

1988 March 4

(A. LOIZOU, STYLIANIDES, PIKIS, JJ.)

ANTONIS MOUZOURAS AND OTHERS,

*Appellants,*

v.

THE IMPROVEMENT BOARD OF AYIA NAPA,

*Respondent.*

(Criminal Appeals Nos. 4802, 4817,  
4826-4830, 4860, 4897-4902).

*Hawking goods, contrary to sections 21(n), 24(1)(a), 50 and 51 of the Villages (Administration and Improvement) Law, Cap. 243 and Bye-Laws 155(1) and 221 of the Villages (Administration and Improvement) Bye-Laws of Ayia Napa 1975-1983 (hereinafter referred to as the Bye-Laws) — Whether regulating hawking (Bye-Laws 155(1)) without first establishing a market is ultra vires section 21(n) — Questions determined in the negative.* 5

*Words and Phrases: «Hawking», «Hawker» in section 21(n) of the Villages (Administration and Improvement) Law, Cap. 243.*

*Words and Phrases: «Keep the peace and be of good behaviour» in section 32 of the Criminal Code, Cap. 154.* 10

*Constitutional Law — Nullum crimen nulla poena sine praevia lege — Constitution, Article 12 — The Criminal Code, Cap. 154, section 32 — Recognizance «in such amount as the Court thinks fit» — This provision does not contravene the aforesaid principle — Art. 12.3 safeguards that no punishment shall be disproportionate to the offence — For this reason and save in exceptional circumstances, the amount should not exceed the monetary punishment provided by the Law.* 15

*Sentence — Criminal Code, Cap. 154, sections 32 and 33 — The difference between the recognizance under s.32 and that under s.33 — The recognizance under section 32 — Its purpose and ambit.* 20

The appellants were convicted and sentenced for hawking

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contrary to the aforesaid provisions of Cap 243 and the bye-laws Counsel for the appellant argued that

5 (a) Bye-Law 155(1) is ultra vires section 21(n), because there was no power to prohibit or regulate hawking, without first establishing a market,

(b) The words «hawk», «hawking» and «hawker» should be given in the absence of definition the meaning given to them by the English Hawkers Act 1888

10 (c) Section 32 of the Criminal Code is contrary to Art 12 1 of the Constitution and that, in any event, the amount should not exceed that of the fine provided for by the law and the bye-laws,

(d) Section 32 of the Criminal Code is not applicable in case of offences other than those provided for in the Code itself

15 *Held* (1) On a true construction of section 21(n) of the said law the establishment, regulation and use of markets is one function and the prohibition and regulation of hawking of any goods in any place other than such markets is another It follows that Bye-law 155 is not ultra vires section 21(n)

20 (2) The words «hawk», «hawking» and «hawker» should be given their ordinary and natural meaning The definition of «hawker» in the Hawkers Act (supra), cannot be invoked as that was a definition drafted for the purposes of that enactment

25 (3) Examination of the terms of section 32 shows that the legislator specified with a fair degree of certainty the sentence that may be imposed, namely, a recognizance with or without sureties and the purpose for which the recognizance may be required to be given What section 32 omits is to specify the amount of the recognizance, leaving the amount to the Court «as it thinks fit» The omission to specify the maximum sentence does not derogate from the principle of Article 12 1 The failure to specify the maximum punishment is not incompatible with any of the provisions of the Constitution Article 12 3 expressly safeguards the principle that no punishment shall be disproportionate to the gravity of the offence and any punishment imposed that defies this fundamental principle of the Constitution, can be struck down as unconstitutional and be varied in an appropriate case in a manner conforming to the Constitution Section 32 has to be applied in a reasonable manner The amount should, as a rule, be correlated to the maximum punishment provided by law, that is, the fine, and if there is provision for imprisonment as well, an amount of fine corresponding thereto in order that under no circumstances should the punishment be disproportionate to the gravity of the offence In exceptional

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circumstances that is, when there is a real likelihood of future breaches of the peace or the law, the amount of the recognizance may exceed the maximum monetary punishment provided by Law

(4) The wording of section 32 shows that the range of application of section 32 is not confined to offences defined by the Criminal Code but to any offence punishable as such by law, that is the law 5

(5) The purpose of the recognizance is twofold

(a) «Keep the peace», which is primarily associated with personal violence and threats, and

(b) «Be of good behaviour», which may take a variety of forms, including observance of specified provisions of the law 10

*Appeals against conviction  
dismissed Appeals against  
sentence allowed*

**Appeals against conviction and sentence.**

Appeals against conviction and sentence by Antonis Mouzouras and Others who were convicted on various dates at the District Court of Famagusta (Criminal Case Nos 1256/86, 1768/86 etc ) of hawking fruit, sandwiches, refreshments etc within the area of the Improvement Board of Ayia Napa contrary to sections 21(n), 24(1)(a), 50 and 51 of the Villages (Administration and Improvement) Law, Cap 243 and Bye-laws 155(1) and 221 of the Villages (Administration and Improvement) Bye-laws of Ayia Napa (1975-1983) and were sentenced to pay fines ranging from £15 - to £25 - on each count 15 20 25

*G Pittadjis*, for the appellants

*P Angelides with A Savenades and M Selipa (Mrs )*, for the respondents

A LOIZOU J This is our judgment in respect of two sets of appeals 30

One set consisting of Criminal Appeals Nos 4897-4902, both inclusive, is from judgments of His Honour Arestis D J and the other set consisting of Criminal Appeals Nos 4802, 4817, 4826-4830, and 4860, from the Judgments of His Honour Eliades, D J by which judgments - which have the same reasoning - the respective accused persons were found guilty of hawking fruit, sandwiches, refreshments, icecreams, vegetables, and other goods with the use of vehicles on various dates within the area of the Improvement Board of Aya Napa, without a licence, contrary to sections 21(n) 24(1)(a), 50, 51 of the Villages (Administration 35 40

and Improvement) Law Cap. 243, as amended (hereinafter to be referred to as the Law) and Bye-laws 155(1) and 221 of the Villages (Administration and Improvement) Bye-laws of Ayia Napa, 1975-1983, (hereinafter to be referred to as the Bye-laws).

5 The particulars of the offence are set out in the respective charge-sheets and we need not delve into the facts of each case as they are not in dispute.

There were two other appeals by the Improvement Board of Ayia Napa, namely Criminal Appeals 4954 and 4955, from the  
10 judgments of His Honour Hadjihambis D.J., by which he acquitted the accused by finding that «Regulation 155 was ultra vires the expressly limited powers given by section 21(n), such being only to «prohibit or regulate the hawking of any goods in any place  
15 outside such market» that is the markets established by the Board, the prohibition of hawking not standing apart from the establishment, regulation and use of markets and not therefore being possible to disregard the limitations of the Law by virtue of the authority of which alone it derives its forces.» Criminal Appeal 4954 was with the leave of the Court withdrawn and dismissed. As  
20 Criminal Appeal No. 4955 was heard separately we shall be giving a brief judgment as our basic reasons will inevitably be analyzed in this judgment.

The appeals against conviction were argued on two grounds. The first one is that the meaning ascribed by the learned trial Judge  
25 to the words «hawk» and «hawking» to be found in section 21(n) of the Law and Bye-law 155(1) of the Bye-laws, is wrong in law.

The second is that Bye-law 155(1) of the Villages (Administration and Improvement) Pedhoulas Bye-laws 1951 is ultra vires the Villages (Administration and Improvement) Laws  
30 1950 and in particular section 21(n) inasmuch as the requirement of a licence for one to be entitled to hawk within the improvement area only arises if a market is established by the Improvement Board.

The appeals against sentence were only argued as regards the  
35 order of recognizance to which certain appellants were required to enter with which arguments we shall deal later in this judgment.

Section 21(n) of the law reads as follows:

«Subject to the provisions of this Law and any other Law in force for the time being, the Board, within the limits of the

improvement area and in so far as its resources permit .....

(n) provide for the establishment, regulation and use of markets and prohibit or regulate the hawking of any goods in any place other than such markets.»

Section 24(l)(a) thereof provides:-

«A Board may, from time to time make bye-laws not inconsistent with the provisions of this or any other Law in force for the time being, for all or any of the following purposes, that is to say:-

(a) to enable or assist a Board to perform any of the duties assigned to it by section 21 or 23 and to provide for the payment of any rates, fees, rents, tolls, or charges in connection therewith.»

Section 50 deals with the power of the Court to order, on conviction, the payment of rates, fees, rents, tolls or charges payable, and section 51 provides that the Board may sue and be sued in its name.

Acting under the powers vested in it by virtue of section 24, of the Law, the Improvement Board of Ayia Napa made the Villages (Administration and Improvement) Bye-laws of Ayia Napa 1975, published in Supplement No. III(l) to the official Gazette of the Republic of the 31st January, 1985, under Notification 28 adopting with the modification the Villages (Administration and Improvement), Pedhoulas Bye-laws 1951.

Bye-law 155(1) provides:

«No person shall, within the improvement area, hawk any goods without a licence first obtained therefor in every year from the Board or person authorized by the Board in that behalf.»

Bye-law 221 provides:

«Save where other provision is made in these bye-laws -

(a) Any breach of these bye-laws shall be punishable with a fine not exceeding £25; and

(b) Any continuing breach shall be punishable with a fine not exceeding £1.- for every day during which such breach continues, and in addition, the Court, may upon conviction of the offender, order that any articles or goods in respect of

which the breach has been committed shall be forfeited to the Board.»

As regards the first ground of appeal learned counsel for the appellants has argued in this Court, as he did unsuccessfully in the Court below, that in the absence of an intention to the contrary the words «hawk» and «hawking» or «hawker» should be given the meaning obtaining in England at the time as the legislature in employing these terms in section 21(n) and in Bye-law 155(1) without a definition had that intention. On that premise learned counsel for the appellants has invited this Court to accept that the words «hawk», «hawking», and «hawker», have the same meaning as the word «hawker» is defined in the English Hawkers Act 1888 which reads as follows:

«A hawker means any person who travels with a horse or other beast bearing or drawing burden; and goes from place to place or to other men's houses carrying to sell or exposing for sale any goods, wares, or merchandise or exposing samples or patterns of any goods, wares, or merchandise to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, wares, or merchandise in or at any house, shop, room, booth, stall, or other place whatever hired or used by him for that purpose.»

The words «hawk», «hawking» and «hawker» are indeed not defined either in the Law or in the Bye-laws. They have therefore to be construed in their ordinary and natural meaning. For that purpose we felt that we should turn to the dictionaries for instruction and consultation. The meaning of the word «hawk» given in the Concise Oxford Dictionary is «carry goods; to cry in the street». The same meaning is to be found also in the Shorter Oxford English Dictionary. And «hawker» is defined as one who hawks goods about, a man who goes from place to place selling his wares or who cries them in the street. It is clear therefore that the dictionary meaning of the words is their ordinary meaning and everyone who had the opportunity to consider their meaning took this to be their ordinary signification in the sense that they mean the sale or offer for sale in the streets of merchandise conveyed from place to place by means of animals, vehicles or even on foot. The definition of «hawker» in the Hawkers Act (*supra*), cannot be invoked as that was a definition drafted for the purposes of that enactment.

We turn now to the second ground of appeal. It was argued that paragraph (n) of section 21 of the Law should be read as a whole, that is that an improvement board cannot regulate the hawking of any goods and subject such function to a licence, unless markets are established and in the case of Ayia Napa this has not been done. 5

On a true construction of the said statutory provision the establishment, regulation and use of markets is one function and the prohibition and regulation of hawking of any goods in any place other than such markets is another. In our view the establishment of a market is not a condition precedent to the regulation of hawking. Bye-law 155(1) therefore which does not refer to the establishment of a market before hawking but only to the requirement of a licence first obtained and lays down by paragraph 2 thereof the fees to be paid, is *intra vires* the Law. 10 15

There remains now to examine the appeal against sentence which in effect is only against the sentence imposed in those cases where the accused was ordered to enter into his own recognizance to keep the laws and the regulations. It was argued that the trial Judge had no power to compel the accused to enter into a recognizance for an amount higher than the maximum penalty provided for the offences charged. 20

The argument of learned counsel for the appellants on this ground is twofold, the one was that there could be no binding over to keep the laws and regulations, but only as provided by section 32 to keep the peace and be of good behaviour. The second one was that the amount of recognizance should not exceed the maximum amount of fine as in case of a breach one may be punished by the forfeiture of his recognizance which may be of a bigger amount than the maximum fine it would have been imposed on the offender in the first place. In other words a sentence will be imposed on the offender not provided by Law contrary to the principle *nullum crimen nulla poena sine praevia lege*, that is only those acts are criminal and only those sentences are imposed which are expressly provided by Law before the commission of the act. Connected with this latter argument was also the stand that a punishment should not be disproportionate to the gravity of the offence. It was urged that the interpretation of section 32 of Cap. 154, should be such as to take cognizance of this basic principle enshrined in Article 12, paragraphs 1 and 3 of our Constitution. 25 30 35 40

Section 32 of Cap. 154 reads:-

5 «32. A person convicted of an offence not punishable with death may, instead of, or in addition to, any punishment to which he is liable, be ordered to enter into his own  
10 recognizance, with or without sureties, in such amount as the Court thinks fit, that he shall keep the peace and be of good behaviour for a time to be fixed by the Court, and may be ordered to be imprisoned until such recognizance, with sureties, if so directed, is entered into; but so that the imprisonment for not entering into the recognizance shall not extend for a term longer than one year, and shall not, together with the fixed term of imprisonment, if any, extend for a term longer than the longest term for which he might be sentenced to be imprisoned without fine.»

15 The sole ground on which the appeal against sentence turns relates to the sentence imposed by Eliades D.J. in Cr. A. 4802.

Besides section 32, section 33 of the Code provides:

20 «When a person is convicted of any offence not punishable with death the Court may, instead of passing sentence, discharge the offender upon his entering into his own recognizance, with or without sureties, in such sum as the Court may think fit, conditional that he shall appear and receive judgment at some future sitting of the Court or when called upon.»

25 As observed in Thomas on Sentencing Second Edition p. 228 binding over, describes two procedures essentially different, although they may share a common origin. Binding over to keep the peace, as being analogous to the imposition of a suspended fine while binding over to come up for judgment might be compared  
30 to the procedure for deferment of sentence. We agree fully that that is the position as regards these two kinds of punishments provided by the aforesaid two sections and described as punishments in section 26(g) of the Code. Moreover in the case of binding over to keep the peace and be of good behaviour if the  
35 term of his recognizance is broken, which has to be formally proved against the person bound, the whole or part of the sum of the recognizance may be forfeited but no further sentence may be passed in respect of the original offence and in ordering the recognizance to be forfeited, the Court should fix a term of  
40 imprisonment to be served in default and make such other



incidental orders as may be appropriate as in the case of the imposition of a fine.

As pointed out in Christopher J. Emmins, a Practical Approach to Criminal Procedure 3rd Edition at p. 243 :

«Binding over is essentially a measure of preventive justice, designed to avoid future breaches of the peace. It is not appropriate where an offender has been convicted of an offence such as theft, repetition of which is most unlikely to involve violence or public disturbance. It is appropriate - and common - in cases of petty violence, especially in disputes between neighbours where Smith alleges that he was assaulted by Jones and Jones alleges that he was assaulted by Smith, and the magistrates metaphorically knock their heads together by ordering that they both be bound over to keep the peace for a year. A bind-over may be ordered in addition to another penalty for an offence, or instead of any other penalty ...»

In Glanville Williams Criminal Law, 2nd Edition at p. 716, the following is stated:

«According to *R. v. Sandbach*, [1935] 2 K.B. 192, the sum for which surety is required by the magistrates may lawfully be greater than the maximum fine that could be imposed for the offence itself. This enables magistrates to make an order against habitual offenders where the maximum fixed by the statute is too low for deterrence. The decision must now be accepted, and is certainly salutary in practice, though it forms an exception to the general principle that when Parliament has laid down a penalty for an offence it is not open to resort to a different process to compel compliance with it. (*R. v. Hurle-Hobbs* [1945] K.B. 165.)»

Mr. Pittadjis raised a three-fold argument in support of his challenge to the legality and validity of the order whereby the appellants were required to enter into a recognizance for a sum in excess of the maximum fine and in terms irreconcilable with the wording of the empowering statutory provisions, namely, section 32 of the Criminal Code. The first point taken is that section 32 is irreconcilable with Article 12.1 of the Constitution in that it leaves sentence unregulated by law. Article 12.1 safeguards constitutionally, counsel argued, the principle that no punishment

can be imposed unless a provision certain for its imposition is made in a statute. Examination of the terms of section 32 refutes the validity of this argument for the legislator specified with a fair degree of certainty the sentence that may be imposed, namely, a  
5 recognizance with or without sureties and the purpose for which the recognizance may be required to be given. What section 32 omits is to specify the amount of the recognizance, leaving the amount to the Court «as it thinks fit». The omission to specify the maximum sentence does not derogate from the principles of Article 12.1 that  
10 primarily aims to ensure that no one is convicted save for a crime in existence at the time of the alleged commission of the offence and no punishment is meted out by a Court of law, save in accordance with and subject to the provisions of a statute in force at the time of the commission of the offence. Section 32 does  
15 provide for a punishment and is correlated to the penal measures that may be imposed for the commission of an offence; no doubt in existence at the time the misdeed was committed.

The failure to specify the maximum punishment is not incompatible with any of the provisions of the law. Article 12.3  
20 expressly safeguards the principle that no punishment shall be disproportionate to the gravity of the offence and any punishment imposed that defies this fundamental principle of the Constitution, can be struck down as unconstitutional and be varied in an appropriate case in a manner conforming to the Constitution.

25 Another argument no less invalid is that the punishment provided for by section 32, Cap. 154, can only be imposed in relation to one offence specified by the Criminal Code. The submission is refuted by the wording of section 32 and the definition of «offence» supplied by section 4 of the Criminal Code.  
30 Offence is defined as follows: «Is an act, attempt or omission punishable by law». Therefore, the range of application of section 32 is not confined to offences defined by the Criminal Code but to any offence punishable as such by law, that is, the law.

35 A more sequential argument affects the interpretation of section 32 in the light of the Constitution and the need for certainty in the provisions of the statute; like any residual penal provisions, section 32 must be reasonably applied. English authorities suggest that the amount of the recognizance may be higher than the maximum fine provided by law. See Criminal Law by *Glanville*  
40 *Williams*, Cap. 16, *Preventive Justice and the Rule of Law*, p. 714 et seq. Nevertheless, that amount should, as a rule, be correlated to the maximum punishment provided by law, that is, the fine, and if there is provision for imprisonment as well, an amount of fine

corresponding thereto in order that under no circumstances should the punishment imposed be disproportionate to the gravity of the offence. In exceptional circumstances that is when there is a real likelihood of future breaches of the peace or the law, the amount of the recognizance may exceed the maximum monetary punishment provided by Law. 5

Lastly the terms of recognizance. Section 32 authorizes the Court to require the accused to enter into a recognizance for a two-fold purpose: «Keep the peace and be of good behaviour for a time fixed by the Court». As explained in *Glanville Williams* (supra) the notions of peace and good behaviour are not identical; keeping the peace is primarily associated with the prevention of personal violence or threats. On the other hand, good behaviour may take a variety of forms, including observance of specified provisions of the law. Hence no objection can be taken to a requirement to observe the specific provisions of a law or regulations. 10 15

In this case the terms of the recognizance are unobjectionable. On the other hand the amount of the recognizance is excessive and is reduced to fifty pounds. 20

In the result the appeals against conviction are dismissed, the appeals against sentence are allowed to the extent hereinabove stated. In the circumstances, however, there will be no order as to costs.

*Appeals against conviction dismissed.* 25  
*Appeals against sentence allowed.*