[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

DJEMAL ISMAEL,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3081).

Criminal Law—Attempt to commit unnatural offence on child under thirteen—Section 174 *of the Criminal Code Cap.* 154*—Intent—Fact that appellant did not accomplish what he intended to do because he was interrupted in the act does not entitle him to be acquitted of the charge of attempting to commit the offence of which he was convicted and be convicted on the lesser offence of indecent assault upon a male contrary to section* 152 *of the Criminal Code, Cap.* 154.

Attempt—Attempt to commit unnatural offence on child under thirteen contrary to section 174 *of the Criminal Code, Cap.* 154*—Intent—Interruption in the act—See above.*

Criminal Procedure—Appeal—Unsuccessful appeal—Sentence to run from the date of the dismissal of the appeal, unless the Court makes an order that sentence should run from the date of conviction—The Criminal Procedure Law, Cap. 155, *section* 147(1)*—Considerations applicable—In this case the Court exercised its discretion on the side of leniency—Because the appeal was lodged after due consideration of the matter by counsel for the appellant, who thought that there was an arguable issue that had to be raised on appeal.*

Appeal—Appeal in criminal cases—Unsuccessful appeal—Sentence—Section 147(1) *of the Criminal Procedure Law, Cap.* 155*—See immediately above under Criminal Procedure.*

The facts sufficiently appear in the judgment of the Court, dismissing the appeal by the accused against his conviction in the Assize Court of Limassol of an attempt to commit, with violence, an unnatural offence upon a child under thirteen contrary to section 174 of the Criminal Code Cap. 154.

Appeal against conviction.

Appeal against conviction by Djemal Ismael who was convicted on the 3rd day of February, 1969, at the Assize

Court of Limassol on one count of the offence of attempt to commit with violence an unnatural offence on a child under thirteen, contrary to section 174 of the Criminal Code Cap. 154 and was sentenced by Malachtos, P.D.C., Vassiliades and Loris, D.JJ., to three years' imprisonment.

Ch. Ali, for the appellant.

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

VASSILIADES, P. : The judgment of the Court will be delivered by Mr. Justice Triantafyllides.

TRIANTAFYLLIDES, J.: The appellant has been found guilty by the Assize Court of Limassol, on the 3rd February, 1969, of an attempt to commit, with violence, an unnatural offence with a child under thirteen, contrary to section 174 of the Criminal Code, Cap. 154 ; and he was sentenced to three years' imprisonment.

He has appealed to this Court contending that his conviction was not warranted by the evidence adduced, and, in particular, that such evidence did not establish the existence, on his part, of the intent to commit the offence of which he was found guilty.

Having heard learned counsel for the appellant and having gone carefully through the evidence on record in this case, we see no reason to disturb any one of the salient findings of fact made by the Assize Court. They are shortly as follows :—

On the 13th October, 1968, the appellant took the complainant, a child of ten, into his house and after certain loathsome preliminaries, during which the appellant threatened the child with a clasp-knife, he tried to have carnal knowledge of him against the order of nature ; as the complainant was resisting and crying, the appellant struck him in the mouth, with his hand, causing his lips to start bleeding.

While all this was going on, the father of the complainant arrived outside the house, together with the rural constable. The father tried to enter the house, but the appellant tried to prevent him from doing so by pushing against the door from the inside ; eventually, the father managed to force an entry.

At that time both the complainant and the appellant were seen pulling up their trousers, which were still lowered, and it was noticed that the appellant's penis was half erected.

Learned counsel for the appellant has submitted that the appellant knew, at the material time, that for some years past he was impotent, and that it was not, therefore, possible for him to have intended to have carnal knowledge of the boy, as carnal knowledge entails a certain degree of penetration ; and that all that the appellant intended to do was to satisfy his sexual desire, in a way, which though admittedly indecent and perverted, could never have amounted to carnal knowledge.

In view of the material before us we have not found this line of argument convincing.

Especially, as it is inconsistent with the answer of the appellant to the formal charge, wherein he stated that he admitted that he had placed his penis on the anus of the complainant " to enter in, but it did not go into because it was not erected ". Moreover, in an earlier statement to the police the appellant, while denying that he had had carnal knowledge of the complainant, stated that " fortunately " he had thought about it and had decided not to insert his penis into the anus of the complainant.

All these show that it is not correct that the appellant knew for some time that he was impotent, as submitted by his counsel.

What must have happened is that the appellant, until the time when he was interrupted by the arrival of the father of the child, had not yet attained a full erection, though he had intended to commit the offence in question as soon as he would be ready to do so.

In the circumstances, the fact that though the appellant embarked upon the commission of the offence in question intending to commit it, he did not in fact do what he had intended to do because he did not accomplish this until he was interrupted in the act, does not entitle him to be acquitted of the charge of attempting to commit the offence of which he has been found guilty, and to be convicted of the lesser offence of indecent assault upon a male, contrary to section 152 of the Criminal Code, as suggested by his counsel.

We are quite satisfied that the conviction of the appellant by the Assize Court was fully warranted, and, in particular, that the trial Court quite rightly found to exist the requisite intent for the offence concerned.

In the result this appeal fails and is dismissed accordingly.

We have considered whether to allow the law to take its course and let the sentence of imprisonment start as from today, or whether to exercise our relevant powers and order that the sentence should run as from the date of conviction. Such powers are there to be resorted to only if a case merits such an indulgence ; otherwise, in the ordinary course of things, if an appeal fails the consequences in law should be borne by the appellant. It is not without some difficulty that we have come to the conclusion that, as this is an appeal which was lodged after due consideration of the matter by counsel for the appellant, who thought that there was an arguable issue that had to be raised in favour of his client, we should lean on the side of leniency and exercise our said powers ; we direct, consequently, that the sentence should run from the date of conviction.

Appeal dismissed ; sentence to run from the date of conviction.