p. 6 *ante* ; at p. 11 ; *Pullen* & *Another* v. *The Republic* (reported in this Part at p. 13 *ante*; at p. 16)). And that imprisonment, as a sanction in a system of social defence, should only be resorted to when no other sentence can fit the circumstances of the particular case. It should be avoided whenever such a course is possible ; and if it cannot be avoided, it must be made to serve one of the objects which such a sentence is intended to serve. In this case, the only justification for a sentence of imprisonment would be its deterrent effect on the appellant and other policemen. But, in the circumstances of this case, we think that imprisonment was not unavoidable ; and that a fine would meet the case.

The appellant, unfortunately, has in the meantime, served his sentence in full (as both sides in this appeal admit) ; so, we do not propose imposing any fine upon him. We think that the appropriate sentence in the circumstances, at this stage of the proceedings, is to bind him over in the sum of £100 for one year to keep the peace.

In the result, the appeal against conviction is dismissed ; the appeal against sentence is allowed ; and the sentence on count 3 is varied to one of binding over the appellant in the sum of £100 to keep the peace for one year from today ; we adopt the trial Court's view regarding sentence on the second count. And we order accordingly.

Appeal against conviction dismissed ; appeal against sentence allowed.