1984 July 31

[TRIANTAFYLLIDES, P., LORIS AND STYLIANIDES, JJ.]

CHRISTAKIS COSTA VARNAVA,

Appellant,

v.

THE POLICE,

Respondents,

(*Criminal Appeal No.* 4541).

EVGENIOS KLEOVOULOU,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 4543).

Criminal Law—Sentence—Housebreaking—One year's imprisonment to run after the expiration of a term of 12 *months' imprisonment imposed for a similar offence on* 16.12.83—*Offences in the present case were committed prior to* 16.12.83—*And could be taken into consideration on* 16.12.83 *under s.*81 *of the Criminal Procedure Law, Cap.* 155—*Moreover trial Judge influenced by fact that appellant was serving a term of* 12 *months' imprisonment—Sentence made to run from the date of imposition.*

*Criminal Law—Sentence—Housebreaking—*18 *months' imprisonment—Not manifestly excessive or wrong in principle—In view of a similar previous conviction of the appellant.*

The appellants pleaded guilty to the offence of housebreaking, contrary to section 294(a) of the Criminal Code Cap. 154. Appellant in Appeal 4541 ("the first appellant") was sentenced to one year's imprisonment to run after the expiration of a term of 12 months' imprisonment which he was serving having been convicted and sentenced of housebreaking on 16.12.83; and the appellant in appeal 4543 ("the second appellant") was sentenced to 18 months' imprisonment.

The first appellant had two previous convictions, which were not similar to the above offence but the prosecution informed

the Court that he was serving the aforesaid term of 12 months' imprisonment and that 18 outstanding offences for housebreaking against him were taken into consideration by the Court in passing sentence on 16.12.83. The second appellant had a similar previous conviction. In passing sentence in this case the Court took into consideration a breaking and stealing by the first appellant and a breaking and entering into a supermarket by both appellants.

The offence in this case as well as both offences which were taken into consideration in passing sentence against the first appellant were committed during August and September 1983, that is prior to 16.12.83 when the above sentence of 12 months' imprisonment was passed on him for an offence of the same nature.

Upon appeal against sentence:

Held, (1) that since the offence in this case as well as both offences which were taken into consideration under s.81 of Cap. 155 in respect of the first appellant were committed during August and September 1983, that is prior to 16.12.83, when sentence was passed upon the appellant for another case of the same nature, and could be treated as outstanding offences which could have been taken into consideration under s.81 of Cap. 155, as all other ingredients required by the said section were present at the time, the term of his imprisonment imposed should run from the date of sentences; and that though the trial Judge did not consider the conviction of 16.12.83 as a previous conviction for the purposes of the present case he was influenced by the fact that the first appellant was still serving a term of imprisonment of 12 months on 19.5.84 when sentence in the present case was passed, thereby ordering the term of the present one to run after the expiration of the former sentence; accordingly the appeal of the first appellant will be allowed by making his sentence commence from the 19.5.84 which is the date sentence was passed on this appellant.

(2) That there is no justification for interfering with the sentence imposed on the second appellant because it is neither manifestly excessive nor wrong in principle.

Appeal of the first appellant allowed. Appeal of the second appellant dismissed.

Cases referred to:

Cleovoulou v. Police (1981) 2 C.L.R. 237.

Appeals against sentence.

Appeals against sentence by Christakis Costa Varnava and Another who were convicted on the 19th May, 1984 at the District Court of Larnaca (Criminal Case No. 335/84) on one count of the offence of housebreaking contrary to section 294(a) of the Criminal Code Cap. 154 and were sentenced by G. Nicolaou, D.J. as follows: Appellant 1 to one year's imprisonment to run after the expiration of the term of imprisonment of one year he was serving and appellant 2 to 18 months' imprisonment.

C. Clerides with *P. Protopapa* (*Miss*), for the appellant in Criminal Appeal 4541.

A. Eftychiou, for the appellant in Criminal Appeal 4543.

R. Gavrielides, Senior Counsel of the Republic, for the respondent.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Loris J.

LORIS J.: By these two appeals, which have been heard together both appellants complain against the sentences passed upon them by a District Judge of the District Court of Larnaca (where they were jointly tried summarily, with the prior consent of the Attorney-General of the Republic given under s. 24(2) of the Courts of Justice Law 1960 - vide Larnaca Criminal Case No. 335/84) after they had pleaded guilty to the offence of housebreaking contrary to section 294(a) of the Criminal Code Cap. 154.

The facts constituting the offence to which both appellants pleaded guilty are very briefly as follows: Both appellants on 30.8.83 broke and entered into a cafe-restaurant at Larnaca and stole therefrom a cash-machine which had in its tills coins and notes worth £20.-; the cash-machine in question was traced few days later, empty, derelicted in the fields.

The prosecution informed the learned trial Judge that Appellant in Cr. Appeal 4541 had two previous convictions notably a minor assault and a disturbance which of course cannot be considered as previous convictions similar to the offence the said appellant had pleaded guilty; the prosecution though, invited the Court to note that appellant in Cr. Appeal 4541 was still serving a term of imprisonment of 12 months having been convicted and sentenced of housebreaking on 16.12.83; it is

significant to note at this stage that the prosecution did not confine themselves in mentioning that the appellant was serving a term of imprisonment but they went into details stating that 18 outstanding offences for housebreaking against appellant were taken into consideration by the Court in passing sentence on 16.12.83.

As regards appellant in Cr. 4543 it was mentioned to the trial Court that he had one similar previous conviction having been convicted on 23.6.81 for housebreaking and sentenced to two years' imprisonment (the term of imprisonment having been reduced to one year by this Court - vide *Kleovoulou v. The Police* (1981) 2 C.L.R. 237).

Before the learned trial Judge passed sentence both appellants applied and prosecution consented that the following outstanding offences to which appellants pleaded guilty be taken into consideration by the Court in passing sentence:

A. In respect of appellant in Cr. Appeal 4541, alone, a breaking into PASYDY building on 15.8.83 and stealing therefrom 2 packets of cigarettes.

B. In respect of both appellants a breaking and entering into a supermarket on 16.9.83 and stealing therefrom £52.-.

The trial Court having taken into consideration the facts and circumstances of the case, including previous convictions, personal circumstances of the accused in the light of addresses by counsel in mitigation and the relevant social investigation reports and having taken into consideration the outstanding offences set out above under s. 81 of Cap. 155 passed the following sentences on 19.5.84:

Appeallant in Cr. Appeal 4541 was sentenced to one year's imprisonment to run after the expiration of the term of imprisonment of 12 months he is now serving having been convicted as aforesaid on 16.12.83.

Appellant in Cr. Appeal 4543 was sentenced to 18 months' imprisonment.

Against these sentences the appeals under consideration were filed.

Learned counsel for appellant in Cr. Appeal 4541 elaborating on his client's appeal submitted that:

(a) The sentence is excessive in view of the fact that the appellant substantially had no previous convictions.

(b) The term of imprisonment should in any event run from the date of sentence and not after the expiration of the term of imprisonment the appellant is now serving having been convicted on 16.12.83; the present offences including those taken into consideration in the present instance were committed prior to the 16.12.83.

Learned counsel in Cr. Appeal 4543 submitted that

(i) his client was sentenced to a term of imprisonment exceeding by six months the term of imprisonment imposed on the other appellant whilst they had both played the same role in the commission of the offence;

(ii) generally the sentence was excessive in view of the particular facts of this case and the low I.Q. of his client.

It was repeatedly stated by this Court 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 of the case or the law; or that the Court, in considering sentence, allowed itself to be influenced by matters 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". (*Afxenti v. The Republic* (1966) 2 C.L.R. 116 at p. 118).

It is transparent from the record, that the trial Court leaned towards the deterrent effect of the sentence emphasizing "the necessity of the protection of the general public" from offenders of this nature, without overlooking mitigating factors placed before him by the appellants. We agree with the approach of the trial Court on the question of punishment; but in the case of appellant in Cr. Appeal 4541 we hold the view that the term of imprisonment imposed should run from the date of sentence i.e. the 19th May, 1984 because the offence in question as well as both offences which were taken into consideration under s. 81

of Cap. 155 in respect of this appellant were committed during August and September 1983, that is prior to 16.2.83, when sentence was passed upon the appellant for another case of the same nature, and could be treated as outstanding offences which could have been taken into consideration under s. 81 of Cap. 155 as all other ingredients required by the said article were present at the time (and only accused's request to that effect was lacking - perhaps due to the fact that he was not then represented by counsel); of course the conviction and sentence on 16.12.83 could not, and the trial Court rightly did not, consider that conviction as a previous conviction for the purposes of the present case but it seems that the trial Judge was influenced by the fact that appellant was still serving a term of imprisonment of 12 months on 19.5.84 when sentence in the present case was passed, thereby ordering the term of the present one to run after the expiration of the former sentence.

Accordingly we feel that we should intervene in the case of appellant in Cr. Appeal 4541 only in respect of the time of the commencement of such sentence; such time will be the 19th May, 1984, when sentence was passed on the appellant; this appeal therefore succeeds to this extent only and the sentence of the trial Court is varied accordingly.

As regards appellant in Cr. Appeal 4543 after hearing learned counsel for this appellant we hold the view that there is no justification for interfering with the sentence imposed. It is neither manifestly excessive nor wrong in principle. Obviously the trial Judge had in mind in passing sentence that this appellant had a previous conviction for a similar offence committed in 1981, whilst the other appellant was substantially a first offender and he was so treated by the trial Judge.

In view of what has been stated above, Cr. Appeal under No. 4543 is hereby dismissed.

Appeal No. 4541 *partly allowed.*
Appeal No. 4543 *dismissed.*