

1986 September 16

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

DEMETRIS PARASCHOU LOUCA.

Appellant.

v.

THE REPUBLIC.

Respondent

(Criminal Appeal No. 4684).

5 *Sentence—Suspended sentence of imprisonment—The Suspension of the Execution of Sentence of Imprisonment in Certain Cases Law, 95/72—Section 4(1)—Nature of suspended sentence—Activation of—Question of activation should be considered after imposition of sentence for the crime that put the activation in issue—What the Court should consider is whether the breach of the conditions tied to the suspension is excusable or reduced in gravity on account of extenuating circumstances—In case of such*

10 *breach activation is the rule and other measures the exception—The activated sentence should, as a rule, run consecutively to the sentence of imprisonment imposed for the crime that put the activation in issue—Procedure followed in this case irregular, because the question of*

15 *activation was considered simultaneously with the question of sentence for the offence, which put the activation in issue—Said irregularity did not lead to any miscarriage of justice—Application of the proviso (Section 145(1)(b) of the Criminal Procedure Law, Cap 155).*

20 On the night of the 21.7.85 the appellant and another person broke into the house of the complainant and stole valuables worth £8,000, which they squandered in their pleasure exploits. About two months earlier the appellant had been sentenced to two years' imprisonment for shop-

25 breaking and theft. The sentence was suspended for a period of three years pursuant to Law 95/72.

The Assize Court of Nicosia sentenced the appellant to three and a half years' imprisonment for the above offence of burglary and ordered the activation of the said suspended sentence to run consecutively to the said period of imprisonment. 5

The record of the trial before the Assize Court shows that the two matters, namely the question of sentence for the offence of burglary and the question of activation of the suspended sentence, were considered simultaneously within the framework of the sentencing process. 10

The question in this appeal is whether the course that was followed as aforesaid was the proper course.

Held, dismissing the appeal: (1) The effect of section 4(1) of Law 95/72 is that the activation of a suspended sentence should be considered after the imposition of sentence for the crime that put the activation in issue. It follows that the procedure followed by the Assize Court was irregular. 15

(2) The irregularity, however, does not necessarily invalidate the activation of the suspended sentence. If the facts warranted the activation, it will not be suspended on appeal (*R. v. Ithell* [1969] 2 All E.R. 449 followed). Moreover, in case of activation, the sentence should, as a rule, run consecutively to the sentence of imprisonment imposed for the crime that put the activation in issue. 20 25

(3) A suspended sentence of imprisonment is a sentence of imprisonment for all purposes. Suspension merely puts off the execution of the sentence. In case of breach of the condition the Court will not examine afresh the propriety of the sentence, but only whether the breach is excusable or its gravity reduced on account of any extenuating circumstances. Section 4(1) of Law 95/72 contemplates in case of breach of the conditions tied to the suspension, activation to be the rule and adoption of alternative measures the exception. 30 35

(4) In the circumstances of this case the irregularity in the procedure of activation did not lead to any miscarriage of justice and, therefore, this Court would apply

the proviso to s. 145(1)(b) of the Criminal Procedure Law Cap. 155.

Appeal dismissed.

Cases referred to:

- 5 *R. v. Ithell* [1969] 2 All E.R. 449;
 Stevens, 55 Cr. App. Rep. 154.

Appeal against sentence.

10 Appeal against sentence by Demetris Paraschou Louca who was convicted on the 8th October, 1985 at the Assize Court of Nicosia (Criminal Case No. 20928/85) on one count of the offence of house breaking contrary to sections 291, 292(a), 255 and 20 of the Criminal Code, Cap. 154 and was sentenced by Artemides, P.D.C., Laoutas, S.D.J. and Kramvis, D.J. to 3½ years' imprisonment and further ordered the activation of a two-year suspended sentence of imprisonment and sentences were made to run consecutively.

E. Efsthathiou with M. Tsangarides, for the appellant.

20 *M. Kyprianou, Senior Counsel of the Republic with R. Vrohimis (Mrs.), for the respondent.*

A. LOIZOU J.: The judgment of the Court will be given by Pikis, J.

25 PIKIS J.: In the course of the hearing, the appeal was confined to the part of the judgment of the Assize Court of Nicosia ordering activation of a two-year suspended sentence of imprisonment made to run consecutively to the three and a half years term of imprisonment imposed on a charge of burglary.

30 The decision of counsel to discontinue the appeal against the sentence of three and a half years' imprisonment was a wise one considering the gravity of the offence compounded by that of the 25 stealing and breaking of-

fences taken into consideration in passing sentence at the request of the appellant.

On the night of 21st July, 1985 the appellant and the confederate (a co-accused at the trial) held watch on the house of the complainant with a view of breaking into the premises and stealing therefrom whatever they could lay their hands on. Taking advantage of the temporary absence of the owner they broke into the premises and stole valuables worth £8,000.-. The spoils of their criminal venture they divided between them losing no time thereafter in disposing of stolen articles the proceeds of which they squandered in their pleasure exploits.

The appellant confessed to the commission of the offence in the course of interrogation by the Police in connection with another stealing offence ten days later. His confession led to the uncovering of the crime and the arrest of his accomplice but not to the restoration of the stolen property. The culprits were able to return only about one half of the stolen articles; the rest they sold and spent the money realised therefrom.

About two months earlier the appellant had been sentenced to two years' imprisonment by the Assize Court of N'cosia for shop-breaking and theft. Forty-four similar offences were taken into consideration at the request of the appellant. The sentence had been suspended for a period of three years pursuant to and in accordance with the provisions of the Suspension of the Execution of Sentence of Imprisonment in Certain Cases Law 1972 (Law 95/72).

The youth of the appellant aged 19 and the fact he had not been sent to prison before played, no doubt, a major part in the decision of the Court to suspend the sentence. Although not a first offender, appellant had not previously been sent to prison. He had one previous conviction recorded on 19th November, 1981 again for a stealing offence, for which he was put on probation for two years.

The first complaint is that the Court failed to follow the procedure prescribed by the Law for the activation of

the suspended sentence; in particular the Court failed to afford the appellant a specific opportunity to be heard in the matter of activation. Further, the Court decided upon activation before sentencing the appellant for the offence
5 for which he was tried. In effect, it has been argued the Assize Court examined and decided upon activation in a manner other than that ordained by the Law.

The second complaint is that the activation of the sentence viewed in conjunction with the three and a half years' imprisonment, made the overall sentence of five and a half
10 years' imprisonment excessive.

The submission is that a decision to activate a suspended sentence cannot be divorced from the overall punishment. The final measure of punishment is relevant on every
15 occasion and under any circumstances and as such can be tested before the Supreme Court in order to determine whether it is out of proportion to the overall criminality of the prisoner.

To appreciate the submissions and examine them in the correct perspective we must consult the record the part having a bearing on the activation of the suspended
20 sentence. Reference was made to the sentence at the stage when the Court normally receives information about the previous convictions of the offender, that is, before the address in mitigation. Thereafter, counsel was heard in
25 mitigation and note was taken of a Social Enquiry Report shading light on the personal circumstances of the appellant.

In the context of the address in mitigation reference was made to every matter that might have a bearing on the decision to suspend. Thereafter, judgment was reserved
30 in order to give the Court opportunity to reflect on the sentence to be imposed.

The judgment of the Court sums up in a succinct way the facts and arguments relevant to determination of sen-
35 tence and the activation of the suspended sentence.

It is clear to us the Assize Court examined the two questions simultaneously, namely, the sentence to be im-

posed for the burglary and the activation of the suspended sentence; a reality unaffected by the order in which they recorded the respective decisions. The alarming number of stealing offences committed within a short period of time and the contempt shown by the appellant to the conditions attached to the suspension of his sentence, drove the trial Court to conclude that activation was well nigh inevitable and they directed that it should run consecutively to the sentence imposed for the crime of burglary.

On examination of the record we cannot agree with this submission that activation was decided independently of the sentence for the crime under trial. The truth is the two matters were pondered and determined together within the framework of the sentencing process. Was this a proper course to follow or should the Assize Court address itself to the question of activation after passing sentence for the subsequent offence that put in focus the question of activation? This is the pertinent question, the one we shall attempt to answer below, a question it may be added that has not arisen before this Court on any previous case.

English cases on the interpretation and application of the English Legislation (1), on which Law 95/72 is modelled, suggest that the question of activation should be considered after the imposition of the sentence for the crime that made pertinent examination of the question of activation. The case of *R. v. Ithell* (2) expressly decided upon reflection on the relevant provisions of the English Law that the question of activation of a suspended sentence should be examined after sentence is imposed for the crime that put into focus activation of the suspended sentence.

We are likewise of opinion this is the effect of the relevant provisions of the Cyprus Statute, namely, s. 4(1) of Law 95/72. It postulates conviction for the subsequent offence as a prerequisite to the ponderation of the question of activation and other means specified therein of dealing

(1) Criminal Justice Act 1967, see s. 40(1) in particular.

(2) [1969] 2 All E.R. 449.

with the accused. It is implicit in the scheme of the law that the punishment for the offence putting in issue the activation of a suspended sentence should be known before the implications of the breach of the conditions of the suspension are considered. This is correct in principle too. For the question of activation and alternative means of dealing with the accused cannot be divorced from the ultimate measure of punishment.

Consequently we uphold the submission that the procedure followed for examination and consideration of the implications of the conviction upon the suspended sentence was not in accordance with the Law and for that reason was irregular. The irregularity, however, does not necessarily invalidate the decision to activate as the case of *Ithell* (supra) indicates. If the activation was warranted by the facts relevant to the exercise of the powers of the Court in the matter, it was stressed, the decision will be suspended on appeal notwithstanding the irregularity. Further, they pointed out that when activation is ordered the sentence should, as a rule, run consecutively to any sentence of imprisonment imposed for the crime that put activation in issue.

S. 4 (1) of Law 95/72 reflecting the policy of the Law with regard to the implications of breach of the conditions of suspension contemplates activation to be the rule and the adoption of alternative measures the exception. This has also been held to be the effect of corresponding English Legislation as it appears from the decision in *Peter Stevens* (1). In *Stevens* the Court emphasized "when a man is given a suspended sentence he is told that if he commits any other offence he will almost receive the amount of a suspended sentence."

It is pertinent to remind that a suspended sentence is a sentence of imprisonment for all purposes. Suspension merely puts off the execution of the sentence. It does not alter its character or complexion. It is by no means an alternative either to probation or release of the defendant upon a recognizance with or without sureties; nor should

(1) 65 Cr. App. Rep. 154.

the period of imprisonment be longer on account of suspension. Upon breach of the conditions of the suspension the foremost question to be considered is whether the breach is for any reason excusable or its gravity reduced on account of any extenuating circumstances. 5

The Court will not examine afresh the propriety of the sentence of imprisonment. In the absence of circumstances duly mitigating the gravity of the breach of the conditions of suspension activation should, as a rule, be ordered.

Suspension is solely tied to the conditions specified in the order and not to the length of imprisonment or any reconsideration of the sentence imposed. Where the conditions governing suspension are breached the premise upon which suspension was ordered collapses and the principal reason for the sentence of imprisonment not becoming operative vanishes. And, the prisoner can hardly complain because by breaking the conditions upon which imprisonment was suspended he takes a calculated risk with his liberty that he forfeits by his own deliberate act. 10
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In the present case the appellant made nonsense of the terms upon which his sentence of imprisonment was suspended and showed utter contempt for the law and the legal process. He went on a criminal spree regardless of the consequences. The activation of the suspended sentence consecutive to the sentence imposed in the particular case was an inevitable and unavoidable result. The irregularity in the procedure followed for the activation of the sentence had no material repercussions on the course of Justice. It occasioned no miscarriage of Justice. 20
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Therefore, we shall apply the proviso to s. 145 (1) (b) of Criminal Procedure Law, Cap. 155 and dismiss the appeal. And we so order. 30

Appeal dismissed.