MICHALAKIS A. XIRISHIS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3105).

Sentence—Two years' imprisonment imposed on a youth of seventeen years for unnatural offence upon a child under thirteen—The Criminal Code, Cap. 154 *section* 174*—Appeal against sentence as being manifestly excessive—Appeal dismissed by majority—Factors to be taken into account—Seriousness of the offence which is punishable with imprisonment of fourteen years—General public's feeling against this kind of conduct—Social aspect of the matter—Exposure of the child to moral danger and contempt—Cf. The Children's Law, Cap.* 352 *sections* 64 *and* 65.

Unnatural offence upon a child under thirteen contrary to section 174 *of the Criminal Code, Cap.* 154*—Sentence—See* supra.

Young offenders—Sentence of imprisonment on youth of seventeen years—Need for institutional treatment.

Cases referred to :

Tryfona alias *Aloupos* v. *The Republic*, 1961 C.L.R. 246 at p. 252.

The facts sufficiently appear in the judgments delivered by VASSILIADES, P., and HADJIANASTASSIOU, J.

Appeal against sentence.

Appeal against sentence by Michalakis A. Xirishis who was convicted on the 3rd June 1969, at the Assize Court of Nicosia on one count of the offence of committing an unnatural offence upon a child under 13, contrary to section 174 of the Criminal Code Cap. 154 and was sentenced by A. Loizou, P.D.C., Stavrinakis and Vakis, D.JJ. to two years' imprisonment.

Appellant, appeared in person.

S. Nicolaides, Counsel of the Republic, for the respondent.

The following judgments were delivered :

VASSILIADES, P. : The appellant, a young man of the age of 17, was convicted in the Assize Court of Nicosia on June 3, 1969, of committing an unnatural offence upon a child under 13, contrary to section 174 of the Criminal Code (Cap. 154). In the Assize Court the appellant was represented by an advocate, Mr. E. Efstathiou, on whose advice, presumably, the appellant pleaded guilty to the charge. The offence is punishable with imprisonment for 14 years ; and with whipping or flogging until that punishment was abolished, which indicates the view taken by the legislator in this country, of the nature of the crime in question.

For the reasons given in the part of the judgment dealing with sentence, the Assize Court imposed on the appellant a sentence of two years' imprisonment. They had before them at the time, a social investigation report, a voluntary statement by the appellant to the police (where he tries to place most of the blame for his conduct on the young child) and the plea in mitigation of appellant's advocate who placed before the Court all that could be said in favour of his client. From this sentence the appellant now appeals on the ground that it is manifestly excessive. The notice of appeal was signed by the appellant in person which, in a way indicates that apparently the appellant does not yet realise the seriousness of the offence for which he is now in prison.

The less said about it, the better. In this country, the general public still feel very strongly against this kind of conduct. It tends to undermine the character of the parties concerned ; it is a stain on their name ; it often operates adversely to the institution of marriage which is the main foundation of family life in our communities ; and has ruinous consequences on the life of persons who had the grave misfortune to fall when still young children, into the hands of unscrupulous and selfish individuals with perverted sexual inclinations.

It is not necessary for us to deal here with the social aspect of the matter more than it is required for the purpose of applying the law to the case before us. But in this connection, we cannot lose sight of the harm which such habits have caused to other communities ; nor can we forget the severity of the punishment which the legislator provided for such conduct, indicating clearly the public feeling in the matter.

The Assize Court, after imposing a sentence of two years' imprisonment on the appellant, proceeded to direct, under section 65 of the Children's Law (Cap. 352) that the boy in question be brought before the Juvenile Court to be dealt with under section 64 for his protection. This indicates that, in the Court's view, the boy needed protection as one of the consequences of appellant's conduct was to expose the boy to moral danger and contempt in his village-community. In fact, the boy's life, not only within his community but also for considerable distance around, has been gravely handicapped by appellant's conduct. So much so that as the boy grows up he will, probably, find that he can only get rid of the stigma on his name and character by emigrating to another country.

With all that in mind, the majority of this Court take the view that the sentence of the Assize Court (one of the objects of which is to impress on appellant's mind his responsibilities towards others) was as lenient as it could be. In my judgment this appeal is entirely devoid of merit ; and that it should be dismissed.

STAVRINIDES, J : I see no reason to interfere with the sentence. I would dismiss the appeal.

HADJIANASTASSIOU, J. : I regret that I have found it necessary to deliver a dissenting judgment in this appeal against sentence, but I have taken the view that the sentence of two years' imprisonment passed at the trial, was both wrong in principle and manifestly excessive.

I propose elaborating on the arguments and considerations which led me to reach the result that a different sentence should have been passed on the appellant.

The appellant was born at Palechori village on January 26, 1952, and at the time of the commission of the offence, he was 16 years of age. The complainant was born on August 25, 1956. The commission of the offence for which the appellant was charged, took place on September 29, 1968. He was convicted by the Assize Court of Nicosia, on his own plea of committing an unnatural offence with a child under 13 years of age, contrary to section 147 of the Criminal Code, Cap. 154, and was sentenced to two years' imprisonment.

As regards the personal circumstances of the appellant, according to the report which was prepared by a welfare officer, and was indeed before the trial Court, this particular offender comes from a large family with ten children.

I propose reading an extract from the observations made by the welfare officer :

«Ὁ κατηγορούμενος προέρχεται ἀπὸ μίαν πολυμελῆ ἀγροτικὴν οἰκογένειαν χωρὶς σοβαρὲς οἰκονομικὲς δυσκολίες.

Οἱ γονεῖς ἐνδιαφέρονται διὰ τὰς ὑλικὰς ἀνάγκας τῆς οἰκογενείας των ἀπέτυχον ὅμως νὰ βοηθήσουν τὸν ἀναφερόμενον εἰς τὴν κοινωνικοποίησιν του. Πολὺ ὀλίγη ἦτο ἡ συνεργασία των μετὰ τοῦ σχολείου καὶ καμμία μετὰ τοῦ ἑκάστοτε ἐργοδότου αὐτοῦ. Ἀπεδείχθησαν πέραν τοῦ δέοντος ἀνεκτικοὶ καὶ ὑπερπροστατευτικοί, οὐδέποτε δὲ ἀνησύχησαν σοβαρῶς διὰ τὴν στάσιν του ἔναντι τῆς ἐργασίας, εἰς σημεῖον ποὺ σήμερον νὰ μὴ μποροῦν νὰ τοῦ ἐπιβληθοῦν διότι δὲν τοὺς ἀκούει.

Ὁ ἀναφερόμενος εἶναι καλῆς σωματικῆς ὑγείας καὶ καλῆς νοημοσύνης, φαίνεται ὅμως ὅτι μέχρι σήμερον δὲν ἔχει βάλει κανένα στόχον ἢ πρόγραμμα εἰς τὴν ζωήν του, ἀπεδείχθη δὲ ἀσταθὴς εἰς τὴν ἐργασίαν του.

Μετὰ τὴν διάπραξιν τοῦ παρόντος πταίσματος κατεβλήθη προσπάθεια ἐκ μέρους τῆς ὑπηρεσίας μας νὰ βοηθηθῇ διὰ μέσου τῆς κοινωνικῆς ἐργασίας νὰ βάλῃ κάποιον πρόγραμμα καὶ σκοπὸν εἰς τὴν ζωὴν του, παρόλον δὲ ποὺ ἐπέδειξεν διάθεσιν συνεργασίας δὲν κατέβαλε μέχρι σήμερον καμμίαν σοβαρὰν προσπάθειαν πρὸς τὴν κατεύθυνσιν αὐτήν.

Ὁ κατηγορούμενος ἐκτὸς τοῦ πταίσματος διὰ τὸ ὁποῖον κατηγορεῖται οὐδὲν ἄλλο πταῖσμα διέπραξεν.»

Pausing there, it would be observed from the passage I have just read, that the parents of the appellant did not in any way try to help the accused with his upbringing in the community, and have failed utterly to show any kind of co-operation with the school authorities or with the employer of their son.

I take it, that because the accused was of a very young age, the trial Court, in considering what would have been the appropriate punishment in this case, must have felt as I do all along, that a sentence of imprisonment for young persons of that age would not have been, and indeed must not be, the appropriate punishment. Particularly so, because in recent years, the reformative aspect of punishment, viewed in relation to both penal treatment and the avoidance of the possibility of a new offender becoming a persistent offender, has received increasing attention, all over the world, with regard to young offenders. It would not be too much to add that, in effect, the Judge no longer takes

the responsibility to pass a sentence of imprisonment, unless he will have before him a complete report from a welfare officer, as well as a complete report, either from a doctor or a psychologist.

Be that as it may, the trial Court apparently have chosen to follow the second school of thought with regard to the treatment of young offenders, and have adopted the stand that imprisonment of this young man would lead to the prevention of crimes in future, and deter other members of the community, who are disposed to committing similar offences.

I would like to quote extracts from the judgment of the trial Court :

> " We have, in considering the appropriate sentence to be passed upon the accused, in mind the principle that a sentence should fit both the offence and the offender. As regards the offence, there is nothing to justify it. The accused, a far older boy, took advantage of the tender age of the complainant, leading him up to a point of consenting to an offence being committed against him. What however presents a serious problem to the Court is the age of the accused. Time and again the Courts have considered the absence of appropriate institutions for offenders of this age group and also the Supreme Court of Cyprus in a number of decisions has emphasized the desirability of avoiding sentences of imprisonment on young persons, stressing at the same time the need of having a Social Investigator's report, if the Court is minded to impose a sentence of imprisonment on a young person ".

Later on they had this to say :

> " With this in mind, we have considered the circumstances of the present case, including the personal circumstances of the accused, particularly his attitude to employment and his failure to respond to the efforts of the Welfare Department. We have, therefore, come to the conclusion that what the accused needs for his reformation is an appropriate environment where the disciplined and orderly life he will be required to lead, will help him for that purpose.
>
> The age, however, of the accused is such that has made us think twice as to the length of this institutional

treatment. On the other hand, though fully justified it should not be too long to appear unreasonably harsh to the accused, owing to his age and at the same time to be that long so that the accused will benefit therefrom. Extremely short sentences would not have met the circumstances of the present case".

Having listened very carefully and with keen interest to the strong words used by the learned President in the majority judgment, I fully share and acknowledge his anxiety. However, with regard to these kinds of offences, and fully aware that these offences are abominable crimes against the society,—particularly so in small communities—nevertheless, bearing in mind the modern trend of approach with regard to the treatment of young offenders, I feel that I ought to have dealt with this problem not with the same thoughts and considerations as I would have done in the case of an older person, but continue to be guided by the well established principles of treating young offenders. I have, therefore, taken into consideration the nature of the offence, the circumstances in which it was committed, the antecedents of the prisoner up to the time of the sentence, his age and character, as well as the fact that he is a first offender ; and bearing in mind all these consideretions, I have reached the conclusion that imprisonment would not have been the appropriate punishment, particularly so, in the absence of medical evidence, and lack of proper institutions.

I would like to reiterate, that imprisonment for this young offender, would increase the possibilities in jail, instead of reforming, of becoming a persistent offender. I sincerely believe, that in the absence of Borstal institutions to teach or train this young offender, prison life—even if placed in a special wing of the prisons—can in no way help to reform or benefit a young prisoner ; particularly so, in the case of those, like the present accused, who need special treatment and care with regard to this sexual disease.

I would, therefore, like to adopt a passage from the judgment of my learned brother, Josephides, J., in the case of *Charalambos Tryfona* alias *Aloupos* v. *The Republic*, 1961 C.L.R. 246 at p. 252 :—

> " I have given careful and anxious consideration to this case because I believe that young men must be given a chance to reform. It is a pity that in Cyprus we have no ' borstal institutions ' as in England.

Young men of the age of 16 and upwards can be committed to these institutions to be trained and given a chance to reform.

I am in a position to know that during the past seven or eight years the Courts in Cyprus have repeatedly asked the legislature to establish such institutions, but without any result. I now take this opportunity of expressing the hope that the responsible authorities in our new Republic will consider establishing the borstal system in Cyprus at the earliest possible moment ".

I also take this opportunity of adding my own hopes that the responsible authorities of our country would decide to establish the long-felt Borstal system without any further delay. The present case shows very clearly that any delay will produce further unnecessary and unpleasant results with regard to the treatment of young offenders. It would, indeed, show to the young offenders and to the public at large, that the community would be willing to give them a chance to reform, and not simply throw them into jail where they would be mixing with hard criminals.

In the light of what I have said, I have reached the conclusion that the trial Court has erred in principle, when they have taken the view that extremely short sentences would not have met the circumstances of the present case, and that prison life would be required to help this young man to reform. I would, therefore, be prepared to express the view that, had I been the trial Judge, I would have been prepared to place this young offender under probation for a period of three years, because there was no evidence before the trial Court that the appellant made this abominable practice a habit, and that his mind became so perverted that he ought not to have been given a first chance.

However, out of great respect to the strong views of the learned President, I have agreed that one year's imprisonment would meet the justice of this particular case. I would, therefore, allow the appeal and substitute the sentence of two years to one year only.

VASSILIADES, P. : In the result, the appeal is dismissed. The sentence to run according to law, from the determination of the appeal.

Appeal dismissed.