1976 May 28

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

CHARALAMBOS PANAYIOTOU,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3693).

Criminal Law—Sentence—Evidence—Social investigation report—Admissibility in evidence.

Criminal Law—Sentence—Receiving stolen property—Trial Judge unduly influenced by social investigation report—No sufficient weight given to fact that appellant admitted offence on interrogation by police and to fact that his two previous convictions were made some time ago—Sentence of nine months' imprisonment manifestly excessive—Reduced.

The appellant pleaded guilty to the offence of receiving a tape recorder, knowing same to have been stolen property, and was sentenced to nine months' imprisonment. He was 21 years of age and had two previous convictions: One for stealing jewellery from the house of his mother when he was 15 years old for which he was placed on probation for a period of three years; and one for obtaining goods by false pretences for which he was bound over. When he was interrogated by the police he admitted the above offence and named the person from whom he had purchased the tape recorder in question. In passing sentence the trial Judge had before him a social investigation report.

Upon appeal against sentence.

Held, (1) (*on the question whether the social investigation report was admissible in evidence*) that the social investigation report, in the particular circumstances of this case, was admissible in evidence, because it is generally accepted that probation officers should be free to express opinions on the likely response of an

accused person to probation, but the Court is not bound by those recommendations in any way (pp. 269–73 *post*).

(2) (*On the question whether the sentence of nine months' imprisonment was excessive*) that the trial Court was unduly influenced by the social investigation report, and particularly the reference therein that appellant used to procure his fiancée to men; that the trial Court did not give sufficient weight to the fact that when the appellant was taken for interrogation, he admitted to the police the offence and named the person from whom he had purchased the tape recorder in question; that, therefore, and because, also, his previous convictions were made some time ago, the sentence is manifestly excessive in the circumstances of this case; and that, accordingly, it must be reduced to one of five months' imprisonment.

Appeal partly allowed.

Cases referred to:

John Michael Ampleford [1975] 61 Cr. App. R. 325 at pp. 326–327;

R. v. *Kirkham* [1968] Crim. L.R. 210;

Stylianou and Others v. *The Republic*, 1961 C.L.R. 265;

Skoullou alias "Kotsiras" v. *The Police* (1969) 2 C.L.R. 27 at p. 30;

Afxenti (Iroas) v. *The Republic* (1966) 2 C.L.R. 116 at p. 118;

Phivos Panteli, alias Phivos tis Manos v. *The Police* (1966) 2 C.L.R. at p. 59.

Appeal against sentence.

Appeal against sentence by Charalambos Panayiotou who was convicted on the 6th February, 1976 at the District Court of Nicosia (Criminal Case No. 23552/75) on one count of the offence of receiving a tape recorder knowing same to have been stolen property, contrary to section 306(a) of the Criminal Code Cap. 154 and was sentenced by HjiConstantinou, S.D.J. to nine months' imprisonment.

G. Mitsides, for the appellant.

C. Kypridemos, Counsel of the Republic, for the respondents.

HADJIANASTASSIOU J. gave the following judgment of the Court. This is an appeal by Charalambos Panayiotou against the decision of a Judge of the Criminal Court of Nicosia given

on 6th February, 1976 against him on a plea of guilty for the offence of receiving a tape recorder, knowing same to be stolen property, contrary to s. 306(a) of the Criminal Code, Cap. 154, and was sentenced to 9 months' imprisonment.

The facts are these: The appellant who was 21 years of age, was charged at the Criminal Court of Nicosia for receiving a tape recorder, make "Clarion" on 1st April, 1975, valued at £40, the property of Panayiotis Dracou of Kaimakli. He pleaded not guilty, but on 22nd December, 1975, counsel appearing for the accused applied for leave to change the plea of not guilty to one of guilty. The accused was re-charged, he pleaded guilty and the learned Judge adjourned the passing of sentence on him pending the preparation of a welfare report. The accused was ordered to sign a personal bail bond in the sum of £200.

On 28th January, 1976, when the welfare report was prepared, Inspector S. Andreou for the Police, informed the Court, in the presence of the accused and his counsel, that on 31st March, 1975, a petrol station was broken into and among other things taken was the tape recorder. For the breaking and entering a certain Michalakis Theocli was arrested, and when he was questioned, he admitted to the police that he was the culprit. He also admitted that he sold the said tape recorder to the accused on 1st April, 1975 for the sum of £15 only.

On 5th April, the accused was arrested, and when he was interrogated by the police, he admitted that he purchased the tape recorder fully aware that it was stolen property and sold it to another person.

The police prosecutor, in presenting the facts to the trial Court, said that the accused had two previous convictions: (1) stealing jewellery from the house of his mother when he was 15 years of age; and was placed on probation for a period of three years with the condition that he should reside at a hostel; (2) obtaining goods by false pretences, for which he was bound over to be of good behaviour for one year under his guarantee for the sum of £50. Then the welfare report was produced to the Court, and counsel appearing for him, in pleading for the leniency of the Court, said that the accused was recently released from the ranks of the National Guard, and that he had started working. Counsel further argued that what the accused has done, he has

done it when he was very young and pleaded that a last chance should be given to him to reform. Finally, counsel contended that from the welfare report, the accused deserved a better treatment and not to be sent to prison.

The trial Court, apparently needing time to consider the whole case, and particularly the report of the welfare officer, adjourned the case, and it was fixed on another date. On that date the learned Judge came to the conclusion—having been influenced from the contents of the welfare report—that because of the behaviour of the accused since his childhood, in the circumstances he thought that a term of imprisonment, viz. a period of 9 months, was the only remedy.

On appeal, counsel for the appellant, in a strong and able argument, contended (a) that the trial Court in passing sentence, did not take into consideration the nature and circumstances surrounding the offence particularly the fact that the appellant made no profit from receiving and selling the stolen property; and that he failed to take into consideration the age of the appellant, as well as that his previous convictions were for offences which the appellant committed at a very young age; (b) that in spite of the mitigating factors appearing in the welfare officer's report, the Court should have disregarded altogether the alleged admission by the appellant to the welfare officer by which he incriminated himself.

Finally, counsel complained that the Court erred in deciding that imprisonment was the proper sentence in this case, and that such sentence was excessive in view of all relevant and surrounding circumstances.

We have given anxious and careful consideration to the submissions of counsel for the appellant, and we think it is convenient to deal with the question whether the social inquiry report was admissible in evidence. Although it is invariable practice for a sentencer in a Court to receive a social inquiry report on an offender before deciding on sentence, he is not under a statutory obligation to do so unless he wishes to make a community service order. Statutory provisions requiring Courts to obtain and consider information about the circumstances, and take into account any information before the Court which is relevant to his character and his physical and mental condition before imposing imprisonment on an offender under 21, or on

one over 21, who has not previously served a sentence of imprisonment, have been held not to impose a mandatory obligation on the Court to obtain a social inquiry report before imposing imprisonment in the cases to which the section refers. The Court has, however, emphasised that sentencers should not normally proceed in the absence of a social inquiry report, even where there is no alternative to a substantial sentence of imprisonment. This has been the position in England, and in *John Michael Ampleford*, [1975] 61 Criminal Appeal Reports 325, Geoffrey Lane, L.J., dealing with the question whether there is an obligation to obtain a social inquiry report, said at pp. 326-327:-

> " It appears to this Court, and indeed it is conceded by Miss Flaws now, that that section does not impose any mandatory obligation upon a Court in those circumstances to obtain a social inquiry report before sentencing that type of offender. If any confirmation of that conclusion is required, it is to be found in section 45 of that same Act.
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> The original ground of appeal having gone, Miss Flaws then invited this Court, as she was entitled to, to consider whether, viewed in the light of the social inquiry report which is now before this Court, that sentence of 15 months' imprisonment in all was correct. She has submitted for our consideration the view that the justice of the case would be met, the public would be sufficiently protected and this man would be helped by a suspended sentence together with a supervision order in place of the sentence of immediate imprisonment which he is at the moment serving. She has drawn our attention to the various matters in the probation officer's report, pointing out that the probation officer was able to interview this man at length, that the appellant explained his matrimonial and family background to the probation officer, that he is a man of ability and potential. Apparently he was frank and honest with the probation officer, and in particular in paragraph 6 the probation officer says 'No doubt the Court will note his propensity to engage in the illegal use of drugs,' which in the officer's opinion indicates that this man is still desperately trying to battle out his deep-rooted difficulties. 'With this in mind, I cannot help having some doubts as to

whether prolonged imprisonment will change this man's behaviour and outlook...'

The fact of the matter is that this appellant is 23 years of age. He is married with one child. Certainly the wife was expecting another child and we do not know whether the child has been born. But he has two previous Court appearances, one in January 1971 for unauthorised possession of LSD for which he received a conditional discharge for two years, and the second one in October 1973 for unlawful possession of cannabis when he was fined £25. Those were two lenient sentences and sentences of which, if he had desired, he could have taken advantage. Parliament has seen fit to make the supplying and possessing of cannabis an offence. If in those circumstances, after two lenient sentences, a person chooses once again to possess or supply a prohibited drug, he cannot complain if imprisonment follows."

It appears, further that the precise form and content of a social inquiry report is not regulated by a statute, but it is generally accepted that probation officers should be free to express opinions on the likely response of accused persons to probation, and that, subject to the wishes of the Court, and if their knowledge and experience enable them to do so, probation officers should be free to give their assessment of the likely response of the offender to any other form of treatment. It is not, of course, the responsibility of the probation officer to advise the sentencer whether or not the public interest requires or permits a particular course to be taken, but the recommendation is subject to the sentencer's decision that the public interest allows him to take the course suggested. The sentencer is not, however, bound by the recommendations in any way.

It is also important to state for guidance, that where a social inquiry report is made to the Court, a copy must be given by the Court to the offender or his counsel, and counsel should not be called on to mitigate before the report has been received. (See *R.* v. *Kirkham*, [1968] Crim. L.R. 210). The probation officer presenting the report may be cross-examined on behalf of the defendant, but the report should not normally be read in full in an open Court. (See [1968] Crim. L.R. p. 33; see also

The Principles of Sentencing 2nd edn, by Thomas at pp. 375–377, where he deals with the social inquiry reports and that generally speaking, it is desirable to have a social inquiry report).

It appears that in England, they legislate, but in our case, no legislation dealing with these problems has been made, and we have to rely on the practice followed by the Supreme Court.

In *Andreas Michael Stylianou and Others* v. *The Republic*, 1961 C.L.R. 265, Zekia, J. (as he then was), dealing with the question of employing the services of a probation officer, in cases where a sentence of imprisonment is contemplated, made these observations:–

> " Before concluding this case, the Court will take the opportunity of expressing the view that in cases where the persons convicted are of young age and a sentence of imprisonment is contemplated, the services of a Probation Officer should be made available to the Court. Some of the members of this Bench who have had experience of such services are in a position to know that they are very valuable in considering sentence, and we consider that in all cases where the accused does not object and is 21 years of age or under, an investigation report by the appropriate Probation Officer should be available upon conviction, and the Probation Officer attend Court, at the instance of the prosecution, to assist the Court with information which the Court may require for purposes of sentence. Needless to say that individual Courts may add to this minimum category and require a probation report in cases where the accused is over 21 years of age."

In *Georgios Ioannou Skoullou alias "Kotsiras" v. The Police*, (1969) 2 C.L.R. 27, Vassiliades, P. dealing with the very same matter, said at p. 30:–

> " With all respect to the learned Judge, we think that if he was minded to impose a sentence of imprisonment in such circumstances, it was highly desirable that before doing so he should have before him a social investigation report, as suggested in the cases to which we have been referred by counsel for the appellant: *Stylianou and Others v. The Republic*, 1961 C.L.R. p. 265; and the other case

of the *Attorney-General v. Stavrou and Others*, 1962 C.L.R. 274 at p. 277".

It is true that in the social investigation report, the welfare officer went too far. Instead of providing information which was relevant to his character, personality, mental condition, as well as the background of the accused regarding the offence, he went too far and recorded matters which had nothing to do with the offence in question. Indeed, some of the information dealing with acts of immorality was a very damning piece of information against the accused. But his counsel, instead of asking to cross-examine the probation officer, he said nothing, and in some respects he accepted the report by saying that he adopted it as regards his upbringing.

There is no doubt that the accused was so co-operative and frank with the probation officer, and one would think that he wanted to get it off his chest, in spite of the fact that those disclosures were damning against him.

Having considered very carefully the argument of the present counsel, and in the light of the authorities quoted earlier in this Judgment, we have reached the conclusion that the probation report, in the particular circumstances of this case, was admissible in evidence, because it is generally accepted that probation officers should be free to express opinions on the likely response of an accused person to probation, but the Court is not bound by those recommendations in any way.

For the reasons we have given, we would dismiss this contention of counsel, as we think that a probation report is very helpful to a trial Judge.

The next question is whether the imposition of the sentence of imprisonment on the accused for a period of 9 months is an excessive one, having regard to all the relevant circumstances of this case. Time and again it has been said that the responsibility for the choice of sentence rests primarily with the trial Court, and that on appeal against sentence the Supreme Court has power to increase, reduce, or modify the sentence. (See section 145(2) of Cap. 155). A sentence may be increased or reduced where the Supreme Court agrees in principle with the

mode of sentence chosen by the trial Court, but decides to increase or reduce it. The circumstances under which the Supreme Court may interfere with the sentence imposed by the trial Court were discussed, *inter alia*, in a number of cases.

In *Afxenti (Iroas)* v. *The Republic*, (1966) 2 C.L.R. 116, Vassiliades, J., (as he then was), dealing with the question of sentence, had this to say at p. 118:-

> "The 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."

In *Phivos Panteli, alias Phivos tis Manos* v. *The Police*, (1966) 2 C.L.R. 58, Josephides, J. dealing with the question whether the sentence was excessive and whether prejudicial material against the accused was introduced by the prosecution before the trial Court, said at p. 59:-

> " The prosecuting officer, in stating the facts to the trial Judge, stated that the accused, who is a fisherman, had been called to the Limassol police station for interrogation in connection with 'a case of indecent assault on male' and then he went on to state that when the appellant was searched, the above articles were found in his possession.
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> Pausing there, we think that the fact that the appellant had been called to the police station in connection with a case of indecent assault on male was both irrelevant and highly prejudicial to the appellant in the present case, and this should not have been included in the statement of facts by the prosecuting officer.
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> The explanation given by the appellant in mitigation of sentence was that dolphins destroy his nets and that he had

to carry gunpowder in order to cause small explosions in the sea to frighten the dolphins away.

The appellant who is 38 years of age had a similar previous conviction in 1954 for which he was bound over for one year. He also had four other convictions for gambling, disturbance etc. for which he was fined or bound over.

The learned trial Judge, in passing sentence, observed to the accused that he was of bad character and that one of his previous convictions was similar to the present offence, and he went on to pass a sentence of nine months imprisonment.

Considering that the appellant's similar previous conviction for drunkenness was more than three years ago, we are of the view that the sentence of nine months imprisonment was manifestly excessive in the circumstances of this case. We also take into account that irrelevant and prejudicial material against the appellant was put by the prosecution before the trial Court which may have influenced the mind of the Judge in imposing sentence.

For all these reasons, we allow the appeal and reduce the sentence of nine months' imprisonment to one of three months' imprisonment."

Having considered everything which was said by counsel, we have reached the conclusion that the trial Court was unduly influenced by the welfare report, and particularly the reference in the said report that he used to procure his fiancée to men and that whilst he had sexual relations with this girl he got engaged at the village of Kapouti with his present wife Maroulla Flouri. In addition, the trial Court did not give sufficient weight to the fact that when the accused was taken for interrogation, he admitted to the police of receiving the stolen tape recorder and named the person from whom he purchased it.

For all these reasons, and particularly because the two previous convictions of the accused were made some time ago, we are of the view that the sentence of 9 months' imprisonment is manifestly excessive in the circumstances of this case.

In the light of the authorities quoted earlier, and for the reasons given, we allow the appeal and reduce the sentence of 9 months' imprisonment to one of 5 months' imprisonment. The sentence to run from the date of conviction.

Appeal partly allowed. 5