1986 April 30

[A. LOIZOU, DEMETRIADES, PIKIS, JJ.]

GEORGHIOS VRYONI,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 4732).

Sentence—Causing grievous bodily harm contrary to s. 231 of the Criminal Code, Cap. 154—Provocative conduct of complainant alleged in mitigation—Nothing said by trial Judge on the point—Nine months' imprisonment—In the circumstances preferable for this Court to lean in favour of appellant rather than send back the case for hearing evidence as to appellant's said allegation—Incident a momentary outburst—Sentence reduced to five months' imprisonment.

Criminal Procedure—Plea of guilty—Conflict as to facts relevant to sentence—Procedure to be followed.

On the 31.8.85 the appellant was engaged in fencing his pen by means of erecting poles and fence wire. His sister-in-law asked him not to erect two to three poles so that she and her husband would be able to lead through them their animals for the purpose of driving them into their pen. The appellant got an iron pipe and told her to go away or he would kill her. She began asking for help and as a result the complainant, who was at the time irrigating plants in an adjacent field, intervened and asked the appellant why he was quarrelling with his sister-in-law. The appellant hit him with the pipe and fractured his ulna. The appellant was convicted upon his own plea for causing grievous bodily harm contrary to s. 231 of Cap. 154 and was sentenced to nine months' imprisonment.

Hence the present appeal against sentence. Counsel for the appellant alleged in mitigation before the trial Judge

that before the appellant hit the complainant with the pipe, the latter advanced towards the appellant holding a pitch-fork, that can easily be employed as an offensive weapon and that this conduct provoked the appellant in attacking the complainant himself. This allegation was not touched upon at all by the trial Judge. It should be noted that in his statement to the Police the appellant put forward the said version of events.

Held, allowing the appeal: (1) Where there is a plea of guilty, but a sharp divergence or substantial conflict of issues of fact which are relevant to the sentence and not to plea, the Court should either listen to submissions from both sides and proceed on the basis that the version of the accused should as far as possible be accepted, or if the Court is not prepared to do that, then it must hear the evidence before forming its own view in respect of the matter in dispute.

(2) Faced with a situation where the trial Judge said nothing about appellant's version, it is preferable, rather than send the case back for hearing evidence on the issue, to lean in favour of the appellant and accept his said contention as to the provocative conduct of the complainant. In the light of all relevant facts and in particular that the whole incident was a momentary outburst, the sentence would be reduced to one of five months' imprisonment.

Appeal allowed. Sentence reduced to five months' imprisonment.

Cases referred to:

R. v. *Huchison* [1972] 1 All E.R. 936;

R. v. *Gortat and Piro* [1973] Crim. L.R. 648;

R. v. *Newton* [1983] 77 Cr. App. Rep. 13;

R. v. *Williams* [1983] 77 Cr. App. Rep. 329.

Appeal against sentence.

Appeal against sentence by Georghios Vryoni who was convicted on the 21st January, 1986 at the District Court

of Paphos (Criminal Case No. 6957/85) on one count of the offence of causing grievous bodily harm contrary to section 231 of the Criminal Code, Cap. 154 and was sentenced by Miltiadou, D. J. to nine months' imprisonment.

N. Ioannou (Mrs.) with *Chr. Clerides,* for the appellant.

A. M. Angelides, Senior Counsel of the Republic, for the respondents.

A. Loizou J. gave the following judgment of the Court. This is an appeal against the sentence of nine months' imprisonment imposed on the appellant by a Judge of the District Court of Paphos after being found guilty on his own plea to a charge of causing gievous bodily harm, contrary to section 231 of the Criminal Code, Cap. 154, on the ground that same was manifestly excessive.

The facts of the case as related by the prosecution were as follows:

The appellant comes from Kouklia village and he is engaged in farming and animal breeding, keeping a pen at locality "Collectiva". The brother of the appellant also keeps a pen in the same field. On the 31st August 1985, and at about 6:00 p.m. the appellant was trying to fence his pen by means of erecting poles and fence wire. At that moment the brother of the appellant who was passing by in his vehicle stopped and his wife alighted from the vehicle and asked the appellant not to erect two to three poles so that they would be able to lead through them their animals for the purpose of driving them into their pen. The appellant instead of any other reply got an iron-pipe and addressing his sister-in-law told her to go away or he would kill her. She started calling for help and the complainant Neophytos Stavrou, who was irrigating plants in the adjacent field went and asked him why he was quarrelling with his sister-in-law.

The appellant without any further explanation hit him with the pipe he was holding on the left arm and fractured his ulna.

Counsel for the appellant alleged in mitigation that be-

fore appellant struck the complainant with the pipe the latter advanced towards him holding a pitchfork, an agricultural implement used for pitching hay etc., that can easily be employed as an offensive weapon and that this conduct provoked him further in attacking the complainant himself. This allegation was not touched upon at all by the trial Judge.

Counsel for the Republic, acting most properly and fairly in accordance with the mission of counsel to help the Court do justice investigated the above allegation and brought to our knowledge that the above version of events was put forward by the appellant in his statement to the Police soon after his arrest. Further he agreed with counsel for the appellant that the duty of a Court in face of the conflicting allegations is correctly stated in Criminal Procedure in Cyprus by A. Loizou and G. Pikis, at p. 86:

> "If, however, there is a conflict between the version of the prosecution and the version of the defence regarding the circumstances under which the offence was committed, not going to plea but merely to some of the facts of the case, the proper course for the Judge is to hear evidence from both sides and resolve the question, always bearing in mind that it is for the prosecution to prove any allegations which may tend to aggravate the case with the necessary certainty required in a criminal case, beyond reasonable doubt".

In support of this proposition reference is made to the case of *R.* v. *Huchison* [1972] 1 All E.R. 936 (C.A.); 56 Cr. App. R. 307, in which the Court of Appeal disapproved the course followed by the trial Judge who, after a plea of guilty, in order to resolve a conflict between the version of the prosecution and the defence, the conflict relating to the particulars of the offence and not the correctness of the plea, heard evidence in the absence of the jury and made himself findings of fact, in effect denying the accused trial by jury as to the ascertainment of the factual background of the case. And also to *R.* v. *Gortat and Piro* [1973] Crim. L. R. 648.

We would like to add to the above statement of the law the principles enunciated by the Lord Chief Justice of England in *R.* v. *Newton* [1983] 77 Cr. App. Rep. 13 which were followed also in the case of *R.* v. *Williams* [1983] 77 Cr. App. Rep. p. 329, in which Goff Lord Justice summed up the position at p. 332 as follows:

> "We have been referred, very helpfully by counsel, to a decision of the Court of Appeal Criminal Division in *Newton* [1983] 77 Cr. App. R. 13; [1983] Crim. L.R. 198. The Lord Chief Justice on that occasion gave guidance on the course to be taken where there was a sharp divergence on a question of fact following an admission of an offence, the question of fact being one which was material to the sentence to be imposed. He explained that where there is a sharp divergence on a question of fact, there are three ways in which the Judge can approach the task of sentencing. In certain circumstances it is possible to obtain the answer to the problem from the jury, for example when it is a question of whether the conviction should be under section 18 or section 20 of the offences against the Person Act 1861, the jury can determine the issue on a trial under section 18 by deciding whether or not the necessary intent has been proved. The second method which can be adopted by a Judge in these circumstances is himself to hear the evidence on one side and another, and come to his own conclusion, acting so to speak as his own jury on the issue. The third possibility is for the Judge to hear no evidence, but to listen to the submissions of counsel and come to a conclusion: but if he does that he must come down on the side of the defendant, where there is a substantial conflict between the two sides; in other words, where there has been a substantial conflict, the version of the defendant must so far as is possible be accepted.
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> The Lord Crief Justice was concerned with a case where there had been, in effect, an admission at a trial. In the present case we are concerned with an appeal against sentence. For my part I accept the

submission of Mr. Searle that the principles, as stated by the Lord Chief Justice in *Newton*, (supra), are equally applicable to the case of an appeal to the Crown Court from magistrates on a matter of sentencing.

In such a case, of course, the first of the three methods proposed by the Lord Chief Justice as possible would not be practicable; the choice is between method 2 or 3. Looking at those two methods. it is plain to me that what was done by the Crown Court in the present case falls neither within the second nor the third of those two alternative methods. Indeed Mr. Beaumont, who appeared for the respondent before this Court, was constrained to agree that he was proposing a fourth alternative method. In the present case, the Crown Court neither heard evidence and then formed its view on the evidence which it heard, nor did it, having heard the submissions of counsel, come down on the side of the defendant".

The position therefore may be summed up as follows: Where there is a plea of guilty but a sharp divergence or substantial conflict of issues of fact which case are relevant to the sentence and not to plea, in which case the plea of guilty should not be accepted and a plea of not guilty should be directed to be entered, the Court should either listen to submissions from both sides and proceed on the basis that the version of the accused should as far as possible be accepted, or if the Court is not prepared to do that then it must hear the evidence before forming its own view in respect of the matter which is in dispute.

In the present case faced with a situation where nothing has been said by the learned trial Judge about the version of the accused as regards, to say the least, the alleged conduct of the complainant, we have felt in the circumstances that rather than send the case back for hearing evidence on the issue as was done in the *Williams* (supra), it is preferable to come down on the side of the appellant. Having given our best consideration to all relevant facts and in particular to the fact that the whole incident pointed to a momentary outburst and not a planned conduct, we

have decided to accept this contention as a piece of provocative conduct on the part of the complainant and so we reduce the sentence of imprisonment imposed on the appellant to one of five months.

Appeal allowed. Sentence reduced to five months.