1983 February 8

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

PAVLOS KYRIACOU KYRIAKIDES,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 4354).

Criminal Law—Sentence—Disparity of sentence as a ground of appeal —Principles applicable.

Criminal Law—Entrapment—Not a substantive defence but may be relevant in mitigation of punishment.

Criminal Law—Sentence—Repentance as a mitigating factor—Principles applicable—Belated repentance cannot be treated as a mitigating factor.

Criminal Law—Sentence—Narcotic drugs—Possession—Seriousness of the offence—Mitigating factors—Appellant committed to trial together with his brother but no indictment filed against his brother —Though Police in a position to trace and arrest persons with whom appellant had the dealings with the drugs they failed to do so and appellant was treated as a scapegoat for others—Sentence of three years' imprisonment wrong in principle—Reduced.

On the 25th June, 1982, the Police acting on information, that a dealing with narcotic drugs was to take place, set out a plan for the arrest of the person or persons involved in such transaction and shortly after midnight of the 24th of June, 1982 and in fact at 00.15 hours of the 25th June, 1982, the Police put under observation a private car in which the appellant was a passenger. At a point between Larnaca and Dhekelia, the Police noticed an article being thrown out of the car. They stopped the car, the appellant denied any knowledge of it. They went back to the point where the article was thrown, which was about 30 meters from the point where the car was stopped, and after a

search with the help of the lights of the car, they found two blocks of canabis resin wrapped up in paper. The appellant was cautioned and he denied any knowledge of it. Later, when he was charged, he again denied any knowledge. The car was driven by the brother of the appellant elder by five years and owner of a bar, who was a co-accused with him at the preliminary inquiry and both of whom were committed for trial before the Assize Court. In the exercise of the powers vested in the Attorney-General under section 107 of the Criminal Procedure Law, Cap. 155, the information was filed only against the appellant and not his brother.

The appellant pleaded guilty to the offence of having in his possession 1000 grams of cannabis resin, contrary to section 6(2) of the Narcotic Drugs Law, 1977 (Law 29/77) and was setenced to three years' imprisonment. The maximum sentence provided by the law for this offence is five years' imprisonment.

Upon appeal against sentence it was contended that the appellant was entrapped by the Police and though the Police knew the person who sold this quantity to the appellant, they let such person go free and arrested the appellant because such other person was the person sent by the Police to entrap him (see *R.* v. *Sang* [1979] 2 All E.R. 1222 on evidence obtained by such means). Counsel also stressed the fact that the appellant was a drug addict and not a trader in drugs and that in the circumstances of the present case, taking into consideration his young age and the fact that he pleaded guilty to the offence, the maximum sentence for which was five years' imprisonment, did not justify the imposition of such a heavy sentence on him which was repugnant to the principles of sentencing of young offenders as emanating from the decisions of this Court in previous cases. He also made reference to another case of possession of a much larger quantity of drugs with the intention of trading for which the law provides a sentence of 14 years' imprisonment in which, the same Court sitting under the same composition, at the same session, imposed upon the accused in that case a term of imprisonment of three years. Counsel contended that there was disparity of sentence between the two cases as the one was a case of trading in narcotics, whereas the present one is a case of a mere possession of drugs for the appellant's own use.

Held, (1) that the question of disparity of sentence as a ground of appeal, can, as a rule, arise when such disparity is apparent between the sentence imposed on an accused and his co-accused in respect of the same offence whether they were tried jointly by the same Court or separately by different Courts, and once the Court has no power to increase the co-defendant's sentence who has not appealed and "is faced with the choice between unholding the sentence and leaving the appearance of injustice or reducing the sentence to which it considers an inappropriate level" (See "Principles of Sentencing" by Thomas at p. 72): that the case mentioned by counsel for appellant in support of his argument is a different case based on different facts which are not before this Court and in which other considerations or mitigating factors might have existed; that it is not in any way connected with the offence in respect of which the appellant was found guilty; and that the defence of disparity as a ground of appeal is therefore, not applicable in the present case.

(2) That though entrapment is not a substantive defence in a criminal case, it is a matter which may be relevant in mitigation of penalty; that in the present case, however, the accused neither at the time of his arrest, nor at any later stage till the day of his trial, did he make any allegation of entrapment nor did he disclose the identities of the persons with whom he had the dealing which resulted to his arrest which could lead to their arrest as well and substantiate the allegation of his counsel when addressing the Court in mitigation that he was entrapped; that in the circumstances of this case, and in view of the absolute silence of the accused upto the last moment, the allegation of entrapment, raised for the first time before the trial Court in mitigation of penalty, was rightly not given much weight by the trial Court.

(3) That though the question of repentance is a matter which should be taken seriously into consideration when such repentance is genuine and amounts to a full disclosure of the offence and in some cases renders assistance to the Police in detecting and arresting others involved in the commission of the crime very little or no weight will be attached to a belated repentance made by the accused solely with the object of improving his position and not being a confession made out of remorse; that such a belated repentance expressed for the first time by appellant's counsel at the stage of the trial cannot be treated as a mitigating factor.

(4) That though the appellant was committed for trial before the Assize Court together with his brother who was much older than him and was the driver of the car from which the drugs were thrown, the indictment was filed only against the appellant and though such matter was within the power of the Attorney-General under section 107 of Cap. 155, the fact remains that his brother was allowed to go scott-free and only the appellant faced the charge; that notwithstanding the fact that appellant kept silent all along, the police who had information about the case and was following up the movements of the appellant and his brother was, in the circumstances of the case, in a position to trace and arrest the persons with whom the appellant had the dealings and who were the suppliers of the drugs the police considered themselves satisfied with the arrest of the appellant and failed to arrest the main perpetrators and traders; that, therefore the appellant, was treated as a scapegoat for others; that taking these matters into consideration, though in principle a sentence of 3 years' imprisonment for the possession of a large quantity of drugs is not improper in the circumstances of the present case such sentence was wrong in principle and will be reduced to two years' imprisonment.

Appeal allowed.

Cases referred to:

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

Azinas and Another v. *The Police* (1981) 2 C.L.R. 9 at pp. 138-142;

R. v. *Sang* [1979] 2 All E.R. 1222;

R. v. *Ivan Harris* (C.A.), See Justice of the Peace of 25.11.1978;

McEvilly, Lee [1974] 60 Cr. App. R. 150;

Mealy, Sheridan [1974] 60 Cr. App. R. 59;

Pouris and Others v. *Republic* (not reported yet);

Maos v. *Republic* (1971) 2 C.L.R. 191;

Howell v. *Republic* [1972] 2 C.L.R. 111;

Makki v. *Republic* (1972) 2 C.L.R. 76;

Atia v. *Police* (1979) 2 C.L.R. 214.

Appeal against sentence.

Appeal against sentence by Pavlos Kyriacou Kyriakides who was convicted on the 20th September, 1982 at the Assize Court of Larnaca (Criminal Case No. 1386/82) on one count of the offence of having in his possession cannabis resin contrary

to sections 2, 3, 6(1)(2), 30 and 31 of the Narcotic Drugs Law, 1977 (Law No. 29/77) and was sentenced by Papadopoulos, P.D.C., Constantinides, S.D.J. and Eliades, D.J. to three years' imprisonment.

E. Efstathiou, for the appellant.

M. Photiou, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, P.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES, J.: The appellant in this case was sentenced by the Larnaca Assize Court to three years' imprisonment after he had pleaded guilty to a charge of having in his possession 1000 grms. of cannabis resin without a permit from the Minister of Health, contrary to sections 2, 3, 6(1)(2), 30 and 31 of the Narcotic Drugs Law, 1977 (Law 29/77). He has lodged the present appeal on the ground that the sentence is manifestly excessive and contrary to the established principles of jurisprudence concerning the treatment of young offenders and, in particular, of young offenders convicted for possession of drugs.

The relevant facts of the case, as appearing in the record, are as follows:

On the 25th June, 1982, the Police acting on information, that a dealing with narcotic drugs was to take place, set out a plan for the arrest of the person or persons involved in such transaction and shortly after midnight of the 24th of June, 1982 and in fact at 00.15 hours of the 25th June, 1982, the Police put under observation a private car in which the appellant was a passenger. At a point between Larnaca and Dhekelia, the Police noticed an article being thrown out of the car. They stopped the car, but the appellant denied any knowledge of it. They went back to the point where the article was thrown, which was about 30 meters from the point where the car was stopped, and after a search with the help of the lights of the car, they found two blocks of canabis resin wrapped up in paper. The appellant was cautioned and he denied any knowledge of it. Later, when he was charged, he again denied any knowledge. The car was driven by the brother of the appellant elder by five years and owner of a bar, who was a co-accused with him

at the preliminary inquiry and both of whom were committed for trial before the Assize Court. In the exercise of the powers vested in the Attorney-General under section 107 of the Criminal Procedure Law, Cap. 155, the information was filed only against the appellant and not his brother.

When the appellant was charged, he pleaded guilty and the Court passed upon him a sentence of three years' imprisonment. Before passing sentence, the Court according to its judgment, examined with utmost care all matters before it and had taken into consideration the personal circumstances of the accused as appearing in the report of the welfare officer and as explained by his counsel in his address, his young age, the fact that he was a first offender and the principles which should govern a Court regarding the treatment of young offenders and concluded as follows:

> "We cannot, however, ignore the seriousness of the offence committed by the accused, nor the fact that offences of this type are committed in a continuously increasing rate, a fact, which necessitates the imposition of deterrent sentences. At this stage, we wish to comment on the submission made for the defence that the accused once he had no intention to trade the drugs in question, he should be considered as the sole victim in this case. We believe that the possession of drugs is a general menace against society and must be faced in the drastic way which has been repeatedly pointed out by our jurisprudence".

Counsel for the appellant in addressing this Court, laid stress to the fact that the appellant was entrapped by the Police and though the Police knew the person who sold this quantity to the appellant, they let such person go free and arrested the appellant because such other person was the person sent by the Police to entrap him, and directed our attention to the criticism of the House of Lords in the case of *R.* v. *Sang* [1979] 2 All E.R. 1222 on evidence obtained by such means. Counsel also stressed the fact that the appellant was a drug addict and not a trader in drugs and that in the circumstances of the present case, taking into consideration his young age and the fact that he pleaded guilty to the offence, the maximum sentence for which was five years' imprisonment, did not justify the imposition of such a heavy sentence on him which was repugnant to the

principles of sentencing of young offenders as emanating from the decisions of this Court in previous cases. He also made reference to another case of possession of a much larger quantity of drugs with the intention of trading, in which, the same Court sitting under the same composition, at the same session, imposed upon the accused in that case a term of imprisonment of three years. Counsel contended that there was disparity of sentence between the two cases as the one was a case of trading in narcotics, whereas the present one is a case of a mere possession of drugs for the appellant's own use.

The Narcotic Drugs Law, 1977 (Law 29/77) under which the appellant was charged and convicted, came into operation on the 29th June, 1979 by decision of the Council of Ministers published under Notification 139 in Supplement No. 3, Part I of the official Gazette of the Republic No. 1530 dated 29.6.1979. By sect. 39(1) of the said Law, as from the date of its coming into operation, the previous Narcotic Drugs Law, Law 3/67 was repealed. Most of the provisions of Law 29/77 have been copied from similar provisions of the English Misuse of Drugs Act, 1971, and especially those referring to the classification of the various drugs in three categories, as set out in the respective schedule and also the list of offences under the various provisions of the Law and the respective maximum sentences.

Under the provisions of section 24(2) of the Narcotic Drugs Law, 1967, the maximum punishment provided for possession of drugs was ten years' imprisonment or £1,000 fine or both and the Courts in imposing sentence, used to take into consideration whether such possession was for the purpose of one's own use or for the purpose of marketing same. Under the new Law, 29/77, the sentence prescribed for the various offences committed under the provisions of such law, vary according to the category under which the drug is classified, as set out in Schedule 1 of the said Law. Cannabis and cannabis resin are classified in category B of Schedule 1. A distinction is made for different criminal sanctions in the case of mere possession of drugs, under section 6(2) and possession for the purpose of supply to others under section 6(3). In respect of offences for mere possession of controlled drugs under section 6(2) the prescribed maximum sentences under the Third Schedule of the said Law are, on

summary trial, six months' imprisonment or £400.- fine or both, and on indictment before an Assize Court, five years' imprisonment or a fine, or both. For offences under section 6(3), possession of controlled drugs with intent to supply to others, the prescribed maximum sentences are, on summary trial 12 months' imprisonment or £400.- fine or both and on indictment, before an Assize Court, 14 years' imprisonment or a fine or both.

Having dealt with the provisions of the Law, we are coming now to deal with the various arguments advanced by counsel for the appellant.

The principle of disparity of sentence as a ground of appeal was for the first time accepted by our Court of Appeal in *Nicolaou* v. *The Police* (1969) 2 C.L.R. 120 in which the sentence of imprisonment imposed upon the appellant was reduced on the ground that the person jointly involved with him in the commission of the offence and who was tried by military Court was given a most lenient sentence, that of being bound over to come up for judgment within two years. The principle has been expounded at some length by the Court of Appeal in the recent case of *Azinas and another* v. *The Police* (1981) 2 C.L.R. 9 where at pp. 138–142 reference is made to a number of decisions of the English Courts on the matter as well as to D.A. Thomas "Principles of Sentencing" Second Edition at pp. 71–73 under the heading "Disparity of Sentence as a ground of Appeal".

As to the origin of disparity as a ground of appeal, Widgery, C.J. had this to say in *R.* v. *Ivan Harris*, C.A. see Justice of the Peace 25.11.1978.

> "Disparity did not find a place in the Cr. Appeal Act 1968. It was a judge made proposition its purpose being to enable the Court to avoid justice not being seen to be done when sentences appeared at first sight to be so disparate as to cause serious grievance".

It is clear, however, from all the above authorities as well as from "The Principles of Sentencing" by D.A. Thomas that the question of disparity of sentence as a ground of appeal can, as a rule, arise when such disparity is apparent between the sentence imposed on an accused and his co-accused in respect of the same offence whether they were tried jointly by

the same Court or separately by different Courts, and once the Court has no power to increase the co-defendant's sentence who has not appealed and "is faced with the choice between upholding the sentence and leaving the appearance of injustice or reducing the sentence to which it considers an inappropriate level" (see "Principles of Sentencing" by Thomas (supra) at p. 72).

The case mentioned by counsel for appellant in support of his argument is a different case based on different facts which are not before us and in which other considerations or mitigating factors might have existed. It is not in any way connected with the offence in respect of which the appellant was found guilty. The defence of disparity as a ground of appeal is therefore, not applicable in the present case.

As to the weight sought to be placed by counsel for the appellant on the fact that accused is a drug addict and not a trader in drugs, such matter was taken into consideration when the indictment was preferred against the accused charging him with simple possession of drugs under section 6(2) for which the maximum term of imprisonment provided is five years and not for possession with intent to supply under section 6(3) for which the maximum term of imprisonment provided is 14 years.

The question of entrapment which has been advanced by counsel for the appellant has been considered in a number of cases by the Court of Appeal and the House of Lords in England. In *McEvilly, Lee* [1974] 60 Cr. App. R. 150 where the defence of entrapment and the position of an agent provocateur was raised, it was held by the Court of Appeal that "the Judge had rightly exercised his discretion in admitting the evidence. There was no basis for excluding it either on the ground of the police officer having acted as an agent provocateur or on any general principle of unfairness or prejudice. In a case where a police officer knows that a defence has been 'laid on' and the plan for carrying it out is already clear in contemplation, the mere fact that there is a possibility that the offence as it was ultimately committed might not have taken place without the intervention of the police officer is not a ground on which the judge should exercise his discretion to exclude the evidence". Also, in Mealy, *Sheridan* [1974] 60 Cr.

App. R. 59, the Court of Appeal rejected the defence of entrapment. The Lord Chief Justice at p. 62, had this to say:

> "In fact, if one looks at the authorities, it is in our judgment quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty".

And at page 63:

> "We, therefore, feel it right to say that this doctrine, given the unlovely name of 'entrapment', does not find a place in English law and that is an end of the matter because it is only on the basis of entrapment that these applicants could have made any headway today."

In *R.* v. *Sang* (supra), though the correctness of the above decisions that entrapment is not a substantive defence to a charge of crime was not challenged before the House of Lords, the House of Lords approved such principle, as it appears from the judgments delivered in the case. The question as to whether entrapment is a substantive defence to a criminal charge was one of the three legal issues which were discussed in the House of Lords in the *Sang's* case, the other two being whether the use of entrapment gives the Court a discretion to exclude such evidence and the question of the Court's discretion to exclude evidence generally. In dealing with the question of entrapment, Lord Diplock had this to say at page 1226:

> "The fact that the counsellor and procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender; both the physical element (actus reus) and mental element (mens rea) of the offence with which he is charged are present in his case."

And Lord Scarman at page 1243 added:-

> "Incitement is no defence in law for the person incited to

crime, even though the inciter is himself guilty of crime and may be far the more culpable. It would confuse the law and create unjust distinctions of incitement by a policeman or an official exculpated him whom they incited to crime whereas incitement by others, perhaps exercising much greater influence, did not."

And further down at the same page:

"There are other more direct, less anomalous, ways of controlling police and official activity than by introducing so dubious a defence into the law."

It is apparent from the above that though entrapment is not a substantive defence in a criminal case, it is a matter which may be relevant in mitigation of penalty. In the present case, however, the accused neither at the time of his arrest, nor at any later stage till the day of his trial, did he make any allegation of entrapment nor did he disclose the identities of the persons with whom he had the dealing which resulted to his arrest which could lead to their arrest as well and substantiate the allegation of his counsel when addressing the Court in mitigation that the accused was entrapped. On this point, the trial Court had made the following observation:

"The defence, besides the argument that the accused is entitled to lenient treatment because the main offender is not before the Court, made a kind of insinuation that the accused was the victim of entrapment. Undoubtedly, the objects of Justice would have been better served if any other culprit was before the Court. We dare say that the possibility of arresting other culprits would have been better if the accused appeared co-operative. We have at this stage to remind that the accused pretended from the very first moment complete ignorance about the drugs found in his presence and this, according to the admitted facts, only a few minutes after their collection from the supplier."

We agree with the trial Court that if the accused made a clean breast in this case, this would have led to the arrest of other persons involved and the Court would thus be in a position to ascertain whether he was entrapped or not. In the circumstances of this case, and in view of the absolute silence of

the accused upto the last moment, the allegation of entrapment, raised for the first time before the trial Court in mitigation of penalty, was rightly not given much weight by the trial Court.

As to the repentance of the appellant which was expressed for the first time by his counsel at the stage of his trial and after he had pleaded guilty to the charge, such repentance was expressed at a very late stage. All along he was denying any involvement in the case and though he had such a chance to express such repentance when interviewed by the welfare officer a few days before his trial he persisted in his denial and advanced the allegation that the police was trying to incriminate his brother. The question of repentance is a matter which should be taken seriously into consideration when such repentance is genuine and amounts to a full disclosure of the offence and in some cases renders assistance to the Police in detecting and arresting others involved in the commission of the crime. Very little or no weight will be attached to a belated repentance made by the accused solely with the object of improving his position and not being a confession made out of remorse. Such a belated repentance expressed at the hearing of an appeal against conviction and sentence, was not treated as a mitigating factor in a recent case of the Court of Appeal in *Pouris and others* v. *The Republic* (not yet reported).

This Court in a number of cases has stressed the seriousness of possession of narcotic drugs which has become a social menace and a social problem and that the Courts should deal severely with offences connected therewith. See, in this respect, *Maos* v. *The Republic* (1971) 2 C.L.R. 191, where a sentence of 2 1/2 years' imprisonment for possession of 17 grms. of cannabis sativa was confirmed on appeal; *Howell* v. *The Republic* (1972) 2 C.L.R. 111, where a conviction of one year's imprisonment imposed on an English soldier aged 19 and first offender for the unlawful possession of 7 1/2 grms. of cannabis sativa, was upheld; *Ibrahim Makki* v. *The Republic* (1972) 2 C.L.R. 76 where an observation was made that a sentence of 18 months' imprisonment was very much on the lenient side; *Atia* v. *Police* (1979) 2 C.L.R. 214, where a sentence of two years' imprisonment on each of two counts of importation and possession of 811.20 grms. of cannabis resin imposed upon him by the District Court, was upheld on appeal and the Court observed

that the sentence imposed upon the accused was on the lenient side and it was with reluctance that they did not increase same.

Having carefully considered what was said on behalf of the appellant by his learned counsel, we have come to the conclusion that certain matters which might have been taken into consideration in deciding the appropriate sentence in the circumstances of the case have either not been taken duly into consideration or had not been given the proper weight. Such matters are:

(a) Though the appellant was committed for trial before the Assize Court together with his brother who was much older than him and was the driver of the car from which the drugs were thrown, the indictment was filed only against the appellant and though such matter was within the power of the Attorney-General under section 107 of Cap. 155, the fact remains that his brother was allowed to go scott-free and only the appellant faced the charge.

(b) Notwithstanding the fact that appellant kept silent all along, the police who had information about the case and was following up the movements of the appellant and his brother was, in the circumstances of the case, in a position to trace and arrest the persons with whom the appellant had the dealings and who were the suppliers of the drugs the police considered themselves satisfied with the arrest of the appellant and failed to arrest the main perpetrators and traders.

The above, leave no doubt in our mind that the appellant was treated as a scapegoat for others. Taking these matters into consideration, though in principle we agree that a sentence of 3 years' imprisonment for the possession of a large quantity of drugs is not improper, in the circumstances of the present case we find such sentence wrong in principle and decided to reduce it to two years' imprisonment. The appeal is, therefore, allowed and the sentence is reduced accordingly.

Appeal allowed. Sentence reduced to two years' imprisonment.