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

N. MAVROS AND OTHERS,

Appellants,

v.

THE POLICE,

Respondents.

(Criminal Appeals Nos. 3648 - 3652).

Criminal Law—Sentence—Homosexual offences—Factors affecting sentence—Psychological affliction of offenders—Whether a mitigating factor.

Criminal Law—Sentence—Sentence of imprisonment—Should be resorted to as the last possible alternative, especially in cases of young persons.

Sentence—Suspended sentence—Its main object being to avoid sending offender to prison—Cannot be consecutive to an effective sentence—But it can be combined with a sentence of fine—Substitution of suspended sentence on appeal for sentence of imprisonment—Consideration of time spent in prison pending appeal—Section 3 of the Suspended Sentences of Imprisonment Law, 1972 (Law 95 of 1972).

Criminal Law—Sentence—Homosexual offences—Sections 171 (a) and 171(b) of the Criminal Code, Cap. 154—Five persons indulging in homosexual orgies—Sentences of 12 and 15 months' imprisonment—Young offenders—Principles of sentencing—Seriousness of offences—In principle imprisonment the proper sentence—No individualization of the sentences by trial judge in that he did not take sufficiently into account the personal circumstances of each appellant—And the extent of the involvement of each of them in the offences from, inter alia, *the point of view of the aspect of moral blame—Sentences of appellants 2, 3, 4 and 5 reduced —Sentence of appellant 1 undisturbed.*

Criminal Law—Sentence—Appeal against sentence—Application for leave to withdraw refused—But small credit given to appellant for his even belated acceptance that

he was rightly punished—By allowing his sentence to run from the date it was passed by Court below.

The appellants complain against sentences of imprisonment imposed on them after they had pleaded guilty to offences contrary to sections 171(a) and 171(b) of the Criminal Code, Cap. 154, namely of having had carnal knowledge of another male person against the order of nature or of having allowed another male person to have carnal knowledge of them against the order of nature.

On the basis of the material before the Court this was a case where homosexual orgies were indulged in, with appellant 1 as the principal initiator and instigator, and with appellant 3 playing a leading role, too.

Appellant 5 has been convicted of only one offence, under s. 171(a) of Cap. 154 and that on that one occasion he was led astray by appellant 1, who was ten years older; at the time of the commission of the offence this appellant was under the influence of a narcotic drug given to him by appellant 1.

Appellant 2 has been convicted in respect of only one count under s. 171(b); he was methodically seduced by appellant 1 and, as a result, indulged in homosexual caresses with him on more than one occasion; he has been involved in buggery only on the one occasion in respect of which he has pleaded guilty; he was a young person, twenty years old; and he was discharged from the National Guard, because of personality disturbances which were found to be so serious as to render him unsuitable for service in the National Guard.

Appellant 4 was relatively older than all the other appellants except appellant 1; he has been convicted on only one count, under s. 171(a) of Cap. 154; his case was not the case of a person who was involved on only one occasion in homosexual behaviour; he had been taking part in homosexual orgies for a long period of time, with different persons; an important mitigating factor in his favour was that he realized himself, on his own, the depravity and impropriety of his conduct, long before he was arrested by the police, and had been

living a moral and normal life since 1973, one whole-year before his arrest.

Appellant 3 was, indeed, a young person, twenty years old; he has been convicted of offences both under s. 171(a) and (b); he had been very deeply involved in homosexual orgies, much more than appellants 5, 2 and 4, nearly as much as appellant 1;

Appellant 1, pleaded guilty to six counts; the five of them involved offences committed by him contrary to s. 171(a) and the other count related to an offence against section 171(b). As already stated he was the principal initiator and instigator of the homosexual orgies subject matter of the charges and he has seduced all the other appellants.

As on behalf of some of the appellants great stress was laid on the fact that such appellants were, according to medical reports, psychologically afflicted, and that this was the cause of their depravity the Court of Appeal in reaching their decision in the present case paid due regard to a passage cited in the case of *Willis*, 60 Cr. App. R. 146 (at p. 149). Moreover, the Court of Appeal have taken anxiously into account that this was an instance where there have been sent to prison persons of relatively young age; they have also borne in mind, the views expressed, as regards assessment of sentence, in cases such as *Mirachis* v. *The Police* (1965) 2 C.L.R. 28 and *Karaviotis and Others* v. *The Police* (1967) 2 C.L.R. 286, concerning the principle that imprisonment should be resorted to as the last possible alternative, especially in cases of young persons; and they referred, too, to Thomas Principles of Sentencing (1970), at p. 247, which deals with the problem of imprisonment of young offenders, and to the case of *Smith* [1964] Crim. L.R. 70 which deals with the same matter.

The attention of the Court of Appeal having been drawn to the possibility of imposing suspended sentences of imprisonment in the present case under s. 3 of the Suspended Sentences of Imprisonment Law, 1972 (Law 95 of 1972), it proceeded to consider whether a sentence of imprisonment may be imposed so that it was to be actually served partly and be suspended as regards its remainder.

Held, (I) with regard to the suspension of the sentences:

We are of the view that the course of imposing a sentence of imprisonment so that it is to be actually served partly and be suspended as regards its remainder is not provided for by our legislation and is also contrary to principle (see the case of *Sapiano*, 52 Cr. App. R. 674). But there does not seem to be any obstacle to combining a suspended sentence with a fine.

Held, (II) with regard to the sentence:

(1) The trial judge was quite right to take a very grave view of the seriousness of the offences concerned; and we agree with him that, in principle, imprisonment was the proper sentence for such offences. (See *Peristianis* v. *The Police* (1969) 2 C.L.R. 137, *Matsentides* v. *The Police* (1973) 2 C.L.R. 250 and Cross on the English Sentencing System (1971) p. 140).

(2) Where we find that the judge erred is that he did not take sufficiently into account the personal circumstances of each appellant, as well as the extent of the involvement of each one of them in the offences in question, from, *inter alia*, the point of view of the aspect of moral blame: in other words, he has not individualized the sentences, as he ought to have done in accordance with the relevant principles expounded in *Lazarou* v. *The Police* (1969) 2 C.L.R. 184, *Economides* v. *The Police* (1970) 2 C.L.R. 138 and *Papageorghiou* v. *The Republic* (1971) 2 C.L.R. 327.

Held, (III) with regard to the appeal of appellant 5:

Having taken everything into consideration we have decided that we should set aside the sentence of twelve months' imprisonment passed upon this appellant and substitute in its place a sentence of imprisonment of equal length but suspended, under s. 3 of Law 95/72, for a period of three years (Practice direction concerning the passing of suspended sentences on appeal reported in [1970] 1 W.L.R. 259 duly borne in mind).

Held, (IV) with regard to the appeal of appellant 2:

The case of this appellant differs from that of appellant 5, in that he was not involved in homosexual behaviour on only one isolated occasion, but he had been

indulging in homosexual play with appellant 1 over quite a long period of time; consequently, we cannot treat appellant 2 as leniently as appellant 5; but, we think, nevertheless, that the sentence of twelve months' imprisonment passed on him should be reduced to one of eight months, as from the date when he was sentenced by the Court below.

Held, (V) with regard to the appeal of appellant 4:

This appellant deserved to be treated with more leniency by the Court below and we, consequently, have decided to reduce the sentence of twelve months' imprisonment passed on him to one of eight months.

Held, (VI) with regard to the appeal of appellant 3:

The role of this appellant has not been so bad as that of appellant 1; so it is unfair to deal with him on the same footing as appellant 1. For this reason and in order to avoid a parity of sentences as between this appellant and appellant 1, when there exists clearly a disparity of blameworthiness, we have decided to reduce the concurrent sentences of fifteen months' imprisonment passed on this appellant to concurrent sentences of one year's imprisonment.

Held, (VII) with regard to the appeal of appellant 1:

In view of his nefarious role in seducing the other appellants we cannot even contemplate a reduction of his imprisonment, which we regard as being on the low side; it is not without some difficulty that we have refrained from making it run as from today; what weighed in making us, in the end, allow his concurrent sentences of fifteen months' imprisonment to run from the date on which they were imposed by the Court below is the fact that at the last moment, during the hearing of this appeal, he sought leave to withdraw it; and even though such leave was refused, we have still to give him some small credit for his even very belated acceptance that he was rightly punished, as he was by the trial Court: we regard such acceptance, as a first step on the path of reforming himself.

Appeals of appellants 2, 3, 4 and 5 allowed; appeal of appellant 1 dismissed.

Cases referred to:

Peristianis v. *The Police* (1969) 2 C.L.R. 137 at p. 144;

Willis, 60 Cr. App. R. 146;

Matsentides v. *The Police* (1973) 2 C.L.R. 250;

Mirachis v. *The Police* (1965) 2 C.L.R. 28;

Karaviotis and Others v. *The Police* (1967) 2 C.L.R. 286;

Skoullou v. *The Police* (1969) 2 C.L.R. 27;

Lazarou v. *The Police* (1970) 2 C.L.R. 18;

Polycarpou v. *The Police* (1970) 2 C.L.R. 111;

Smith [1964] Crim. L.R. 70;

Lazarou v. *The Police* (1969) 2 C.L.R. 184;

Economides v. *The Police* (1970) 2 C.L.R. 138;

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

Sapiano, 52 Cr. App. R. 674;

R. v. *King* [1970] 2 All E.R. 249;

Nicolaou v. *The Police* (1969) 2 C.L.R. 120.

Appeals against sentence.

Appeals against sentence by N. Mavros and 4 others who were convicted on the 15th September, 1975 at the District Court of Nicosia (Criminal Case No. 11563/75) on various counts of unnatural offences contrary to section 171(a) and (b) of the Criminal Code Cap. 154 and were sentenced by Hji Constantinou, S.D.J. to the following terms of imprisonment: Appellants 1 and 3 to 15 months' imprisonment on each count to run concurrently and appellants 2, 4 and 5 to one year's imprisonment each.

L. Clerides with *A. Xenophontos*, for appellants 1, 2 and 3.

C. Indianos with *P. Sarris*, for appellant 4.

T. Eliades, for appellant 5.

A. M. Angelides, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was delivered by:

TRIANTAFYLLIDES, P.: The appellants (who in this judgment are referred to by the numbers which were given to them as accused persons on the charge sheet) have appealed against the sentences imposed on them after they had pleaded guilty to offences contrary to sections 171(a) and 171(b) of the Criminal Code, Cap. 154, namely of having had carnal knowledge of another male person against the order of nature or of having allowed another male person to have carnal knowledge of them against the order of nature.

Appellant 1, Mavros, pleaded guilty to six counts; the five of them involve offences committed by him contrary to section 171(a) and the other count relates to an offence against section 171(b); in effect, he admitted that he had carnal knowledge of appellant 3 on four occasions, that he allowed the same appellant to have carnal knowledge of him on one occasion, and, also, that he had had once carnal knowledge of appellant 2.

Appellant 2, Antoniou, pleaded guilty only to one count charging him with an offence under section 171(b), in which the person who was allowed by this appellant to have carnal knowledge of him was appellant 1.

Appellant 3, Asproftas, admitted committing an offence under section 171(a) by having carnal knowledge of appellant 1, and four offences under section 171(b); in committing two of them he allowed appellant 1 to have carnal knowledge of him, and in respect of the other two he allowed appellants 4 and 5, respectively, to have carnal knowledge of him.

Appellant 4, Trillides, pleaded guilty to one count concerning an offence contrary to section 171(a); in committing it he had carnal knowledge of appellant 3.

Lastly, appellant 5, Georghiou, pleaded guilty to an offence contrary to section 171(a); in committing it he

had carnal knowledge of appellant 3.

Appellant 1 was sentenced to fifteen months' imprisonment on each count, the terms to run concurrently; appellant 2 was sentenced to twelve months' imprisonment; appellant 3 was sentenced to 15 months' imprisonment on each count, the terms to run concurrently; and appellants 4 and 5 were each sentenced to twelve months' imprisonment.

On the basis of all the material before us, and taking, particularly, into account that the pleas of guilty of the appellants establish that the offences committed by them were interrelated, we are of the view that this is a case where homosexual orgies were indulged in, with appellant 1 as the principal initiator and instigator, and with appellant 3 playing a leading role, too.

As it was stated in *Peristianis* v. *The Police*, (1969) 2 C.L.R. 137, 144, offences such as those which were committed by the appellants are considered by the great majority of the people of this country as a social evil, due to the fact that they undermine morality and affect detrimentally sober, disciplined and healthy life.

It might be useful, also, to refer, at this stage, to Cross on the English Sentencing System (1971) p. 140, where the following passage is to be found :-

> "Why are homosexual offences generally subject to heavier punishment than heterosexual offences? It is very difficult to give a more convincing reason than that society as a whole disapproves of them more strongly."

Furthermore, in *Matsentides* v. *The Police* (1973) 2 C.L.R. 250, which was a case involving a homosexual offence, we have stressed that the sentence had to be assessed bearing in mind the moral concepts of our country, where the offence had been committed.

We have taken fully into account what has been stated by counsel for the appellants; also, whatever appears on record in relation to each one of them, as well as what has been fairly stated in favour of some of them by counsel for the respondents :

As on behalf of some of the appellants great stress

was laid on the fact that such appellants are, according to medical reports, psychologically afflicted, and that this is the cause of their depravity, we think that it is useful to refer to the case of *Willis*, 60 Cr. App. R. 146, where (at p. 149) the following are stated :-

"We turn now to the main mitigating factors. (1) Mental imbalance. The Wolfenden Report rejected the theory that homosexuality is a disease (see para. 30). Some psychiatrists try to persuade judges that it is and that its physical manifestations should be regarded as symptoms of the disease, rather than as breaches of the criminal law. Parliament has considered all these matters and has decided that some kinds of homosexuality (buggery is one) should be criminal offences. There is no justification for judges taking any other view. The Wolfenden Report recognised. however, that in some cases homosexual offences do occur as symptoms in the course of recognised mental or physical illness and cited as an example senile dementia (see para. 30 and for more details the note by Dr. Curran and Dr. Whitby at p. 72). When such cases are identified by satisfactory medical evidence judges will want to pass sentences which do not result in immediate committal to prison.

(2) Personality disorders. Men suffering from such disorders do not come within the purview of the Mental Health Act 1959 unless the disorder is so gross that it amounts to psychopathy. The types of disorder may vary: at one end of the scale there is the mentally immature adult who is in the transitional stage of psycho-sexual development: he can be helped to grow up mentally. At the other end are those with severely damaged personalities. such as the obviously effeminate and flauntingly exhibitionist individuals and the deep resentful anti-social types. Probably nothing can be done for these individuals: but their pitiable condition calls for understanding and mercy. Offenders with personality disorders do. however. present a difficult sentencing problem. At present little can be done by either doctors or welfare workers for most of them : they require management rather than treatment. If they cannot be managed. either because they do not want to be or

are mentally incapable of accepting management, they may become a danger to boys when at large in society. In such cases, the public are entitled to expect the courts to keep this class of offender away from boys, in really bad cases for indefinite periods.

(3) Emotional stress. Many people have homosexual dispositions which they control as successfully as those of us who are orientated heterosexually. The Wolfenden Committee found that there was no good reason to suppose that at least in the majority of cases homosexual acts are any more or less resistible than heterosexual acts (see para. 33). Nevertheless it is a matter of both judicial and medical experience that latent homosexuals who have controlled their urges for years will give way under stress or unexpected and powerful temptation. The stress may come from the loss of a supporting parent or wife or of a job thought to be secure. The unexpected and powerful temptation may come from a depraved homosexual who sets out to seduce someone whom he recognises as having the same urges as he himself has. It is a saddening and disturbing experience for judges to find, as many have, that the wicked seducer was an adolescent boy. When an accused who has kept his homosexuality under control for a long time begins committing offences either because of some precipitatory stress or exceptional temptation, the case may call for a measure of leniency."

Due regard to the views set out in the above extract has been paid in reaching our decision in the present case.

We have, indeed, taken anxiously into account that this is an instance where there have been sent to prison persons of relatively young age; and this is so, in particular, in respect of appellants 2, 3 and 5.

We have borne in mind, too, the views expressed, as regards assessment of sentence, in cases such as *Mirachis* v. *The Police,* (1965) 2 C.L.R. 28 and *Karaviotis and Others* v. *The Police,* (1967) 2 C.L.R. 286, concerning the principle—with which we agree—that imprisonment should be resorted to as the last possible alternative, especially in cases of young persons; also, re-

ference may be made, in this respect, to cases such as *Skoullou* v. *The Police*, (1969) 2 C.L.R. 27, *Lazarou* v. *The Police*, (1970) 2 C.L.R. 18, and *Polycarpou* v. *The Police*, (1970) 2 C.L.R. 111.

In Thomas on Principles of Sentencing (1970), at p. 247, it appears, in relation to dealing with the problem of the imprisonment of young offenders, that the approach adopted in the aforementioned case-law of ours has been given, to a certain extent, statutory effect in England.

In the textbook by Thomas, *supra*, a reference is to be found (at p. 19) to the case of *Smith*, [1964] Crim. L.R. 70, where it was held, by the Court of Appeal in England, that "in the case of a young offender there can rarely be any conflict between his interest and the public's. The public have no greater interest than that he should become a good citizen".

The difficulty of the task of the courts, in this connection, is to how best to achieve the realization of the above object.

It is with all the foregoing in mind that we have approached the sentences passed by the trial judge in this case:

We think that he was quite right to take a very grave view of the seriousness of the offences concerned; and we agree with him that, in principle, imprisonment was the proper sentence for such offences.

Where, we find, with all due respect, that the judge erred is that he did not take sufficiently into account the personal circumstances of each appellant, as well as the extent of the involvement of each one of them in the offences in question, from, *inter alia*, the point of view of the aspect of moral blame; in other words, he has not individualized the sentences, as he ought to have done in accordance with the relevant principles expounded in *Lazarou* v. *The Police*, (1969) 2 C.L.R. 184, *Economides* v. *The Police*, (1970) 2 C.L.R. 138 and *Papageorghiou* v. *The Republic*, (1971) 2 C.L.R. 327.

In this connection our attention has been drawn to the possibility of imposing, in the present case, suspended sentences of imprisonment, under section 3 of the Sus-

pended Sentences of Imprisonment Law, 1972 (Law 95/72).

A point that has been raised, in this respect, in argument, is whether a sentence of imprisonment may be imposed so that it is to be actually served partly and be suspended as regards its remainder; we are of the view that such a course is not provided for by our legislation and it is, also, contrary to principle; and we might usefully refer to the case of *Sapiano*, 52 Cr. App. R. 674, where it was held that "it is not proper to pass a suspended sentence to be consecutive to an effective sentence, as the main object of a suspended sentence is to avoid sending the offender to prison". But there does not seem to be any obstacle to combining a suspended sentence with a fine (see *R.* v. *King*, [1970] 2 All E.R. 249).

We shall bear in mind the above, too, in dealing with this case; and we shall neither lose sight of the need to avoid disparity in sentences, in the sense in which such need has been explained in, *inter alia*, *Nicolaou* v. *The Police*, (1969) 2 C.L.R. 120.

We come now to deal with the individual case of each appellant:

We shall commence with appellant 5; as already stated, this appellant has been convicted of only one offence, under section 171(a) of Cap. 154, and it appears, from the material before us, that on that one occasion he was led astray by appellant 1, who is ten years older; also, appellant 5 was at the time of the commission of the offence under the influence of a narcotic drug given to him by appellant 1.

By a medical report, which is part of the record, it is established that there have not been found on appellant 5 any physical signs indicating that he is a passive homosexual.

Having taken everything into consideration we have decided that we should set aside the sentence of twelve months' imprisonment passed upon him and substitute in its place a sentence of imprisonment of equal length but suspended, under section 3 of Law 95/72, for a period of three years.

In imposing a suspended sentence of imprisonment on appellant 5 we have borne duly in mind the Practice Direction concerning the passing of suspended sentences on appeal, which is to be found in [1970] 1 W.L.R. 259, and reads as follows :-

"Lord Parker C.J. : The attention of the Court of Appeal (Criminal Division) has been drawn to the position which may arise when a court of quarter sessions has substituted a suspended sentence for a sentence of imprisonment imposed by the court of trial. In such a case the defendant will have been in custody between the trial and the appeal and yet, should the suspended sentence later become operative, the defendant will not get, as it were, a credit in respect of that period in custody.

This results from the fact that section 67(1) of the Criminal Justice Act, 1967, does not operate to reduce the term of any suspended sentence by any period in custody before the suspended sentence was passed, which includes, where the suspended sentence is passed on appeal, any period in custody pending appeal.

Where, therefore, after a period in custody pending appeal, the appellate court is of opinion that it would be fair in all the circumstances to take that period in custody into account, this should be done by making some approximate adjustment to the term of the suspended sentence and the court should state expressely that it had the period of custody in mind whether an adjustment has or has not been made. The appellate court should further indicate that the operational period runs from the date when that court passes the suspended sentence.

The Court of Appeal (Criminal Division) propose to adopt this practice."

We have decided, indeed, in the light of all relevant circumstances, that it is not unfair not to make any allowance, on the basis of the above Direction, in respect of the time spent by this appellant in prison pending his appeal, and, therefore, we have not made the length

of the suspended sentence less than that of the sentence which was passed upon him at the trial, *viz.* one year. The operational period of the suspended sentence shall run as from today.

We come, next, to appellant 2 : He has been convicted in respect of only one count, based on section 171(b) of Cap. 154. It is clear from his statement to the police that he was methodically seduced by appellant 1 and that, as a result, indulged in homosexual caresses with him on more than one occasion; but he has been involved in buggery only on the one occasion in respect of which he has pleaded guilty. He is a young person, twenty years old. As it appears from a certificate, which was produced, he was discharged from the National Guard because of personality disturbances, which were found to be so serious as to render him unsuitable for service in the National Guard.

This appellant's case differs from that of appellant 5, in that he was not involved in homosexual behaviour on only one isolated occasion, but he had been indulging in homosexual play with appellant 1 over quite a long period of time; consequently, we cannot treat appellant 2 as leniently as appellant 5; but, we think, nevertheless, that the sentence of imprisonment passed on him (a term of twelve months) should be reduced to one of eight months, as from the date when he was sentenced by the court below.

We shall deal, next, with appellant 4 : He is relatively older than all the other appellants, except appellant 1. He has been convicted on only one count, under section 171(a) of Cap. 154. As it appears from his statement to the police this is not the case of a person who was involved on only one occasion in homosexual behaviour; he had been taking part in homosexual orgies for a long period of time, with different persons; on the other hand, an important mitigating factor in his favour is that he realized himself, on his own, the depravity and impropriety of his conduct, long before he was arrested by the police, and had been living a moral and normal life since 1973, one whole year before his arrest.

We, therefore, think that he deserved to be treated with more leniency by the court below and we, conse-

quently, have decided to reduce the sentence passed on him (a term of twelve months) to one of eight months' imprisonment.

We come, now, to appellant 3: Though he is, indeed, a young person, twenty years old, he had been very deeply involved in homosexual orgies, much more than appellants 5, 2 and 4, nearly as much as appellant 1; but, his role has not been so bad as that of appellant 1, who seems to have seduced all the other appellants; so it is unfair to deal with this appellant—(appellant 3)—on the same footing as appellant 1. For this reason, and in order to avoid a parity of sentences as between this appellant and appellant 1, when there exists clearly a disparity of blameworthiness, we have decided to reduce the sentences passed on this appellant (concurrent terms of fifteen months) to concurrent sentences of one year's imprisonment.

We shall deal, lastly, with appellant 1: We have had occasion to refer already to his nefarious role in seducing other appellants. We cannot even contemplate a reduction of his imprisonment, which we do regard as being on the low side; it is not without some difficulty that we have refrained from making it run as from today; what weighed in making us, in the end, allow his concurrent sentences of fifteen months' imprisonment to run from the date on which they were imposed by the court below is the fact that at the last moment, during the hearing of this appeal, he sought leave to withdraw it; and even though such leave was refused, we have still to give him some small credit for his even very belated acceptance that he was rightly punished, as he was, by the trial court; we regard such acceptance as a first step on the path of reforming himself.

For all the reasons stated hereinbefore these appeals succeed as indicated in this judgment, in so far as appellants 2, 3, 4 and 5 are concerned; and the appeal of appellant 1 is dismissed.

Appeals of appellants 2, 3, 4 and 5 allowed.
Appeal of appellant 1 dismissed.