1989 April 14

(SAVVIDES, HJITSANGARRIS, BOYADJIS, JJ.)

ANDREAS IGNATIOU,

Appellant,

v.

THE POLICE,

Respondent

(Criminal Appeal No. 5126)

Sentence — Appeal — Principles governing interference by the Court of appeal

Sentence — Affray contrary to section 89 of the Criminal Code, Cap. 154 and disturbance contrary to section 95 of the same code — Three months' imprisonment for the first and one month for the second and activation of suspended sentence of imprisonment of two months imposed for assault occasioning actual bodily harm — In the particular circumstances of this case, the sentence is manifestly excessive.

The wife of the appellant left him, taking the children of the marriage with her. She co-habited with her boyfriend. A number of incidents followed leading to the conviction of the appellant for the aforesaid assault, which he committed on his wife.

The commission of the sub-judice offences took place when the appellant visited his wife's place of work in order to discuss family problems. The wife's boyfriend came in and, there followed an argument, followed by an invitation by the boyfriend of the wife of the appellant «to go out and settle their differences» (Πάμε έξω να λογαριαστούμε). There followed the commission of the offences. The trial Court misdirected itself into thinking that the appellant went to the wife's place of work, in order to «re-claim» her from her boyfriend. Most of appellant's previous convictions resulted from the grudge emanating from his wife's behaviour. The Court of Appeal reduced the sentence of two month's imprisonment to a sentence of one month, did not pass a sentence on the second count, but left the activation of the suspended sentence unaffected.

Appeal allowed

Cases referred to:

Tryfona alias Aloupos v. The Republic, 1961 C.L.R. 246;

Karaviotis and others v. The Police (1967) 2 C.L.R. 286;

Georghiou v. The Police (1967) 2 C.L.R. 292;

Demetriou v. The Police (1968) 2 C.L.R. 127;

Leandrou v. The Police (1971) 2 C.L.R. 37;

Kyprianou v. The Republic (1971) 2 C.L.R. 158;

Philippou v. Republic (1983) 2 C.L.R. 245;

Iroas v. The Republic (1966) 2 C.L.R. 116.

Appeal against sentence.

Appeal against sentence by Andreas Ignatiou who was convicted on the 20th March, 1989 at the District Court of Paphos (Criminal Case No. 4934/88) on one count of the offence of affray contrary to section 89 of the Criminal Code, Cap. 154 and one count of the offence of disturbance contrary to section 20 of the Criminal Code, Cap. 154 and was sentenced by Miltiadous, D.J. to concurrent terms of three months' imprisonment and one month's imprisonment respectively.

Appellant appeared in person.

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

SAVVIDES J. gave the following judgment of the Court. The present appeal is directed against a sentence of three months' imprisonment on a count charging the appellant with affray contrary to section 89 of the Criminal Code, Cap. 154 (first count) and a sentence of one month's imprisonment on a count charging him with disturbance contrary to sections 95 and 20 of the same Law (second count) both to run concurrently, imposed upon him by the District Court of Paphos after he had pleaded guilty to such offences. The appeal is also directed against the order of the trial Court reactivating his suspended sentence of two months' imprisonment imposed upon him on 17th March, 1988, for assault occasioning actual bodily harm.

The circumstances of the commission of the offences are shortly as follows:

The appellant (accused 2 on the charge) together with his wife (accused 3) and her boyfriend (accused 1) were jointly charged with affray (count (1)) and disturbance (count (2)) to which they all pleaded guilty.

The appellant and his wife had been living separately as their marriage had broken down a number of years ago and his wife was co-habiting with her boyfriend, accused 1, having left the family home and having taken the children of the marriage with her. There were frequent quarrels between the appellant and his wife in respect of family matters which resulted to the commission by the appellant of a number of offences mainly assaults and affrays which led to his conviction. In respect of one of them, that of assault occasioning actual bodily harm, he was sentenced on the 17th March, 1988, to two months' imprisonment suspended for three years.

The wife of the appellant was employed at the Agapinor Hotel at Paphos. On the 6th June, 1988, the appellant went to the place of her employment for the purpose, according to the prosecution, of discussing with her some family problems in connection with their children. Whilst there, accused 1, the person with whom his wife co-habited arrived there together with the mother of appellant's wife. There was a row between them in the course of which accused 1 provoked the appellant by saying: «Let us go our to clear out difference». (Πάμε έξω να λογαριαστούμε). They all went out of the hotel where the offences, to which all three accused pleaded guilty took place. It has been the allegation of the appellant before us that in the course of such affray his mother-in-law intervened and stabbed him with a clasp knife, a fact which learned counsel for the respondent, in fairness to the appellant admitted.

The trial Judge, bearing in mind the fact that both accused 1 and the appellant had a number of previous convictions, imposed a sentence of three months' imprisonment on each one of them in respect of count 1 and one month's imprisonent on count (2), both sentences to run concurrently. Also he took into consideration that both of them had previous suspended sentences of imprisonment the period of suspension of which had not expired and reactivated half of the imprisonment on the 1st accused (from six months to three months) and the whole of the two months' imprisonment of

appellant, such imprisonment to run after the expiration of the term of imprisonment imposed in the present case.

The first accused filed also an appeal against his sentence which, with the leave of the Court, withdrew on the date of the hearing.

The learned trial Judge in dealing with the facts of the case for the purpose of sentence said, inter alia, the following:

> «As it emanates from the facts of the case, the second accused is the lawful husband of the third accused who deserted him and co-habits with the first accused and in demanding her from him, they got mixed up in an affray and caused disturbance.»

We wish to point out at this stage that what is mentioned by the learned trial Judge that the appellant went there to demand his wife from the first accused is inconsistent with the facts as related by the prosecution which attributed the visit of the appellant to his wife as being a visit for discussing family problems.

In the course of such discussion the first accused arrived there and shouted out to the appellant to get out of the hotel for the purpose of settling their differences. This was, in the circumstances, obviously an insinuation for a fight which in fact followed.

Counsel for the appellant in addressing the trial Court in mitigation made reference to the problems the appellant had encountered due to the breakdown of the marriage, the desertion of his wife, her taking with her their children and depriving him of them and her co-habitation with her lover. The conduct of his wife, he added, had led him to the commission of the offences appearing in the list which are attributable to such conduct and all took place after 1985 when his wife deserted him whereas before such date he had a clean record.

The learned trial Judge after making extensive reference to the previous convictions of the appellant concluded as follows:

> «I have carefully examined all the facts of the case before me and have taken into consideration what learned counsel for the accused said in mitigation and I have reached the conclusion that the only appropriate sentence for accused (1) and (2) is that of imprisonment.
>
> Bearing in mind the facts of the case, the personal circumstances of the accused and the long criminal record of accused (1) and (2) I sentence them ....»

No reason is given by the learned trial Judge why in the case of the first accused his suspended sentences of six months' imprisonment for shop-breaking and stealing was reactivated for only part of it (three months) and in the case of the appellant his suspended sentence of two months' imprisonment for assault occasioning bodily harm was reactivated for the whole term.

It is well settled by our case law that primary responsibility for assessing sentence lies with the trial Court and this Court will not interfere, on appeal, with the sentence as assessed by a trial Court except on one of the accepted grounds, viz that the trial Court has acted in a manner which is wrong in principle, or that the sentence is manifestly excessive or the Court has misdirected itself as to the essential facts or as to the law. (See, inter alia, *Tryfona alias Aloupos v. The Republic,* 1961 C.L.R. 246; *Karaviotis & Others v. The Police* (1967) 2 C.L.R. 286; *Georghiou v. The Police* (1967) 2 C.L.R. 292; *Demetriou v. The Police* (1968) 2 C.L.R. 127; *Leandrou v. The Police* (1971) 2 C.L.R. 37, 38; *Kyprianou v. The Republic* (1971) 2 C.L.R. 158, 161; *Philippou v. The Republic* (1983) 2 C.L.R. 245).

Useful reference may be made in this respect to the case of *Iroas v. The Republic* (1966) 2 C.L.R. 116 where at page 118 the following were stated:

> «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 or the law; or, that the Court, in considering sentence, allowed itself to be influenced by matter 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.»

Learned counsel for the respondent conceded in this case that there was provocation on the part of the first accused and that most of appellant's previous convictions do in fact relate to the grudge he had with his wife and her desertion of the family home taking the children with her to co-habit with accused 1. Also that the appellant, in the course of the affray besides his wife and her lover, had also to face the attack of his mother-in-law who stabbed him.

It is apparent from the record that there was a misdirection by the learned trial Judge on the facts and in particular as to the cause of the affray. From the facts before him the provocation of accused

(1) was apparent but the trial Judge instead found that the visit of the appellant to the hotel was for the purpose of demanding his wife from accused (1) with whom she was co-habiting and not as stated by the prosecution that the visit of the appellant was for the purpose of discussing with his wife family matters. Besides such misdirection we find that in the circumstances of the present case the sentence imposed on the appellant is manifestly excessive and that we should interfere with it.

The sentence on count (1) is, therefore, reduced to one of one month's imprisonment and we pass no sentence on count (2). As to the order for reactivation of the two months' imprisonment we find no reason to interfere with the order of the trial Court and we leave such order as it stands.

The appeal is allowed and the sentence is reduced accordingly.

Appeal allowed. Sentence reduced to one month.