

1982 May 12

[A. LOIZOU, SAVVIDES, STYLIANIDES, JJ.]

VINE PRODUCTS BOARD,

*Appellants,*

v.

DEMETRA A. TOUTTOULA,

*Respondent.*

(Criminal Appeal No. 4309).

*Vine Industry (Regulation and Control) Law, 1965 (Law 52/65 as amended)—Creating a vineyard without a permit—Section 12(A)(1)(a) and (2) of the Law—Discretionary power to make uprooting order upon conviction—Akin to the power to make a demolition order under section 20(3)(A) of the Streets and Buildings Regulation Law, Cap. 96—And Courts should be guided by the principles expounded in cases decided under Cap. 96 and their discretion should be exercised in a manner which will not frustrate the very purpose for which Law 52/65 exists namely the regulation and control of vineyards—Trial Judge wrongly exercised his discretion by not making an uprooting order—Order of uprooting made by Court of Appeal.*

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The respondent pleaded guilty to a charge of creating a vineyard without a permit contrary to section 12(A), 1(a) and (2)\*

\* Section 12(A)(1) and (2) reads as follows:

“12(A)(1). Any person who—

“(a) without a permit creates a vineyard or extends an existing vineyard or commences extending an existing vineyard or suffers or permits such creation or extension;

(b) takes any action in contravention of any of the conditions imposed in the relevant permit, shall be guilty of an offence and shall on conviction, be liable to a fine not exceeding two hundred pounds or to imprisonment not exceeding one year, or to both such imprisonment and fine.

(2) In addition to any other penalty provided by this section, the court which convicts a person of an offence under paragraph (a) or (b) of subsection (1) may order that the vineyard or part thereof in respect of which the offence was committed be destroyed by uprooting or otherwise within such time as may be fixed in the order of the Court which shall in no case exceed the period of two months, unless before the lapse of the time so fixed by the Court the Commission shall grant a permit on such terms as it deems fit”.

of the Vine Industry (Regulation and Control) Law, 1965 (Law 52/1965 as amended) and regulation 5(a) of the Plantation of Vines (Regulation and Control) Regulations of 1970.

5 The vineyard in question was created in the area of Droushia village and was of an extent of about 3 donums. The trial Judge sentenced the respondent to pay a fine of £5 but he made no order for destruction of the vineyard by uprooting, having taken into consideration the fact that it was a small vineyard and the produce of it would be used by the respondent and her family "thus not contravening the spirit of the relevant law".  
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Upon appeal by the Vine Products Board it was contended that by the non-making of an uprooting order the trial Judge wrongly exercised his discretion in the matter inasmuch as he took into consideration matters that ought not to and could not have been so taken and or could not justify the non-making of such an order.  
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*Held*, (1) that the discretionary power given to Courts by sub-section 2 of section 12A of Law 52/1965 for making upon conviction, an order of destruction by uprooting or otherwise of a vineyard or part thereof in respect of which an offence was committed, in addition to any other penalty provided by the section, is akin to the powers given to Courts under other laws as, for example, for the making of demolition orders under section 20(3)(A) of the Streets and Buildings Regulation Law, Cap. 96, which have been held to amount to "punishments" within the meaning of that term of Article 12, para. 3, of the Constitution, and the exercise of these powers came under consideration by the then Supreme Constitutional Court and this Court in a number of cases (see, inter alia, *The District Officer of Nicosia v. Georghios HadjiYiannis*, 1 R.S.C.C. p. 79; *Improvement Board of Kaimakli v. Pelopidas Sevastides* (1967) 2 C.L.R. p. 117).  
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(2) That considering the very purpose of Law 52/1965 and the identical nature of its subsection 2 of section 12(A) with other similar provisions (section 20(3)(A) of Cap. 96) this Court holds the view that in the exercise of their discretion Courts, when seized upon with the question whether a destroying order by uprooting or otherwise should be made or not, should be guided by the same principles expounded in the cases decided  
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under Cap. 96 and such discretion should be exercised in a manner which will not frustrate the very purpose for which this law exists, namely, the regulation and control of vineyards and for which the power to make such destroying orders is contained in it, so that under no circumstances a would-be-offender or an offender should feel that he can, or can continue to, enjoy the spoils of his illegality by paying only the premium of a monetary sentence—or even of imprisonment—which in the present case was a fine of C£5; that, therefore, this Court has come to the conclusion that the discretion of the Court was wrongly exercised and that an order for destruction by uprooting the said unlawfully planted vineyard ought to have been made in the circumstances; accordingly it is hereby ordered that the vineyard in respect of which the offence was committed be destroyed by uprooting within two months from to-day, unless before the lapse of this time the Appellant Board shall grant the permit to the respondent on such terms as it deems fit.

*Appeal allowed.*

Cases referred to:

- District Officer Nicosia v. HadjiYiannis*, 1 R.S.C.C. 79;  
*Improvement Board of Kaimakli v. Sevastides* (1967) 2 C.L.R. 117;  
*Golden Seaside Estate Co. Ltd. v. The Municipal Corporation of Famagusta* (1973) 2 C.L.R. 58;  
*Salamis Holdings Ltd. v. Municipality of Famagusta* (1973) 2 C.L.R. 239;  
*The Municipality of Nicosia v. Pierides* (1976) 2 C.L.R. 1.

### **Appeal.**

Appeal by the prosecuting authority, with the sanction of the Attorney-General of the Republic, against the inadequacy of the sentence imposed on the respondent (the refusal of the trial Court to order the destruction of the vine yard by uprooting) who was convicted on 2nd April, 1982 at the District Court of Paphos (Criminal Case No. 143/82) on one count of the offence of creating a vineyard without a permit, contrary to sections 12(A)(1)(a) and (2) of the Vine Industry (Regulation and Control) Law, 1965 (Law No. 52 of 1965) (as amended by Laws 33 of 1966, 87 of 1970 and 59 of 1973) and regulation 5(a) of the Plantation of Vines (Regulation and Control)

Regulations of 1970 and was sentenced by Papas, D.J. to pay a fine £5.

*A. P. Anastassiades*, for the appellants.

Respondent absent.

5 A. LOIZOU J. gave the following judgment of the Court. The Vine Products Commission has, with the sanction of the Attorney-General of the Republic, filed this appeal against the sentence imposed on the respondent who had pleaded guilty to a charge of creating a vineyard without a permit from the  
10 appellant Commission, contrary to sections 12(A)(1)(a) and (2) of the Vine Industry (Regulation and Control) Law, 1965 (Law No. 52 of 1965, as amended by Laws 33 of 1966, 77 of 1970, 59 of 1973) and regulation 5(a) of the Plantation of Vines (Regulation and Control) Regulations, of 1970.

15 The particulars of the said offence were that the respondent during the months of March to May, 1981, on a date unknown to the prosecution at locality "Viglia" (or Tarangos) area of Droushia, created a vineyard of an extent of about three donums in plot 30, Sheet/Plan 35/10, by planting 850 vineplants of the  
20 variety "Mavro".

The respondent was sentenced to five pounds fine but no order for destruction by uprooting was made. The learned trial Judge in exercising his discretion in the matter, said that he had considered everything that had been said on her behalf  
25 and in particular the fact that it was a small vineyard and the produce of it would be used by her and her family, "thus not contravening the spirit of the relevant Law". In fact, counsel appearing for her in his plea in mitigation stressed the fact that the appellant was a poor married person, that she had no  
30 other vineyard and that she would use the produce of this vineyard for her own use.

Although the appellant was duly served she has not attended the Court on the date fixed for the hearing of this appeal and we have decided to hear same in her absence.

35 The grounds of appeal relied upon by the appellant Commission are that, by the non-making of such an uprooting order the trial Judge wrongly exercised his discretion in the matter inasmuch as he took into consideration matters that ought

not to, and could not have been so taken and or could not justify the non-making of such an order, that it was also contrary to the law and to the spirit and the letter of the relevant legislation and the policy pursued through it.

Section 12(A) of the aforesaid law reads as follows:- 5

“12A. (1) Any person who—

(a) without a permit creates a vineyard or extends an existing vineyard or commences extending an existing vineyard or suffers or permits such creation or extension; or 10

(b) takes any action in contravention of any of the conditions imposed in the relevant permit,

shall be guilty of an offence and shall on conviction, be liable to a fine not exceeding two hundred pounds or to imprisonment not exceeding one year, or to both such imprisonment and fine. 15

(2) In addition to any other penalty provided by this section the court which convicts a person of an offence under paragraph (a) or (b) of subsection (1) may order that the vineyard or part thereof in respect of which the offence was committed be destroyed by uprooting or otherwise within such time as may be fixed in the order of the Court which shall in no case exceed the period of two months, unless before the lapse of the time so fixed by the Court the Commission shall grant a permit on such terms as it deems fit. 20 25

(3) If any person against whom an order has been made in accordance with the provisions of subsection (2) shall neglect or fail to comply with the order made within the period prescribed therein, the Commission shall be entitled to carry out the measures imposed by the order and to claim from the person convicted the payment of the expenses incurred by the Commission for carrying out the measures provided by the order. These expenses shall be regarded as a penalty within the meaning of the Criminal Procedure Law and the payment thereof shall be enforced in accordance with the provisions of the said Law. 30 35

(4) Any person against whom an order has been made in accordance with the provisions of subsection (2) who does not comply with the order made shall be guilty of an offence and shall, on conviction, be liable to imprisonment not exceeding one year or to a fine not exceeding two hundred pounds or to both such imprisonment and fine".

This discretionary power given to Courts by subsection 2 hereof for making, upon conviction, an order of destruction by uprooting or otherwise of a vineyard or part thereof in respect of which an offence was committed, in addition to any other penalty provided by the section, is akin to the powers given to Courts under other laws as, for example, for the making of demolition orders under section 20(3)(A) of the Streets and Buildings Regulation Law, Cap. 96 which have been held to amount to "punishments" within the meaning of Article 12, para. 3, of the Constitution, and the exercise of these powers came under consideration by the then Supreme Constitutional Court and this Court in a number of cases (see, inter alia, *The District Officer of Nicosia v. Georghios Hadji-Yiannis*, of Akaki, Vol. 1, R.S.C.C., p. 79; *Improvement Board of Kaimakli v. Pelopidas Sevastides* (1967) 2 C.L.R. p. 117; *Golden Seaside Estate Co. Ltd. v. The Municipal Corporation of Famagusta* (1973) 2 C.L.R. 58; *Salamis Holdings Ltd. v. Municipality of Famagusta* (1973) 2 C.L.R. 239; *The Municipality of Nicosia v. Pierides* (1976) 2 C.L.R. 1).

In the case of the *Improvement Board of Kaimakli v. Sevastides* (supra), Vassiliades, P., at p. 124 had this to say:

"..... But this change (the 1963 amendment of section 20) cannot be understood or applied in a manner frustrating the very purpose for which the Law exists; and for which the provision about a demolition order is contained in the statute. There may be cases where a demolition order need not be made; where for instance some condition in the permit has not been complied with, or there occurred an infringement of minor importance".

The aforesaid quotation was cited with approval in the case of *Golden Seaside Estate Ltd. v. The Municipal Corporation of Famagusta* (supra), where after dealing with the relevant facts, the judgment was concluded by saying:

“ — We are unable to subscribe to that argument. The authorized addition of 13 flats cannot be a mere technicality, nor was it carried out bona fide. Certainly, the consequences of demolition order if a permit is not eventually given, will be serious but the Appellant has only itself to blame for bringing itself into such a predicament. For the Court to be dissuaded from making such an order in a case of this kind would be tantamount to putting a premium on the magnitude of the breach”.

Considering the very purpose of the aforesaid Vines Industry (Regulation and Control) Law and the identical nature of its subsection 2 of section 12(A), with other similar provisions, we hold the view that in the exercise of their discretion Courts, when seized upon with the question whether a destroying order by uprooting or otherwise should be made or not, should be guided by the same principles expounded in the cases hereinabove set out and such discretion should be exercised in a manner which will not frustrate the very purpose for which this law exists, namely, the regulation and control of vineyards and for which the power to make such destroying orders is contained in it, so that under no circumstances a would-be-offender or an offender should feel that he can, or can continue to, enjoy the spoils of his illegality by paying only the premium of a monetary sentence—or even of imprisonment—which in the present case was a fine of C£5.

Moreover, it should not be lost sight of the fact that in addition to the very enjoyment of the products of an unlawfully planted vineyard, its owner will also receive the subsidies paid by Government per donum as part of its policy, thus adding to the benefits that an offender will have from his illegality and at the same time adding with it to the burdens of the public revenue.

For all the above reasons we have come to the conclusion that the discretion of the Court was wrongly exercised and that an order for destruction by uprooting the said unlawfully planted vineyard ought to have been made in the circumstances. The fact that the respondent was poor and she would use its crop for her own use, whatever that means, not constituting a sufficient reason for the exercise of the Court's discretion against the making of such order, as her acts cannot be held

to be an infringement of minor importance or a mere technicality made bona fide.

We, therefore, hereby order that the vineyard in respect of which the offence was committed be destroyed by uprooting  
5 within two months from to-day, unless before the lapse of this time the respondent Commission shall grant the permit to the respondent on such terms as it deems fit. In view however, of the absence of the respondent from this Court, an  
10 endorsed copy of this order to be served upon her the soonest possible.

The appeal, therefore, is allowed.

*Appeal allowed.*