1988 July, 14

[MALACHTOS, DEMETRIADES, SAVVIDES, PIKIS, JJ.]

PETROS MATSAS,

Appellant - Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION,

Respondents.

(Revisional Jurisdiction Appeal No. 674).

Disciplinary proceedings—Whether it is prohibited by any rule of law to found disciplinary proceedings on conduct amounting to a criminal offence—Question determined in the negative—Constitution, Articles 12.5 and 30.2.

Constitutional Law—Disciplinary proceedings—Constitution, Articles 12.5 and 30.2—Conduct amounting to criminal offence—Disciplinary charges brought before the Public Service Commission—No violation of the said articles of the Constitution.

Constitutional Law—Right to fair trial—Constitution, Article 12.5—It applies to the conduct of disciplinary proceedings.

Constitutional Law—The delay in prosecuting an offence—Constitution, Article 30.2—The delay is not equivalent to a finding of innocence—Neither the pardoning nor the prescription of a criminal offence precludes the pressing of disciplinary charges based on the same conduct.

Disciplinary proceedings—Delay in initiating them—Effect—No rule of administrative law prohibiting the institution of such proceedings after the lapse of any specific period—Constitution, Article 30—It applies to civil and criminal proceedings.

Disciplinary proceedings—Evidence—Evaluation—Judicial control—Principles applicable—Interference is only permissible, if the findings were not reasonably open to the administrative organ.

Evidence—Corroboration—Warning whenever the charges involve sexual misconduct—*The corroborating evidence must come from a source other than the one it purports to corroborate—Previous complaints of the complainant do not amount to corroboration, unless they qualify as first complaints in the sense of section 10 of the Evidence Law, Cap. 9.*

Evidence—Joinder of offences—Six counts relating to sexuals offences—Testimony of one complainant in respect of one count cannot be treated as corroborating evidence of another complainant in respect of another count—The joinder of offences does not make evidence, admissible on one count, admissible on every other count—These rules are applicable to disciplinary proceedings against public officers (section 3 of schedule 3 to the Public Service Law, 33/67).

Disciplinary proceedings—Evidence—Oral evidence contradictory with letter sent by the complainant to the President of the Republic—Failure of the PSC to call for the production of the letter—Ground of annulment.

The appellant was convicted on six counts involving the indecent assault and in one case indecent approach to female employees of his department. The recourse against the conviction was dismissed. Hence this appeal.

The matters which were raised before the Court during the hearing of the appeal, appear sufficiently from the hereinabove headnotes. The Court, in allowing the appeal, did not accept the contention that conduct amounting to a criminal offence cannot found a disciplinary charge. Neither did the Court accept the contention that delay in prosecuting amounts, in virtue of Article 30 of the Constitution, to a positive finding of innocence. The Court pointed that there is no rule of administrative law prohibiting the initiation of disciplinary proceedings after the lapse of any specific period of time.

Finally, however, the Court annulled the sub judice decision on the ground of misconception relating to the evidence brought before the Public Service Commission; and, because of the failure of the Public Service Commission to call for the production of a letter by one of the complainants to the President of the Republic, once it was proved that the oral evidence of the same complainant was not in accord with the said letter. The principle of law, which the Court expounded in reaching the conclusion that the sub judice decision is fraught which misconception of the relevant evidential rules, appear in the last three of the hereinabove headnotes and need not be repeated.

Appeal allowed.
Sub judice decision annulled.

Cases referred to:

Christodoulou v. Disciplinary Board (1983) 1 C.L.R. 999;

Republic v. Mithillos (1983) 3 C.L.R. 36;

Haros v. Republic, 4 RSCC 39;

Morsis v. Republic, 4 RSCC 133;

Menelaou v. Republic (1980) 3 C.L.R. 467;

Petrou v. Republic (1980) 3 C.L.R. 203;

Papacleovoulou v. Republic (1982) 3 C.L.R. 187;

R v. Barrington [1981] 1 All E.R 1135;

R v. Scarrot [1978] 1 All E.R 672;

R v. Doughty [1965] 1 All E.R. 560;

Boardman v. DPP [1974] 3 All E.R. 887;

R v. Johannson [1977] 63 Cr. App. R 101;

R v. Novac, 63 Cr. App. Rep. 112;

Bell v. DPP of Jamaica [1985] 2 All E.R.585;

Paporis v. National Bank (1986) 1 C.L.R. 578;

Oueiss v. Republic (1987) 2 C.L.R. 49;

Enotiades v. Republic (1971) 3 C.L.R. 409;

Papachrysostomou v. Police (1988) 2 C.L.R. 55;

Christofides v. CYTA (1979) 3 C.L.R. 99;

Sutton v. The King (No. 1), 14 C.L.R. 160.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 11th October, 1986 (Revisional Jurisdiction Case No. 43/84)* whereby appellant's recourse against the decision of the respondent to punish appellant with demotion after having found him guilty of disciplinary offences was dismissed.

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

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

Cur. adv. vult.

MALACHTOS J. : The judgment of the Court will be delivered by Pikis J.

PIKIS. J. : The appeal turns on the confirmation by the Court of first instance of the disciplinary conviction of the appellant on six counts involving the indecent assault and in one case indecent approaches to female employees of the Department of Psychiatric Services, namely, Maria Antoniadou, Chloi Kimisi and Xenia Poyadji. Following his conviction, the appellant was demoted to the post of medical specialist, psychiatric services. Before sentence and at all times material for the purposes of the disciplinary proceedings, the appellant held the post of Director Psychiatric Services.

* *Reported in (1986) 3 C.L.R. 1731.*

The learned Judge who tried the case in an elaborate and well reasoned judgment dismissed the submission of the appellant that the institution of the disciplinary proceedings and the conviction itself involved breaches of the constitutional rights of the applicant safeguarded by Articles 12, 13 and 30 of the Constitution. At the root of the submission of the appellant lied the suggestion that the mounting of disciplinary proceedings founded on conduct amounting to a criminal offence, namely, indecent assault, violated the right of the applicant of access to a Court assigned to him by law, that is, a Court exercising criminal jurisdiction, a right safeguarded by Art. 30.1 of the Constitution. Interwoven, with this breach was another violation of constitutional rights,those guaranteed by Art. 12.5 of the Constitution , the minimum defence rights conferred on every person accused of crime. The complaint is that appellant was denied the forum and the rights guaranteed in that forum of protesting his innocence.

The relevance of Art. 13, guaranteeing freedom of movement, was at no stage explained nor is it apparent to us. In the decision of the learned trial Judge there was no obstacle in law to fashioning disciplinary charges on conduct amounting to a criminal offence. Nor was any other right of the appellant breached by the course followed. The proceedings were modelled on the disciplinary code applicable to public employees embodied in the Public Service Law, 33/67, aimed to sustain and enforce standards of conduct befitting the civil service.

The Subjective evaluation, on the other hand, of the evidence by members of the Disciplinary Committee (the Public Service Commission) was not as such open to review, except to the extent that its findings might not be reasonably open to them on consideration of the evidence in its totality.

The points pressed before the trial Court were repeated before us as founding valid grounds justifying the annulment of the conviction and the punishment incidental thereto. It must be noted that the conclusion of the disciplinary proceedings occurred two days prior to the retirement of the appellant.

To appreciate the arguments raised in the correct context it is necessary to make brief reference to the events that led to disciplinary action and the facts supporting the disciplinary charges. On 20th January, 1983, an investigation was ordered into complaints made by four members of the female staff of the psychiatric services, the complainants. Klavdios Andoniades, Senior Counsel of the Republic, was appointed to investigate the allegations of misconduct. The investigation was concluded on 5th April, 1983, recommending the institution of disciplinary proceedings against the appellant. On the basis of this report nine charges were preferred against the appellant, that is, six charges upon which the appellant was ultimately convicted and three other charges likewise involving allegations of indecent assault resting on the accusasions of Theodosia Papakyriacou, the fourth complainant. After a lengthy trial involving the hearing of a good number of witnesses, including the complainants and the appellant, the Public Service Commission convicted the appellant on six counts and acquitted him on the remaining three for inadequacy or weakness of the evidence supporting them. Before the ordering of the investigation, Maria Antoniadou had made a written complaint to the President of the Republic encouraged, it seems, by a fellow employee of the psychiatric department. The union of public employees too, took an interest in the investigation of the complaints of its members. The reference to the background of the case would be inadequate without specific mention of the history of the complaints of the first complainant, namely, Maria Antoniadou. Her complaints referred to acts of indecent assault that allegedly occurred on three separate occasions in October 1977. In her allegations the appellant without any disguising of his intentions assaulted her indecently on three separate occasions in the course of meetings incidental to the exercise of her duties. She complained to the Police but then changed her mind and did not press her complaints to avoid, as she said, personal embarrassment. The Police made no attempt to prosecute the appellant, confront or question him in connection with the allegations of the complainant. There the matter ended, until 1982 when she repeated her complaints in a letter to the President of the Republic. A strong point made by counsel for the appellant is that the delay to prose-

cute deprived the appellant of an effective opportunity to defend himself. The complaints of the remaining complainants related to events that allegedly occurred in 1982.

In addition to the above grounds, counsel for the appellant also challenged the disciplinary conviction for misconception of the law and the evidence involving serious misdirections that made the conviction unsustainable, liable to be set aside. This point of the case for the appellant was not, as far as we were able to discern, articulated before the trial Court in the manner in which it was raised and argued before us. Prior to examining this aspect of the appeal, we shall dwell on the submissions revolving on alleged breaches of the constitutional rights of the applicant guaranteed by Articles 30 and 12 and the suggestion that it was an abuse of power on the part of the investigating officer to recommend the institution of disciplinary proceedings.

In agreement with the learned trial Judge we hold there is no rule of law prohibiting the founding of disciplinary charges on conduct amounting to a crimilal offence.The matter was conclusively settled by the decision of the Full Bench in *Christodoulou v. Disciplinary Board* (1983) 1 C.L.R. 999. Disciplinary and criminal proceedings, it was observed, are designed to serve different purposes. The former to ensure discipline in the public service and the latter to establish criminal liability under the general law. The following passage from the judgment of the Court makes it explicit that there is no obstacle in law to founding disciplinary proceedings on conduct amounting to crime:

> "In our judgment, there is no objection in principle or practice to fashioning disciplinary charges on the provisions of criminal statutes so long as the object they are designed to serve is purely disciplinary associated with the sustainance or preordained standards in the relevant branch of the public service and, in the case of National Guard intended to sustain discipline in the Force". (Page 1005).

In the case of *Christodoulou* (supra) it is noted as in a good

number of earlier cases (*Haros v. Republic*, 4 RSCC 39; *Morsis v. Republic*, 4 RSCC 133; *Menelaou v. Republic* (1980) 3 C.L.R. 467; *Petrou v. Republic* (1980) 3 C.L.R. 203; *Papacleovoulou v. Republic* (1982) 3 C.L.R. 187) that the rights safeguarded by Art. 12.5 of the Constitution, the fundamental rights of the accused in a criminal case, are applicable to disciplinary proceedings as well. There is nothing on record to suggest that the rights safeguarded by Art. 12.5 or anyone of them were breached by the institution and conduct of the disciplinary proceedings.

On consideration of the principle enshrined in the case of *Christodoulou*, it is apparent that appellant was not denied access to a Court assigned to him by or under the Constitution. The Public Service Commission in the exercise of its disciplinary competence over public servants, is not a Court in the sense of Art. 30 but a disciplinary committee charged with the sustenance of standards of conduct in the public service . None of the rights of the appellant safeguarded by Art. 30 were violated by the founding of disciplinary charges of facts amounting to a criminal offence as well.

Arguments were raised on behalf of the appellant tending to suggest that failure to prosecute on behalf of the Police authorities should be assimilated to a positive finding of innocence by a Court exercising criminal jurisdiction. There is no support for this proposition. The relevance of the findings of a criminal Court to disciplinary proceedings was canvassed and probed in depth by the Full Bench in *Republic v. Mithillos* (1983) 3 C.L.R. 36. The following passage from the judgment in *Mithillos* casts light on the relevance of the findings of a criminal Court to disciplinary proceedings:-

"(1) The outcome of disciplinary proceedings is not necessarily dependent on the outcome of criminal proceedings, even in cases where the factual background is the same. It is acknowledged that criminal and disciplinary proceedings serve different objectives and purposes. Criminal proceedings are primarily meant to ensure obedience to

the general law, whereas disciplinary proceedings are intended to safeguard observance of the internal disciplinary code. Consequently, the same evidence, although insufficient to ground a criminal conviction, may suffice to prove disciplinary charges.

(2) The findings of fact of the criminal Court are binding upon the disciplinary tribunal provided they are positive, based on an affirmative declaration of their worth by the criminal Court and not founded on doubts of the criminal Court as to their value" (Page 39).

Greek jurisprudence establishes that neither the pardoning nor the prescription of a criminal offence precludes the administrative authority from pressing disciplinary charges based on the same conduct. (*Phthenakis, "System of Public Employees"*, 1967 Ed., Vol. 3, p. 231; and *Kyriacopoulos, "Law of Civil Employees"*, 1954 Ed., p. 241).

This is the position in law. This having been said we must not be led to assume that failure or delay to prosecute for criminal conduct or the abandonment of a criminal prosecution and the reasons for it are matters that should be ignored by the responsible authority in deciding whether to initiate disciplinary proceedings. And where the decision to refrain from prosecuting is associated with the poor quality of the evidence or its insufficiency, this may be an equally potent reason for not sanctioning disciplinary proceedings. The unreliability of evidence is equally consequential for criminal and disciplinary proceedings. The time factor too is relevant to deciding whether to raise disciplinary proceedings. As a rule it is undesirable in the absence of a proper explanation of the delay to require the defendant to answer for events separated from the trial by a considerable time. But there is no rule of administrative law prohibiting the institution of disciplinary proceedings after the lapse of any specific interval of time. The decision of the Privy Council in *Bell v. DPP of Jamaica* [1985] 2 All E.R. 585 suggests that the concept of a fair trial (referring to criminal proceedings) safeguarded by the Constitution of Jamaica

imports a right to trial within a reasonable time, calculated from a date that was reasonable in all the circumstances to prosecute the accused. Art. 30.2 of the Constitution of Cyprus likewise safeguards a right of trial within a reasonable time. The right primarily refers, as the Supreme Court indicated in *Paporis v. National Bank*, (1986) 1 C.L.R. 578 to the length of judicial proceedings; a necessary safeguard for a fair trial. The right is in terms confined by the provisions of para. 2 of Art. 30 to civil and criminal proceedings. No need arises to examine in these proceedings whether a similar right vests in a person facing disciplinary charges as an incident of the wider concept of natural justice. For in the instant case there was no delay on the part of the appropriate administrative authority to hold an inquiry into the complaints of disciplinary misconduct or put the appellant on trial following their conclusion. The time gap between the occurrence of the events, subject-matter of the complaint of Maria Antoniadou and the trial of the appellant is a factor that affects the reliability of her evidence. If the appellant had been put on trial before a criminal Court in 1983 for charges founded on the complaints of Maria Antoniadou made to the Police in 1977, he might arguably have, on account of the delay to institute criminal proceedings a valid case of breach of his rights safeguarded by Art. 30.2 of the Constitution.

The ponderation of the evidence tendered in disciplinary proceedings is a matter for the disciplinary committee. It is clear there is no room for interference by a Court exercising revisional jurisdiction under Art. 146.1 with the subjective evaluation of the facts by the body trusted with disciplinary competence. (See, *inter alia, Enotiades v. Republic* (1971) 3 CLR 409; *Christofides v. CYTA* (1979) 3 C.L.R. 99). Interference is only permissible if the findings were not on consideration of the totality of the evidence reasonably open to the disciplinary committee. The complaint here, and this brings us to the last aspect of the appeal, is that the P.S.C. misconceived and consequently misapplied the principles or rules of the law of evidence that they purported to apply, affecting the approach to and the evaluation of testimony involving sexual misconduct. Also complaint is made that they

failed to keep in perspective the separateness of the charges joined in the same accusation.

In evaluating the evidence of the complainants, the respondents acknowledged that having regard to the sexual character of the disciplinary offences, corroboration should be looked for in the same way that corroboration is sought in practice by a criminal Court trying sexual offences. Thus, they warned themselves of the danger of acting on the uncorroborated evidence of the complainants reminding themselves of amenity to convict even in the absence of corroboration provided they were satisfied of the veracity of the complainants and reliability of their testimony. This was a proper direction; for equally potent reasons warrant in disciplinary proceedings too, a warning as to corroboration whenever the charges involve sexual misconduct. The need for corroboration has to do with the nature of the accusation and the possibility inherent thereto of the complainant colouring her evidence or telling the Court less than the whole truth. The taboos affecting sexual conduct are such that readiness to tell the truth may recede before the desire to conform and keep appearances. The respondents having rightly warned themselves of the need for corrobation, failed to comprehend or more precisely fell into error in discerning the nature of the evidence capable of furnishing corroboration. For evidence to provide corroboration it must come from a source other than the one it aims to corroborate, that is, from a person other than the complainant herself and must tend to establish not only that an offence was committed but that it was committed by the accused. For this reason complaints made by a female complainant of sexual assault do not provide corroboration; they merely tend to establish consistency on the part of the complainant. Only complaints qualifying as immediate complaints under the provisions of s. 10 of the Evidence Law can provide corroboration. For testimony admitted under s.10 of Cap. 9 provides evidence of the facts themselves *(Sutton v. The King* (No. 1), 14 C.L.R. 160, at p. 173). Immediate complaints received under s.10 provide testimony in pari materia with dying declarations and for similar reasons afford independent testimony of the events narrated therein. The conditions stipulated in the proviso to

s. 10 for the admission of a complaint are designed to ensure that the content of it is the spontaneous reaction to events that just occurred. The complaint must have been made in circumstances that the complainant had no opportunity to concoct the story told.

The respondents assimilated, as it is clear from passages in their decision, complaints made by the victim of sexual assault to complaints admissible under s.10 of the Evidence Law. Thus, complaints made by Xenia Poyadji to two union officials after she had made a written report of them, were treated as complaints capable of furnishing corroboration. Although the respondents state in their decision that they were prepared to act on the uncorroborated testimony of the complainants, it is obvious from the tenor of their decision that in evaluating the evidence they acted under a misconception as to the existence of corroborative evidence. In the case of Maria Antoniadou they treated as corroborative the evidence of two witnesses that they had explicitly acknowledged not to qualify as immediate complaints under s.10 - Cap. 9.

In the introductory part of the judgment there is a passage that suggests that the respondents laboured under considerable confusion in determining the evidence necessary to sustain the charges. Referring to the testimony of Chloi Kimisi they say she was a classical witness and even a criminal Court could rely on her testimony even in the absence of corroborative evidence. Although the standard of proof in disciplinary proceedings is not necessarily the same as that obtaining in a criminal case, both a Court of law and a disciplinary tribunal must be clearly satisfied of the credibility of a witness. The lesser standard that obtains in civil proceedings becomes more stringent in proportion to the gravity of the allegation at issue. No doubt accusations of sexual misconduct directed against a senior government officer are of the gravest nature casting a correspondingly high burden of proof.

Counsel for the Republic invited the respondents to accept the evidence of one complainant as corroboration of the testimony of one another on the principle of similar fact evidence. The submission was wholly wrong. For evidence to be admissible as evidence of similar facts, there must be a unique or striking similarity between the separate incidents and a degree of time proximity between the dates of their occurrence. We shall not debate this proposition further, save to mention that the relevant principles

are far too well established (*R. v. Doughty* [1965] 1 All E.R. 560, 562; *Boardman v. DPP* [1974] 3 All E.R. 887; *R. v. Johannsen* [1977] 63 *Cr. App. R.* 101; *R. v. Scarrott* [1978] 1 All E.R. 672; *R. v. Novac*, 63 *Cr. App. R.* 112; *R. v. Barrington* [1981] 1 All E.R. 1135) by the case-law to require further elaboration.

Although the respondents did not ultimately treat the testimony of the complainants as furnishing corroboration of one another, it appears that they treated such evidence as admissible on every count of the accusation. This was a grave error for as in the case of a criminal trial the joinder of offences does not make evidence admissible on one count admissible on every other count. *(Oueiss v. Republic* (1987) 2 C.L.R. 49; *Papachrysostomou v. Police* (1988) 2 C.L.R. 55). Section 3 of Schedule 3 to the Public Service Law (37/67), provides that disciplinary proceedings are conducted to the extent possible in the same way as a summary criminal trial; an enactment making applicable the relevant procedural rules as to joinder of offences and joinder of offenders. Lastly, a noticeable omission of the respondents in ascertaining the facts of the case was their failure to require the production of the statement of the written complaint of Maria Antoniadou to the President of the Republic, in some respects contradictory or incompatible with part of her evidence. Section 4(b) Schedule III to Law 33/67 expressly empowers the P.S.C. to require the production of every document relevant to the charge. Though they noted the discrepancy that emerged in the course of oral evidence, they did not consider it necessary to require the production of that statement. And they were content with the explanation given by Maria Antoniadou that upon reading the statement to the Police made six years earlier, she recovered an accurate recollection of the events.

It emerges from the above that the sub judice decision is fraught with misconception of the relevant evidential rules or principles that the respondents themselves set out to apply, a misconception that led to a misappreciation of the evidence and ultimately a misconception of the facts themselves.

Therefore , we shall allow the appeal and annul the sub judice disciplinary decision.

Appeal allowed.
Sub judice decision annulled.