[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

TASSOS SAVVA POLITIS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3470).

Sentence—Principles governing assessment of sentence—And principles upon which the Court of Appeal will interfere with sentences imposed by trial Courts—Committing offence whilst under the influence of drink—Whether a mitigating circumstance—Six months' imprisonment for stealing a motor cycle—Sections 255 *and* 262 *of the Criminal Code, Cap.* 154*—Appellant suffering from personality disorder—Due weight given to all mitigating circumstances—Sentence neither excessive nor wrong in principle—Appeal against sentence dismissed—But the sentence to run as from conviction.*

Criminal Procedure—Appeal—Appeal against sentence—Approach of the Court to appeals against sentence—Principles well settled—See further supra.

This is an appeal against a sentence of six months' imprisonment imposed by the trial Court on a charge of stealing a motor cycle. The Supreme Court, after reviewing the facts and the authorities, dismissed the appeal holding that in the circumstances of this case the sentence was neither excessive nor wrong in principle; but the Court ordered that the sentence should run as from the conviction.

The facts sufficiently appear in the judgment of the Supreme Court.

Cases referred to:

Stratos and Another v. *The Police,* 17 C.L.R. 73 at p. 75;

R. v. *Gumbes* [1926] 19 Cr. App. R. 74;

Tryfona Alias Aloupos v. *The Republic,* 1961 C.L.R. 246 at p. 253;

Meytanis v. *The Police* (1966) 2 C.L.R. 84;

Costa v. *The Republic* (1966) 2 C.L.R. 87 at p. 88;

Iroas v. *The Republic* (1966) 2 C.L.R. 116;

Attorney-General v. *Vasiliotis alias Kaiser and Another* (1967) 2 C.L.R. 20;

Voudaskas v. *The Republic* (1967) 2 C.L.R. 109, at p. 114;

Smith v. *The Police* (1969) 2 C.L.R. 189, at p. 192;

Koutsides v. *The Police* (1971) 2 C.L.R. 163;

Papageorghiou v. *The Police* (1971) 2 C.L.R. 327.

Appeal against sentence.

Appeal against sentence by Tassos Savva Politis who was convicted on the 4th June, 1973, at the District Court of Nicosia (sitting at Morphou) (Criminal Case No. 1764/73) on two counts of the offences of stealing contrary to sections 255 and 262 and of receiving contrary to section 306(a) of the Criminal Code, Cap. 154 and was sentenced by Hji Constantinou, S.D.J., to six months' imprisonment on the first count and no sentence was passed on him on the second count.

E. Lemonaris, for the Appellant.

Cl. Antoniades, Counsel of the Republic, for the Respondents.

The judgment of the Court was delivered by:-

HADJIANASTASSIOU, J.: The Appellant pleaded guilty at the District Court of Morphou to a charge of stealing a motor cycle contrary to ss. 255 and 262 of the Criminal Code, Cap. 154 and also to a charge of receiving same, contrary to s.306(a) of the Criminal Code. He was sentenced by the District Judge to 6 months' imprisonment on count 1 and no sentence was passed on him on count 2. He appealed in person against sentence as being manifestly excessive.

The owner of this motor cycle is Grigoris Poly Aniftou of Morphou who on January 25, 1973, lent it to Andreas Polycarpou Fridas who left it parked outside the house of a certain Lenia Georghiou of Morphou. At about 10.30 p.m. he looked for the said motor cycle but as he could not find it, he reported

the matter to the police at 11 p.m. of the same evening. In the meantime at about 10.15 p.m. whilst two police officers were patrolling the area of Morphou–Xeros road, met the accused at the junction of Morphou–Xeros–Nikitas road, who was driving his own motor car EZ436. He was stopped and a motor cycle was found in his car. Questioned by the police as to who was the owner of the said motor cycle, his reply was that it was the property of his father-in-law and that he was taking it to be repaired. Because of a complaint that a motor cycle was missing the police visited the father-in-law of the accused who informed them that he was in possession of his own motor cycle. In the meantime, the accused visited the Morphou police station and although he appeared to be under the influence of drink, when he was questioned as to what he had done with the motor cycle he had in his motor car, his reply was what he did not know. Later on, however, at about 11.40 p.m. the accused admitted having left it at a place near Neon Livadhi Village. He then accompanied the police to the scene and the said motor cycle was found. On the following day the motor vehicle of the accused was searched and the police found other stolen articles which were the subject of a charge in Cases Nos. 1765/73 and 1766/73.

On May 7, 1973, the accused was charged, and having pleaded guilty to both counts, the case was adjourned to June 4, to enable the welfare authorities to prepare a report. On June 4, 1973, the learned trial Judge after hearing the facts of the case as well as acquainting himself with the contents of the report, and having heard the plea of the accused in mitigation, viz., that he committed those offences whilst he was drunk and promised that he would not commit other offences in future, he imposed a sentence of 6 months' imprisonment on the accused, taking also into consideration two more outstanding charges against him of stealing.

Having had the advantage of perusing the said report, it appears that the accused at the age of 17 was undergoing psychiatric treatment which lasted for a short period only because in the meantime he was enlisted in the national guard. After serving for a period of 5 months he was dismissed from the army apparently for being an abnormal person on the medical opinion of a Government psychiatrist. Later on because he encountered difficulties in finding employment, he joined once again the National Guard and remained there until he completed his national service. Out of the army now he indulges

in alcoholic drinks and under the influence of alcohol he commits regularly offences such as stealing, assaults and breach of the public peace, and also traffic offences. There is no doubt that according to the welfare report, even when he works he does not care very much about his family.

On January 25, 1972, he was placed under probation for a period of 2 years by the District Court of Morphou for a case of assault and breach of peace. Unfortunately, the report goes on, when he was working in Nicosia he was not visiting the probation officer and had not shown any signs of co-operation. In September, 1972, because of a complaint by a probation officer he appeared before the same District Court of Morphou on a charge that accused had contravened the terms of the probation order. The accused was examined by a psychiatrist, and the report before the Court shows that he is suffering from personality disorder. He is conscious of his acts and he is responsible for any antisocial acts of his. Then the report goes on, that psychiatric treatment for personality disorder is non-existent and only by a long psychiatric observation it is possible to bring about a change in his behaviour for his better adaptation to life.

After the commission of the present offences, the accused in February, 1973, visited once again the psychiatrist and remained in the institution for a week. He received medical attention and he was advised to avoid alcoholic drinks and to visit every now and then his psychiatrist. Unfortunately, as the report proceeds, the accused continues to drink and has interrupted his therapy.

As we said earlier, in the light of this back-ground, the learned Judge in sentencing the accused to be imprisoned said:-

> " The offences, which the accused admitted to have committed are of quite a serious nature. It is clear from the report of the Welfare Officer as well as from the attached thereto report of the Mental Hospital that the accused does realize the nature of his acts, but that he is in need of constant supervision if he is to change the way of his life. It is also clear from the report that the accused has got the habit of drink, and mostly this results in his anti-social and antifamily way of life. He has repeatedly in the past promised that he would abstain from drinking but he never kept such a promise. He did not prove himself

to be very co-operative with the Welfare Department under whose care he has in the past been placed."

Later on he said:-

" Under all the circumstances I am of the opinion that the only way to treat this accused mostly for his own benefit as well as for the protection of the public, is to commit the accused to prison where he will stop his habit of drinking and also he may receive constant supervision by the psychiatric services of the Republic".

There is no doubt that the learned Judge in fixing the punishment has taken into consideration the nature of the offence and the circumstances in which it was committed, the antecedents of the accused up to the time of sentencing him, his age and character and also the fact that he is now indulging in alcoholic drinks as well as his state of mind. In this case and in most other crimes, a very wide discretion is allowed to the Judge who tries the case, and we are of the view that in inflicting the said punishment he had in mind that in recent years the reformative aspect of punishment, viewed in relation to both penal treatment and the avoidance of the possibility of a new offender becoming a persistent offender has received his attention. Of course, the previous good character of this accused may be a reason for inflicting a light sentence upon him and we are sure that the learned Judge had this also in mind in passing sentence upon the accused. Regarding the plea of the accused that he had committed the offences in question whilst he was drunk, we think, that the fact that the accused committed the crime when in a state of drunkenness may be a mitigating circumstance.

In *Rex* v. *Morton* [1908] 1 Cr. App. R. 255, Pickford, J. had this to say:-

" Appellant was found guilty of burglariously entering a house with his boots off. He was under the influence of drink at the time, and though that does not excuse what he did, it affects the guilty intention which he must have had. The sentence of twelve months' hard labour was excessive, and would have to be reduced to six months' hard labour, and this to run from date of the conviction. The Court does not wish in any way to express an opinion conflicting with that of the justices with regard to the serious nature of the crime of burglary".

Of course, drunkenness may on the other hand be a ground for passing such a sentence (depending on the particular facts of the case) as will debar the prisoner for some time from the use of intoxicating liquors. See *Rex* v. *Rees* [1908] 1 Cr. App. R. 83, a case regarding a habitual drunkard with a record of ten previous convictions for thefts and eight previous convictions for drunkenness.

The appeal was originally fixed for hearing on July 6, 1973, but on that date counsel for the Republic informed the Court that the psychiatric authorities informed him that the accused was transferred from prison to the institution at Athalassa for medical observation and that he would require a month's time for treatment in order to enable him to follow the nature of his case. In the light of this statement, unavoidably the case had to be adjourned until today. Counsel for the Appellant filed today in Court a medical certificate dated July 12, 1973, to the effect that the accused had undergone treatment and is now in a position to appear before the Court and follow his case.

Regarding appeals against sentence, this Court, in carrying out the task of reviewing sentences will generally not interfere to alter the sentence passed at the trial merely because the members of the Court think they might have passed a different one, but only where the sentence is manifestly excessive or wrong in principle.

In *Stratos and Another* v. *The Police*, 17 C.L.R. 73, the Appeal Court of Cyprus, in allowing the appeal against sentence, followed and adopted the principles laid down in *R.* v. *Gumbes* [1926] 19 Cr. App. R. 74, and said at p. 75:–

> " In our view the Court below, in sentencing the Appellants, gave excessive weight to what it believed to have been their previous convictions, quite apart from the fact that it was wrongly informed in regard to one of them, and did not give sufficient weight to what their later offence intrinsically deserved.
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> What the trial Court considered that this later offence intrinsically deserved is shown by the fact that those accused who had no previous conviction against them were merely cautioned. We do not say that this Court would have taken the same view, but it is very evident that in sentencing the Appellants to six months' imprisonment the Court was primarily influenced by offences of a very different

character which it believed to have been committed nearly 10 years ago. Nothing was said against the character of the Appellants in that long interval.

In considering to what we should reduce the sentences of imprisonment passed on the Appellants we have been placed in a difficulty by the fact that they have been in prison, as ordinary prisoners, we are informed, since the date of their conviction, the 30th October, that is to say for a period of 35 days, until today. If we reduced the sentences of imprisonment to sentences of fines, and this we would have thought adequate, we should merely add to the punishment which the Appellants have already suffered. We think they have suffered more than enough and we consequently reduce their sentences of six months' imprisonment to 34 days in each case to run from the date of their conviction, so that they may be released forthwith".

In *Charalambos Tryfona alias Aloupos* v. *The Republic*, 1961 C.L.R. 246, both the question of principles upon which sentences should be assessed and the principles upon which the High Court will interfere with sentences were discussed by the four members of the Court. Josephides, J. had this to say at p. 253:–

" Coming to the merits of this appeal, although if I were the trial Judge I would feel inclined to impose a lesser sentence, nevertheless, having regard to the circumstances of this case and the principles applicable to appeals against sentence, I do not consider that the sentence is manifestly excessive".

See also *Meytanis* v. *The Police* (1966) 2 C.L.R. 84, where a sentence of one year's imprisonment was varied and a probation order was made.

In *Costa* v. *The Republic* (1966) 2 C.L.R. 87, the Court, after dealing with the medical report of the Appellant which described him as mentally backwards to an obvious extent, and that his personality presented irregularities, lack of sense of responsibility and other mental deficiencies, had this to say at p. 88:–

" With this evidence before them, very fairly put to the

Court by the prosecution, and standing uncontested, the Military Court were dealing with an apparently abnormal person. In their reasons for the sentence imposed, the Court make reference to Appellant's mental condition; but they seem to treat this matter as an extenuating circumstance and a ground for leniency rather than as a state of mental condition going to the root of Appellant's responsibility for offences under the military code, affecting sentence accordingly".

Later on the Court went on:-

" In the circumstances of this case, we find it unnecessary to go further into this matter. We have before us a young man, unfortunate enough to have to face life with a heavy mental handicap to the extent described in the medical certificate on record, (*exhibit* 1). It is clear to us that the Military Court, in passing sentence on him, they did not attach to this personal factor of the Appellant, the proper weight; nor did they allow this material consideration to affect sentence to the appropriate extent.

It may be that the fitness of this unfortunate young man to be subject to military law, should have been further investigated before passing sentence upon him at all. Be that as it may, however, we are unanimously of the opinion that, in the exceptional circumstances of this case, there is sufficient reason for this Court to consider the sentence imposed on this Appellant, as manisfestly excessive; and to allow this appeal on that ground, reducing the sentence to one of imprisonment for the period served, i.e. from the date of conviction to the present day.

Appeal allowed; sentence on each count reduced accordingly, to run concurrently from the date of conviction to the present day. Appellant discharged from prison forthwith".

In *Michael Antoni Afxenti "Iroas"* v. *The Republic* (1966) 2 C.L.R. 116, the Court had this to say:-

" This Court has had occasion to state more than once in earlier cases, that the responsibility of imposing the appropriate sentence in a case, lies with the trial Court. The Court of Appeal will only interfere with a sentence so

imposed, if it is made to appear from the record that the trial Court misdirected itself either on the facts or the law; or, that the Court, in considering sentence, allowed itself to be influenced by matter which should not affect the sentence; or, if it is made to appear that the sentence imposed is manifestly excessive in the circumstances of the particular case.

After hearing learned counsel for the Appellant, both regarding the circumstances under which the offence was committed, and regarding the mental condition of the Appellant, upon which counsel mainly relied in addressing this Court today, we are unanimously of the opinion that there is no justification for interfering with the sentence imposed".

See also *the Attorney-General of the Republic* v. *Vasiliotis alias Kaiser and Another* (1967) 2 C.L.R. 20, following the principles laid down in *Michael Iroas* v. *The Republic* (*supra*).

In *Voudaskas* v. *The Republic* (1967) 2 C.L.R. 109, a case of trespass with intent to annoy, the accused was sentenced to 18 months' imprisonment by the Assize Court of Limassol. The Court in dismissing the appeal, had this to say at p. 114:-

" We take the view that the mental condition of an accused person about to be sentenced according to law, should be taken into account by the Court, not only for purposes of belatedly intended treatment while the accused remains at large (as often suggested by counsel on their behalf) but also for purposes of institutional treatment, while such persons are serving a sentence of imprisonment. This makes them more readily subject to the appropriate treatment, either in the prison hospital, or in the mental hospital, the services of which are always available for the benefit of persons confined in prison under a sentence".

In *Smith* v. *The Police* (1969) 2 C.L.R. 189, the Court in varying the sentence of two years' imprisonment imposed on the two Appellants had this to say at p. 192:-

" We take the view that the sentences, which were imposed on the Appellants, are, indeed, in the circumstances manifestly excessive and, also, wrong in principle, in the sense that undue weight was given to other mitigating considerations. We have, therefore, decided to reduce the sentences

to one year's imprisonment on each count, to run concurrently".

See also *Koutsides* v. *The Police* (1971) 2 C.L.R. 163 and the recent case of *Papageorghiou* v. *The Police* (1971) 2 C.L.R. 327, where the sentence imposed in both cases was reduced.

Counsel for the Appellant has mainly contended that the Court ought to vary the sentence because the learned Judge in exercising his discretion has allowed himself to be unduly influenced by matters which ought not to have affected the sentence, i.e. by the social investigation report regarding his promise to stop alcoholic drinks and because in the said report there is a reference that the Appellant had committed often crimes under the influence of drink. Counsel further argued that the learned Judge failed to take sufficiently into account, in the circumstances of this case, that the Appellant had no previous convictions for stealing and for drunkenness up to the age of 27, and that the crime of stealing was committed with no planning at all and when he was drunk; and that he was suffering for a long time with mental disorder. Having heard also counsel for the Respondent, we agreed to adjourn the hearing of this appeal once again to allow sufficient time to Dr. Malekides who has been treating the Appellant to prepare an up to date report regarding the latter's mental disorder.

On August 7, 1973, having perused the report of Dr. Malekides who described the Appellant as a very immature and inadequate person who reacts to stressful stimuli by neurotic manifestations or disturbed behaviour, he continued adding that he has improved considerably as far as neurotic manifestations are concerned and that he would be sent back to prison soon. Dr. Malekides concluded that the Appellant is suffering from personality disorder and unfortunately his prognosis is poor as it is impossible to change his already developed handicapped personality.. It is, however, expected, the report goes on, to show gradually with the years, some maturity, and, therefore, better adjustment. He would need, however, the help of the psychiatric services, and especially of the social services even with slightly promising results.

Having regard to the circumstances of this case, and directing ourselves with those weighty judicial pronouncements we have quoted earlier in this judgment, we are of the view that the sentence imposed on the Appellant is neither manifestly excessive

nor wrong in principle, once the learned trial Judge did not give undue weight to the promise of the Appellant to his doctor to stop drinking, and also to the opinion of the psychiatrist that he needed a long psychiatric observation for personality disorders and because psychiatric treatment is non-existent for this type of illness. Furthermore, in our opinion, due weight was given to the other mitigating considerations by the learned Judge including the fact that penal measures ought not to apply to an offender because of some incidental benefit which a psychiatrist thinks it would bring to him, but because the Court was of the opinion that the offence justified such a sentence. As we said earlier, the learned Judge in fixing the punishment has taken into consideration that the Appellant was a first offender, married with five children and that the offence was committed without any planning and under the influence of drink; and that he helped the police in tracing the stolen motor cycle.

However, in the light of all the circumstances, we have reached the conclusion that the learned trial Judge was justified in imposing the sentence of 6 months and we see no reason to interfere with the sentence passed at the trial. The appeal is, therefore, dismissed, but in the circumstances, sentence to run from the date of conviction of the Appellant.

Appeal dismissed.