[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

MICHALAKIS SPYROU KAKATHYMIS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3290).

Sentence—Previous convictions—Assessment—Proper evaluation of the previous bad record of the offender—Office breaking and theft—Section 294 (a) of the Criminal Code Cap. 154—Maximum sentence (seven years' imprisonment) provided by law imposed on Appellant in view of his bad criminal record—Maximum previous sentence for a similar offence being three years' imprisonment—In the instant case Appellant's co-accused treated more leniently—Three years' imprisonment imposed on co-accused—The trial Court imposed on the Appellant a sentence which was increased beyond a term bearing some relation to the gravity of the offence—And which was, thus, rendered in effect an additional punishment for his previous offences—Such course held not to have constituted a proper approach to the question of sentencing Appellant—Moreover the Appellant is a person of 30 *years of age with a severely impaired health; and his case is not one in which it could be said with any certainty that all hope that he may succeed, eventually, in mending his way of life has been lost—Sentence of seven years' imprisonment imposed by the trial Court on the Appellant is, therefore, both wrong in principle and manifestly excessive—Reduced into one of four and a half years' of imprisonment.*

Persistent offenders—Sentencing of—Principles applicable—In Cyprus the principles to be applied are those obtaining in England before the enactment of the (English) Criminal Justice Act, 1967, *which in section* 37(2) *provides for extended terms of imprisonment in cases of "persistent offenders".*

Sentence—Appeal against—Previous convictions—Proper evaluation of—Sentence wrong in principle and manifestly excessive.

The trial Court sentenced the Appellant on a charge for office breaking and theft under section 294(a) of the Criminal

Code Cap. 154 to the maximum term of imprisonment provided by law for the offence in question *viz.* to seven years' imprisonment. For the same offence the trial Court sentenced the co-accused of the Appellant to three years' imprisonment (after taking, also, into consideration another similar offence committed by him). The Appellant who is a person aged thirty years with severely impaired health has a very bad criminal record *viz.* about twenty previous convictions mostly for similar offences, the heaviest previous sentence being three years' imprisonment.

Allowing this appeal and reducing the sentence imposed by the trial Court from seven years' imprisonment to one of four and a half years on the ground that the sentence appealed against is wrong in principle and manifestly excessive, the Supreme Court:–

Held, (1). Though the trial Court sentenced, for the same offence, the co-accused of the Appellant to three years imprisonment (after taking, also, into consideration another similar offence committed by him), it proceeded to sentence the Appellant to the maximum term of imprisonment provided by law for the offence in question *viz.* seven years' imprisonment; such term being more than twice as long as the sentence passed on his co-accused. It does seem to us, therefore, that in view of his criminal record, the sentence of imprisonment imposed on the Appellant was increased beyond the term which bore some relation to the gravity of the particular offence and it was also rendered, thus, *an additional punishment* for his previous offences. Such a course did not, in our view, constitute a proper approach to the matter of sentencing the Appellant.

(2) The trial Court passed on the Appellant seven years' imprisonment "to protect the community from persons like the accused who persistently disturb peace and good order in illegal pursuit of personal advantage".

But in Cyprus we do not have in force a statutory provision such as section 37(2) of the (English) Criminal Justice Act, 1967, which enables extended terms of imprisonment to be imposed in cases of persistent offenders; and we have, therefore, to apply the relevant principle of sentencing which was applicable in relation to persistent offenders prior to the enactment of the said section 37 of the English Act (see in this

respect the case *D.P.P.* v. *Ottewell* [1968] 3 All E.R. 153 H.L. at pp. 155 and 156 and the cases cited therein).

(3) (a) In the light of the foregoing we have reached the conclusion that the sentence of seven years' imprisonment passed on the Appellant is manifestly excessive and wrong in principle.

(b) Now, we have taken into account that the Appellant is a person with a severely impaired health and that his case is not one in which it could be said with any certainty that all hope that he may, eventually, succeed in mending his way of life has been lost; having weighed also all other relevant factors we have decided to reduce the sentence imposed on the Appellant to one of four and a half years' imprisonment as from the date of conviction.

Appeal allowed. Sentence reduced as above.

Cases referred to:

D. P. P. v. *Ottewell* [1968] 3 All E.R. 153, at pp. 155–156, H.L.

Appeal against sentence.

Appeal against sentence by Michalakis Spyrou Kakathymis who was convicted on the 20th October, 1971 at the Assize Court of Limassol (Criminal Case No. 12941/71) on one count of the offence of office breaking and theft contrary to sections 294(a) and 20 of the Criminal Code Cap. 154 and was sentenced by Loris, Ag. P.D.C., Hadjitsangaris, D.J. and Chrysostomis, Ag. D.J. to seven years' imprisonment.

The Appellant appeared in person.

A. Frangos, Senior Counsel of the Republic, for the Respondent.

The judgment of the Court was delivered by:–

TRIANTAFYLLIDES, P.: The Appellant has appealed against the sentence of seven years' imprisonment which was passed on him for the offence of breaking and entering an office in Limassol and committing a felony, viz. theft, therein, contrary to section 294(a) of the Criminal Code (Cap. 154); the sentence passed on the Appellant was the maximum punishment

provided for the offence in question. A co-accused of the Appellant was sentenced to only three years' imprisonment.

The said co-accused is a person younger than the Appellant; and he does not have such a very bad criminal record as the Appellant, who has been convicted on nearly twenty previous occasions, mostly for offences of the same kind, within a period of about ten years.

As was submitted, very fairly, by learned counsel for the Respondent, the Appellant, notwithstanding his bad record, is still young in age—about 30 years old—and, therefore, this is not a case in which it could be said with any certainty that all hope that he may succeed, eventually, in mending his way of life has been lost.

We share this view of counsel for the Respondent and we are, therefore, of the opinion that the Appellant should not have been sent to prison for a period as lengthy as seven years; his longest prison sentence in the past having been only one of three years.

Though the trial Court sentenced, for the same offence, the co-accused of the Appellant to three years' imprisonment (after taking, also, into consideration another similar offence committed by him), it proceeded to sentence the Appellant to—as already stated—the maximum term of imprisonment provided by law for the offence in question; such term being more than twice as long as the sentence passed on his co-accused. It does seem to us, therefore, that, in view of his bad criminal record, the sentence of imprisonment imposed on the Appellant was increased beyond a term which bore some relation to the gravity of the particular offence and it was also rendered, thus, an additional punishment for his previous offences. Such a couse did not, in our view, constitute a proper approach to the matter of sentencing the Appellant.

The trial Court passed on the Appellant seven years' imprisonment "to protect the community from persons like the accused who persistently disturb peace and good order in illegal pursuit of personal advantage". But in Cyprus we do not have in force a statutory provision such as section 37(2) of the Criminal Justice Act 1967, in England, which enables extended terms of imprisonment to be imposed in cases of persistent offenders; and we have, therefore, to apply the relevant principle of sentencing which was applicable in relation

to persistent offenders prior to the enactment of the said section 37. It is useful to refer, in this respect, to the case of *Director of Public Prosecutions* v. *Ottewell* ([1968] 3 All E.R. 153); in delivering his opinion in that case, in the House of Lords, in England, Lord Reid said (at p. 155):-

> " How to deal with a persistent offender has always been a problem. Preventive detention and corrective training were introduced in an attempt to solve it; but for various reasons these were found to be unsatisfactory and they are abolished by s. 37(1). It appears to me to be clear that sub-s.(2) is intended to replace them. The cross heading in the Act of 1967 preceding s.37 is: 'Powers to deal with persistent offenders', and the section appears, at least at first sight, to confer a general power on the Court. If (a) the accused has been convicted of an offence punishable with imprisonment for two years or more, and (b) he is a persistent offender as defined in sub-s. (4), and (c) the Court is satisfied for the reasons stated that it is expedient to protect the public from him for a substantial time, then the Court may impose 'an extended term of imprisonment' ";

and in dealing, later on, with the relevant principle of law which was applicable before the enactment of section 37(2), he said (at p. 156):-

> " So it is necessary to enquire to what extent the Court of Appeal (Criminal Division) did permit a sentence to be lengthened for this purpose.
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> In *R.* v. *Boardman and Powis** the two accused were convicted of stealing. The former who had a clean record was sentenced to twelve months' imprisonment; the latter who had a bad record was sentenced to five years' imprisonment. The Court stated that having regard to the disparity of the sentences and to the remarks of the chairman it was quite clear that Powis was sentenced very largely on his past record. That seemed very much like punishing him again for his previous crimes. Boardman because of his record had some claim to a degree of leniency which was absent in the case of Powis; but withholding leniency was one thing and inflicting

* [1958] Crim. L. R. 626.

heavier punishment for a record was another. So the sentence on Powis was reduced to two years' imprisonment.

In *R.* v. *Connolly** the accused had stolen letters worth sixpence; but he was a confirmed thief and a pest to society. He was sentenced to five years' imprisonment, but that was reduced on appeal to eighteen months. The Court stated that if preventive detention were not imposed in cases of this sort the sentence must bear some relation to the gravity of the offence.

In *R.* v. *Reid*** the accused, a persistent offender, had obtained £2 by false pretences. He was sentenced to five years' imprisonment, but this was reduced on appeal to eighteen months. The Court said that it was wrong to increase the sentence for a trivial offence by reference to offences in the past for which a man had already paid the penalty. If quarter sessions had thought that preventive detention was the appropriate sentence then such a sentence should have been passed; if not, they should have passed a sentence commensurate with the gravity of the offence.

This cases show that with regard to imprisonment, unlike preventive detention, the previous power to extend a sentence for the purpose of protecting the public from the persistent offender was severely limited. It was regarded as improper to extend a sentence of imprisonment beyond a term which bore some relation to the gravity of the last offence: Anything beyond that was regarded as additional punishment for previous offences, and that of course would be improper. In my judgment, however, s. 37(2) of the Criminal Justice Act 1967 is designed to remove that limitation and to authorise an extended term, not as punishment for the last offence nor as additional punishment for previous offences, but for the purpose stated in the section, i.e., the protection of the public from the persistent offender for a substantial time. That is, in my view, a new power intended to operate not only in cases where previously preventive detention would have been appropriate but also in other cases which may come within the terms of the section".

* [1959] Crim. L. R. 530.
** [1960] Crim. L. R. 276.

In the light of all the foregoing we have reached the conclusion that the sentence of seven years' imprisonment which was passed on the Appellant was manifestly excessive and wrong in principle.

In considering what would be the proper sentence to be imposed on the Appellant we have taken into account, *inter alia*, that he is a person with severely impaired health; as it appears from a medical certificate dated the 26th January, 1971, which was issued to him by a surgeon of the Limassol Hospital, the Appellant "has got multiple fistulae-in-ano" for which he has been operated upon by several surgeons in the past. Now he has been advised to go to St. Mark's Hospital in London for treatment"; thus, it seems that there still exists a possibility that the Appellant may be cured by means of better medical facilities abroad.

Having weighed all relevant factors we have decided to reduce the sentence imposed on the Appellant to one of four and a half years' imprisonment as from the date of his conviction.

We would like, in concluding, to observe that we trust that the Appellant, by receiving a sentence which is quite lighter than the one passed on him at his trial will fully realize that society has not yet given up hope that he will try to abandon his criminal way of life; but in order that he may be given new hope in life and be filled with the will to become an honest and useful citizen it is absolutely essential that the State should assist him as effectively as possible to regain his health; let there be a thorough assessment of the medical condition of the Appellant and if it is, as a result, found that he cannot be cured in Cyprus, but that he can be cured abroad, then we do trust that every effort will be made to make it possible for the Appellant to receive any needed treatment abroad.

Appeal allowed.