1976 December 21

[TRIANTAFYLLIDES, P., L. LOIZOU, MALACHTOS, JJ.]

MICHALAKIS N. MILIOTIS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3741).

Criminal Law—Sentence—Unnatural offence—Section 171 (*a*) *of the Criminal Code, Cap.* 154—*Approach of Court of Appeal to offences of this nature—Two years' imprisonment on appellant—And two and a half years' imprisonment on his co-accused who played a far more serious and blameworthy part—No due weight given to state of appellant's health—Greater differentiation should have existed as regards punishment between the two offenders in view of the different extent of their culpability and because co-accused was burdened with a bad criminal record and appellant was a first offender—Sentence reduced.*

The appellant pleaded guilty to the offence of having had carnal knowledge of another male person against the order of nature and sentenced to two years' imprisonment. The offence was committed jointly with another person who was sentenced to two and a half years' imprisonment.

The trial Court in imposing sentence took into account the personal circumstances of the appellant, who was a first offender, but it has not given due weight to the bad state of the health of the appellant who was excused from enlistment in the National Guard due to an affliction of his heart. Regarding the culpability of the appellant and his co-accused, in relation to the commission of the offence, the trial Court stated that the behaviour of the co-accused was only marginally more serious than that of the appellant because the co-accused threatened the complainant twice with a knife.

Upon appeal against sentence:

Held, (after stating the approach of this Court to offences of this nature—vide p. 45 *post*—and observing that appellant's co-accused played a far more serious and blameworthy part in this case than as found by the trial Court) due to the impaired health of the appellant and the fact that there should exist greater differentiation as regards punishment between the appellant and his co-accused in view of the different extent of the culpability of each one of them in this case, especially as the co-accused is a person burdened with a bad criminal record whereas the appellant is a first offender, we have decided, not without difficulty and to a certain extent somewhat reluctantly, to reduce the sentence passed on appellant to one of fifteen months' imprisonment.

Appeal allowed.

Cases referred to:

Mavros and Others v. *The Police* (1976) 7 J.S.C. 1074 (to be reported in (1975) 2 C.L.R.).

Appeal against sentence.

Appeal against sentence by Michalakis N. Miliotis who was convicted on the 25th June, 1976 at the Assize Court of Larnaca (Criminal Case No. 4198/76) on one count of the offence of having had carnal knowledge of another male person against the order of nature, contrary to section 171 (a) of the Criminal Code, Cap. 154 and was sentenced by Pikis, Ag. P.D.C., Artemis and Constantinides, D.JJ. to two years' imprisonment.

A. Koukounis, for the appellant.

Gl. Michaelides, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: The appellant has appealed against the sentence passed upon him by an Assize Court in Larnaca when he pleaded guilty to the offence of having had carnal knowledge of another male person, the complainant in this case, against the order of nature, contrary to section 171 (a) of the Criminal Code, Cap. 154.

The offence was committed by the appellant in Larnaca, on April 25, 1976, jointly with another person who was the co-

accused (accused No. 1) of the appellant at the trial (the appellant being accused No. 2).

The appellant was sentenced to two years' imprisonment whereas his co-accused was sentenced to two and a half years' imprisonment.

The appellant was, also, sentenced to one month's imprisonment for contempt of Court, which was committed during the trial, and it was ordered by the trial Court, quite rightly in our view, that his aforesaid sentence of two years' imprisonment should commence to run after the expiration of the sentence for contempt of Court.

The main ground on which this appeal has been based is that in the light of the particular circumstances of the present case and of the personal circumstances of the appellant the sentence which was imposed on him is manifestly excessive.

The trial Court said the following in passing sentence upon the appellant:-

> " Accused 2 is a first offender, the offspring of a dissolved family. He had indeed, as it appears from the social inquiry report before us, a hard life, his parents having shown disinterest both in his upbringing and fate. He got married recently and set up home at Larnaca. The personal circumstances of accused 2 do not leave us unmoved. It is a well accepted principle of sentencing that a plea of not guilty to a charge in respect of which a person is found guilty does not aggravate the offence. On the other hand, it is equally well accepted that a plea of guilty is a factor that may justifiably be taken into consideration in mitigation as evidence of the repentance of the accused and we agree with learned counsel for accused 2 that his client has given token of this repentance from the very beginning as well as in Court, admitting at the first justifiable opportunity the offence committed by himself. Another principle of sentencing is that the sentence to be imposed must reflect the role played by each offender in the commission of the offence. The behaviour of both accused is extremely serious while the behaviour of accused 1 is only marginally more serious than that of accused 2 inasmuch as accused 1 threatened the complainant twice with a knife.

We have given careful consideration to the totality of the facts before us and the personal circumstances of the accused. In the case of accused 2, one added reason that has been advanced in mitigation is that he is a first offender."

It appears from the above passage that the trial Court did take into account the personal circumstances of the appellant, though it does not appear to have given due weight, because it does not mention this in its judgment, to the bad state of the health of the appellant, who, according to a medical certificate which was produced at the trial, was excused from enlistment in the National Guard due to an affliction of his heart.

Furthermore, on the basis of the facts of this case, as they are disclosed by the record before us, we do not share the view of the trial Court that there is only marginal difference between the culpability of the appellant and that of his co-accused in relation to the commission of the offence in question. In our opinion the appellant's co-accused played a far more serious and blameworthy part in this case, especially as it was he, and not the appellant, who threatened the complainant with a knife, in an effort to make him succumb to their perverted desires.

We do regard the present case as a very serious one. The anxious approach by this Court to offences of this nature has been stated repeatedly and it is an approach commensurate to the notions of morality prevailing in our country. As it appears from what we have said, lately, in *Mavros and others* v. *The Police*, (1976) 7 J.S.C. 1074*, this kind of offence is a crime which, notwithstanding changes in the legislation of other countries, continues to draw here universal condemnation.

It is after quite lengthy consideration of what would be the proper course to be adopted by us in this case that we have decided, not without difficulty and to a certain extent somewhat reluctantly, to intervene in favour of the appellant in order to reduce the sentence passed upon him; the two main reasons which have made us do so are his impaired health and the fact that there should exist greater differentiation as regards punishment between the two offenders concerned, that is the appellant

* To be reported in (1975) 2 C.L.R.

and his co-accused, in view of the different extent of the culpability of each one of them in this particular case; especially, as the co-accused is a person burdened with a bad criminal record whereas the appellant is a first offender.

We have, therefore, decided to reduce the sentence passed upon the appellant to one of fifteen months' imprisonment, to run after the expiry of the sentence imposed on him, as aforesaid, for contempt of Court.

This appeal is, consequently, allowed accordingly.

Appeal allowed.