1979 May 4

[TRIANTAFYLLIDES, P. L. LOIZOU AND MALACHTOS, JJ.]

GEORGHIOS FASOULIOTIS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 4032).

Findings of trial Court—Based on credibility of witnesses—Appeal—Principles applicable.

Criminal Law—Sentence—Common assault and public insult—Sixty-seven years old retired judicial officer slapped twice and spat on the face—Two months' imprisonment—Appellant thirty-five years old, a first offender and not a person in need of reform through imprisonment—Personal circumstances of the appellant—Though custodial sentence duly justified, a shorter sentence would serve sufficiently its main deterrent purpose—Sentence reduced.

The appellant was convicted of the offences of common assault and public insult and was sentenced to two months' imprisonment in respect of the assault and the other offence was taken into consideration.

According to the evidence of the complainant, a sixty-seven years old retired judicial officer, he was on May 25, 1978, driving his car along Santa Roza avenue in Nicosia, when, on seeing the driver of a car, which was proceeding ahead of him, switch on and off, alternatively, its rear indicator lights, blew his horn in order to warn the driver of the other car of the danger of a possible collision. The said driver was the appellant. Eventually the two cars stopped near to each other at the traffic lights of a nearby road junction and there the appellant alighted from his car and approached that of the complainant and slapped him twice, once on each cheek, whilst he was still sitting in his car; the complainant did not retaliate in any way by acts or words, but when the lights changed into green he proceeded across the

road junction and, having turned right, he stopped, his car, and noted down on a piece of paper the registration number of the car of the appellant. The appellant turned, also, to the right and stopped his car next to that of the complainant; he alighted once again, approached the complainant and spat at him; he, also, insulted him.

The appellant denied that he had either assaulted the complainant or insulted him or spat at him.

The trial Judge did not believe the evidence of the appellant, who, together with the complainant, were the only two witnesses who testified at the trial as to what had happened on the occasion in question; and he rejected, in particular, the allegation of the appellant that the complainant was under the influence of drink at the material time.

In reaching his conclusion as regards the credibility of the complainant and the appellant the trial Judge relied, *inter alia*, on their demeanour as witnesses before him and on the nature of the testimony they had given.

The appellant appealed against conviction and sentence. He was thirty–five years old, married with three children and a first offender who was not in need of reform through imprisonment. He ran a furniture factory which had to meet large orders for furniture, both in Cyprus and abroad, and, his absence from the management of his factory would influence quite adversely the functioning of his furniture business as a whole, as he happened to be, also, the designer of the furniture made at his said factory.

(I) *With regard to the appeal against conviction:*

Held, unanimously, that this Court does not interfere on appeal with findings of a trial Court based on the credibility of witnesses when it is satisfied that such findings were reasonably open to the trial Court; that it is up to the party challenging such findings to satisfy this Court, on appeal, that they are erroneous (see, *inter alia*, *Charalambides* v. *HjiSoteriou & Sons and Others* (1975) 1 C.L.R. 269 at p. 277); that the appellant has not only failed to satisfy this Court that the trial Judge was wrong in believing the complainant and disbelieving the appellant, but this Court is, also, prepared to go to the extent of saying that it is satisfied that the version of the complainant was rightly ac-

cepted as the correct one and the version of the appellant was properly rejected as being false; and that, accordingly, the appeal against conviction must be dismissed.

(II) *With regard to the appeal against sentence:*

Held, (*L. Loizou J. dissenting*) that though a custodial sentence was duly justified, in the present case, in view of all relevant considerations, including the personal circumstances of the appellant and the fact that a sentence of imprisonment for a period of one month is sufficient to deter the appellant and others from resorting to conduct such as the one in respect of which the appellant has been sent to prison, a sentence of two months' imprisonment was not warranted; that, therefore, it must be treated as being so excessive as to justify interference with it on appeal; and that, accordingly, the appeal should be allowed so that the sentence shall be reduced to imprisonment of one month as from the date when he was sent to prison.

Appeal against conviction dismissed. Appeal against sentence allowed.

Cases referred to:

Charalambides v. *HjiSoteriou & Son and Others* (1975) 1 C.L.R. 269 at p. 277;

Achillides v. *Michaelides* (1977)* 3 J.S.C. 299, at pp. 307–309;

Petrou v. *Petrou* (1978) 1 C.L.R. 257 at pp. 266, 267;

R. v. *Davies* [1976] Crim. L.R. 697;

R. v. *Moore* [1976] Crim. L.R. 145;

R. v. *Callmeyer* [1976] Crim. L. R. 267.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Georghios Fasouliotis who was convicted on the 12th April, 1979, at the District Court of Nicosia (Criminal Case No 21066/78) on two counts of the offences of common assault and public insult contrary to sections 242 and 99, respectively, of the Criminal Code Cap. 154 and was sentenced by Artemides, D.J. to two months' imprisonment in respect of the assault and the other offence was taken into consideration.

St. Kittis, for the appellant.

R. Gavrielides, Counsel of the Republic, for the Respondent.

* To be reported in (1977) 1 C.L.R.

The following judgments were given:

TRIANTAFYLLIDES P. The appellant has appealed against his conviction, on April 12, 1979, of the offences of common assault, under section 242 of the Criminal Code, Cap. 154, and of public insult, under section 99 of Cap. 154; he was sentenced to two months' imprisonment in respect of the assault and the other offence was taken into consideration.

The appellant has appealed against both his conviction and the sentence imposed on him.

The salient facts of this case are briefly as follows:-

The complainant, who is a retired judicial officer, sixty-seven years old, was, on May 25, 1978, driving his car along Santa Roza avenue, in Nicosia, when, on seeing the driver of a car, which was proceeding ahead of him, switch on and off, alternately, its rear indicator lights, blew his horn in order to warn the driver of the other car of the danger of a possible collision. The said driver was the appellant, who, when he was about to turn into a side road, was prevented from doing so by road works and had to drive straight on; and that is why he flashed alternately his indicator lights.

Eventually, the two cars stopped next to each other at the traffic lights of a nearby road junction and there, according to the evidence of the complainant, which the trial Court treated as credible, the appellant alighted from his car and approached that of the complainant and slapped him twice, once on each cheek, whilst he was still sitting in his car; the complainant did not retaliate in any way by acts or words, but when the lights changed into green he proceeded across the road junction and, having turned right, he stopped his car, and noted down on a piece of paper the registration number of the car of the appellant.

The appellant turned, also, to the right and stopped his car next to that of the complainant; he alighted once again, approached the complainant and spat at him; he, also, insulted him.

The next day, after the complainant had reported the matter to the police, the appellant was formally charged with the offences of common assault and public insult and he denied them. He said, in his statement in answer to the formal charge that he

had heard the complainant, who was driving behind him, blowing his horn continuously, and that at the traffic lights both he and the complainant got out of their cars and there he realized that the complainant was intoxicated; so, he got back into his car and drove off without either assaulting, or insulting, or spitting at, the complainant.

When the appellant gave evidence on oath at the trial, he stated that, after he had heard the complainant blowing his horn, he made room for him to overtake and at that moment he noticed the complainant gesticulating with his hands in a manner which the appellant took to be insulting conduct towards him on the part of the complainant.

When their cars stopped at the traffic lights the appellant—according to his evidence at the trial—approached the complainant and asked him, while he was in his car, why he had been blowing his horn and gesticulating in an insulting manner. He realized, then, that the complainant was intoxicated and was speaking in a manner which prevented the appellant from understanding what he was saying and, after having failed to establish communication with him, the appellant told him "I spit at your age because you drive in the streets drunk and endanger your own life as well as that of others; the appellant insisted, however, in his testimony, that he did not actually spit at the complainant; he, then, returned to his own car and, after crossing the junction, he noticed that the complainant had got out of his car and was writing something in a notebook. The appellant drove up to the car of the complainant and asked him what else he wanted and, then, drove away. He denied that he had either assaulted the complainant or insulted him or spat at him.

The trial Judge did not believe the evidence of the appellant who, together with the complainant, were the only two witnesses who testified at the trial as to what had happened on the occasion in question; he rejected, in particular, the allegation of the appellant that the complainant, at the material time, was under the influence of drink.

We have considered all that has been submitted during the hearing of this appeal by counsel for the appellant in an effort to persuade us that it was not safe for the trial Judge to rely on the evidence of the complainant; counsel stressed that the complain-

ant had openly admitted, in his testimony, that soon before the incident in question he had had two or three drinks of whisky.

The trial Judge, in reaching his conclusion as regards the credibility of the complainant and the appellant, relied on their demeanour as witnesses before him, on the nature of the testimony they had given, and pointed out, in particular, that he regarded the allegation that the complainant was under the influence of drink as completely false in view of the coherent and careful manner in which the complainant had behaved at the time of his encounter with the appellant, and of the many details, regarding what had happened, that he recollected clearly and related with precision at the trial. Furthermore, the trial Judge highlighted the inconsistencies between the statement of the appellant in answer to the formal charge and his testimony at the trial.

It is well settled that this Court does not interfere on appeal with findings of a trial Court based on the credibility of witnesses when it is satisfied that such findings were reasonably open to the trial Court; and it is up to the party challenging such findings to satisfy this Court, on appeal, that they are erroneous (see, *inter alia*, *Charalambides* v. *HjiSoteriou & Son and others*, (1975) 1 C.L.R. 269, 277, *Achillides* v. *Michaelides*, (1977)* 3 J.S.C. 299, 307–309, and *Petrou* v. *Petrou*, (1978) 1 C.L.R. 257, 266, 267).

In the present case not only the appellant has failed to satisfy us that the trial judge was wrong in believing the complainant and disbelieving the appellant, but we are, also, prepared to go to the extent of saying that we are satisfied that the version of the complainant was rightly accepted as the correct one and the version of the appellant was properly rejected as being false.

Consequently, the appeal of the appellant against his conviction fails and it is unanimously dismissed accordingly.

As regards the appeal against sentence, we have not been able to reach a unanimous decision:

I agree with the trial Judge that, though in most cases of common assault no imprisonment is imposed (see Thomas on

* To be reported in (1977) 1 C.L.R.

Principles of Sentencing, 1970, p. 105), the present case is such an instance of aggressive and insulting behaviour that a custodial sentence was clearly required.

In *R.* v. *Davies*, [1976] Crim. L.R. 697, a youth, seventeen years old, pleaded guilty to using, after drinking, insulting words to two women in the street and he was sentenced to six months' detention; he had three previous convictions for dishonesty and there had been made in respect of him a probation and supervision order; it was held, on appeal, that there was no excuse for his conduct and a custodial sentence was clearly correct, but, as there was no accompanying violence, a sentence of three months would provide a sufficient deterrent.

In *R.* v. *Moore*, [1976] Crim. L.R. 145, a young man, twenty-three years old, was convicted of assault occasioning actual bodily harm in the following circumstances: He was driving a car after dark and another motorist noticed that he was showing no lights and flashed his own lights in order to draw his attention to it. A little later the other motorist felt a bump as a result of a collision of the car of the appellant with his car and stopped to examine the condition of his own car; he was then attacked by the appellant and his passenger who kicked him in the face breaking a tooth of his and causing a cut on his lip. The appellant was sentenced to four months' imprisonment; though he had no previous convictions, it was held, on appeal, that an immediate prison sentence was unavoidable despite his good record and the possible effects of such sentence on his newly married wife and his employment, and that the length of the sentence of imprisonment might well have been six months; it was stressed, in dismissing his appeal, that where Courts of first instance imposed custodial sentences for violence of this kind that is inexcusable, unprovoked, sheer vicious aggression, they would be upheld.

In *R.* v. *Callmeyer*, [1976] Crim. L.R. 267, a sentence of eighteen months' imprisonment, which was passed upon a man, twenty years old, after he had pleaded guilty to assault occasioning actual bodily harm, was upheld. The circumstances of that case were as follows: The victim was using a public telephone kiosk and though there was an adjacent kiosk which was not being used at the time, the appellant opened the door of the kiosk where the victim was and asked to use the telephone. An

argument developed and the appellant hit the victim on the head with the receiver and pulled him out and punched him and kicked him. The appellant had a bad criminal record, but it was stated, on his behalf, that he was not given to violence as part of his general character. It was held, on appeal, that, having regard to the appellant's record and behaviour, the length of the sentence of imprisonment was right and it was stressed that it mattered not whether people who behaved in this way had previous convictions for violence; they should get immediate custodial sentences and this was the only way to stop violence on the streets.

Therefore, a custodial sentence was duly justified in the present case; I agree, however, with counsel for the appellant that a shorter sentence of imprisonment would serve sufficiently its main purpose of deterring the appellant, and others like him, from resorting to conduct such as the one in respect of which he has been sent to prison.

The appellant, who is thirty-five years old, is married and has three children; he runs a furniture factory which has to meet large orders for furniture; both in Cyprus and abroad, and, his absence from the management of his factory will influence quite adversely the functioning of his furniture business as a whole, as he happens to be, also, the designer of the furniture made at his said factory. The appellant is a first offender and he is, certainly, not a person who appears to be in need of reform through imprisonment.

The trial Judge, in giving his reasons for sending the appellant to prison for two months, stressed the difference in ages between the appellant and the complainant, but he, quite rightly, pointed out that the fact that the complainant is a retired judicial officer (Mr. G. Georghiou, an ex President of a District Court) was not a factor which had played any part in the assessment of the sentence to be passed upon the appellant because all citizens are equal before the law and equally entitled to its protection.

On the other hand, it appears, from what the trial Judge has stated, that he took a serious view of the fact that the appellant, in defending himself, put forward the allegation, which was not accepted by the trial Judge, that the complainant, at the material time, was intoxicated; and it does seem to me that this, apparent-

ly, influenced him in being more severe towards the appellant than he might, otherwise, have been.

Having weighed all relevant considerations, I have reached the conclusion that this is a case in which the proper sentence should not be more than one month's imprisonment and I have decided, therefore, that this appeal should be allowed accordingly, so that the sentence passed upon the appellant shall be reduced to imprisonment of one month as from the date when he was sent to prison.

Before concluding, I would like to stress that the reduction of the sentence in the present case in no way implies that I entertain any doubt at all concerning the correctness of the version of the complainant, or the propriety of his conduct on the particular occasion; or that sentences of imprisonment of much longer durat on than for one or two months should not be imposed in future in similar cases if they are warranted by the particular circumstances of any such case; simply, I am of the opinion that in the present case, in view of all the foregoing considerations, including the personal circumstances of the appellant and the fact that a sentence of imprisonment for a period of one month is sufficient to deter the appellant and others from resorting to conduct such as the one which has led to the present predicament of the appellant, a sentence of two months' imprisonment was not warranted and, therefore, it must be treated as being so excessive as to justify interference with it, on appeal.

L. Loizou J. I am in complete agreement that the appeal against conviction should be dismissed. The evidence for the prosecution, which incidentally in certain respects was corroborated by that of the appellant himself, was overwhelming and once the trial Court believed the evidence, and rightly so in my opinion, the verdict was inevitable. I find no merit in any of the grounds put forward and argued by counsel for the appellant on this issue and in my view the judgment is not open to any criticism.

With regard to the appeal against sentence, however, I find myself in the unhappy position of having to disagree with my brother Judges.

Although the assault was not serious, in the sense that the

violence used was not extensive, the circumstances were such as to warrant, in my view, the sentence of imprisonment imposed by the trial Judge. The appellant, a man of 35, assaulted a man of much weaker disposition, 67 years old. The assault was unprovoked and absolutely unwarranted and unjustified; it was sheer mindless violence. Any accused person is of course free to plead not guilty to the charge against him and to put forward any defence that is open to him without, by reason of such course, aggravating the case beyond the limit warranted by the facts, but with this qualification: that he cannot at the same time claim mitigation of sentence below that limit on the ground that he has shown remorse. But in actual fact at no time, either when first approached and charged by the police or during the trial did the appellant in this case say one word to show that he appreciated the wrong that he had commited or that he repented for the humiliating and degrading treatment to which he subjected the complainant.

In my view, the prison sentence imposed on him was, having regard to the circumstances, appropriate, inspite of his clean record and any possible effect on his business, and cannot be said to be either wrong in principle or manifestly excessive. I see no reason at all to interfere with the sentence imposed by the trial Court within whose province the nature and extent of punishment primarily lie. Peaceful citizens and the society generally have to be protected from unduly irritable and excitable persons, as the appellant apparently is judging from his behaviour, who as a result of unjustified and unprovoked outburst of temper resort to this sort of conduct in the streets and use senseless violence and insulting behaviour.

I would dismiss the appeal against sentence as well.

MALACHTOS J. I agree that the appeal against conviction should be dismissed, but the appeal against sentence should be allowed and the term of imprisonment of the appellant be reduced to one month for the reasons given by the President of the Court.

TRIANTAFYLLIDES P. In the result the appeal against conviction

is dismissed, but the appeal against sentence is allowed by majority, as stated in the judgments which have just been delivered.

Appeal against conviction dismissed. Appeal against sentence allowed.