1973
Sept. 13
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MICHAEL
THEODOROU
MATSENTIDES
v.
THE POLICE

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

MICHAEL THEODOROU MATSENTIDES,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3486).

Trial in criminal cases—Joint trial—Plea of guilty by co-accused—Co-accused was then sentenced and gave evidence against the Appellant—Mistaken information given by the prosecution during explanation of facts for the purposes of sentencing said co-accused—But in the circumstances of this case no miscarriage of justice occurred—Judges expected due to training and experience not to be influenced by anything said which is not established by evidence in the course of the trial—Pilavakis and Another *v.* The Queen, 19 *C.L.R.* 163, distinguished.

Joint trial—Miscarriage of justice—See supra.

Sentence—Assessment—Attempting to have carnal knowledge of a person against the order of nature—Section 173 *of the Criminal Code, Cap.* 154*—Matters to be taken into account in assessing sentence*—Inter alia, *the moral concepts of the country.*

Carnal knowledge of a person against the order of nature—Section 171(*a*) *of the Criminal Code, Cap.* 154*—Attempting to have carnal knowledge etc.—Section* 173 *of the Criminal Code—Conviction resting on the uncorroborated evidence of the complainant—Minor self-contradictions in his evidence—Court of Appeal not prepared to interfere with conviction on this ground.*

Corroboration—Accomplice—Uncorroborated evidence of the accomplice (complainant)—See immediately hereabove.

Accomplice—Uncorroborated evidence of—Acted upon—See above.

The facts sufficiently appear in the judgment of the Court.

Cases referred to:

Pilavakis and Another v. *The Queen*, 19 C.L.R. 163, *distinguished;*

Peristianis v. *The Police* (1969) 2 C.L.R. 137;

Case of *Harris*, 55 Cr. App. R. 290;
Theodorou v. *The Police* (1971) 2 C.L.R. 245.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Michael Theodorou Matsentides who was convicted on the 16th July, 1973 at the District Court of Limassol (Criminal Case No. 13930/72) on one count of the offence of having carnal knowledge of a person against the order of nature contrary to section 171(a) of the Criminal Code Cap. 154 and was sentenced by Chrysostomis, D.J. to fifteen months' imprisonment.

G. Cacoyiannis, for the Appellant.

A. Frangos, Senior Counsel of the Republic with *R. Gavrielides*, for the Respondents.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: The Appellant appeals from the decision of the District Court of Limassol by means of which he was convicted of the offence of having had carnal knowledge of a person against the order of nature, contrary to section 171(a) of the Criminal Code, Cap. 154; he, also, appeals against the sentence of fifteen months' imprisonment which was passed upon him, on the 16th July, 1973, in respect of such offence.

The said offence was committed at Kyperounda on the 11th October, 1972. The complainant, who is a co-villager of the Appellant, was originally a co-accused for the same offence, under section 171(b) of Cap. 154; at the commencement of the trial he pleaded guilty; and, after having been bound over for two years in the sum of £200, he was called as a witness against the Appellant.

It has been submitted by counsel for the Appellant that a miscarriage of justice has occurred in this case because when the complainant pleaded guilty the facts of the case were explained to the trial Judge and, thus, there was, to put at its lowest, a grave risk of the Judge becoming disposed against the Appellant; especially as, in relation to an allegedly material point, such facts were not explained correctly in that it was stated by the prosecution that on underwear worn by the complainant there was found oil of the same kind as oil which was found in a bottle in a bedroom of the house of the Appellant.

We are of the view that the position in the present case is entirely different from that in the case of *Pilavakis and Another* v. *The Queen*, 19 C.L.R. 163, which was relied on by counsel for the Appellant; in that case the prosecution had referred in its opening address to a statement incriminating the accused, given by somebody who was not called to testify.

Looking at the essence of the issue before us we cannot find that any miscarriage of justice has actually occurred; in reaching this conclusion we have taken into account the established practice of our Courts in cases of this kind, according to which a co-accused who is to be called as a witness for the prosecution is allowed to plead guilty and is sentenced before the commencement of the hearing of the case against the other co-accused, as well as that the Appellant was not tried by a jury, but by a Judge, who, as pointed out in the *Pilavakis* case, *supra* is expected, due to training and experience, not to be influenced by anything said which is not established by evidence in the course of the trial. Moreover, a mere perusal of the prosecutor's statement, which was made in explaining the facts of the present case as regards the complainant, leaves no room for doubt that it was not really anything other than a proper opening address, by the prosecution, concerning the salient facts of the case as a whole; and if the Appellant had been brought to trial alone right from the beginning, and if the above statement had been made by way of an opening address of the prosecution, we do not think that the Appellant could have validly objected that it was prejudicial. It is correct that in the course of such opening statement mistaken information was given, as aforesaid, to the trial Judge about the identification of the oil found on underwear of the complainant, but that matter was thrashed out at the trial and it was then proved, indeed, that it could not be said with certainty that the oil in question was of the same kind as that found in a bottle in the possession of the Appellant; and the trial Judge has mentioned this expressly in his judgment and, therefore, he cannot be regarded as having been misled in the least on this point by what the prosecution had said earlier on in this connection.

Another contention of counsel for the Appellant is that it was not proper or safe to convict the Appellant on what the trial Judge found to be the uncorroborated evidence of the complainant; the relevant facts are as follows:-

On the date in question, at night time, the Appellant and the complainant met at a coffe-shop; being co-villagers they were

known to each other; the Appellant who is about forty-three years old and the complainant, who is a young man nearly a quarter of a century younger than the Appellant, went to the house of the Appellant, as suggested by the latter. After they entered the house, the door was closed by the Appellant; some time later one of the prosecution witnesses, who was outside the house, started shouting and asking Appellant if the complainant was in the house with him. It seems that the Appellant and the complainant were followed, on their way to the house, by another prosecution witness and, as a result, this witness and the other one, who was shouting, went and stood outside the house of the Appellant. The Appellant denied that the complainant was with him and did not open the door; he put the light off, pretending to be asleep, and at the same time he tried to get the complainant secretly out of the house by pushing him through a trap-door and telling him to climb over a wall; when, however, this method of escaping proved to be dangerous, they returned to the house and they, eventually, emerged from it.

It is true that when the complainant was asked about what had happened in the house he denied that anything improper had taken place and he said—(as has been the defence of the Appellant)—that they went to the house in order to discuss the possibility of the complainant getting engaged to a certain girl. Later on, however, the complainant stated that the Appellant had had sexual intercourse with him against the order of nature. In his evidence he described how he had been taken into the bedroom of the Appellant and was made to undress while the Appellant was undressing too, and how oil was then applied to his anus and he was made to sit on the penis of the Appellant; the complainant said that he felt pain as the Appellant's penis was "penetrating" his anus, and that it was at that moment when they were interrupted by a person shouting from outside. The complainant did not allege that he did not consent to what was taking place.

The trial Judge treated the evidence of the complainant, even though he found it to be uncorroborated, as safely reliable and convicted the Appellant on the strength of it.

Having paid due regard to all relevant considerations in this case, including the conduct of the Appellant at the time, we do not think that minor self-contradictions in the evidence of the complainant, or certain unimportant, really, discrepancies

between his evidence and that of other prosecution witnesses, or his initial statement that nothing improper had happened—which is, surely, attributable to feelings of shame—can lead us to the conclusion that it was improper to convict on the evidence of the complainant, and, therefore (as, for example, in *Theodorou* v. *The Police* (1971) 2 C.L.R. 245) we are not prepared to interfere with the conviction on such a ground.

The issue of whether or not the penis of the Appellant has actually penetrated into the anus of the complainant has given us some difficulty, as regards the conviction of the Appellant of the particular offence charged; it is clear that unless such penetration has taken place the offence charged was not committed. Bearing in mind the fact that the Appellant and the complainant were interrupted at the very beginning of the act of sodomy, as well as the medical evidence which appears to point to the conclusion that there may not have taken place penetration, because in the condition in which the anus of the complainant was found there was no indication that penetration had been effected, and bearing, further, in mind that the pain which the complainant felt might be attributed only to the efforts of the Appellant to penetrate (which actually caused an injury outside, and near, the anus of the complainant), we have decided to give the Appellant, in this respect, the benefit of what appears to be reasonable doubt, and, therefore,, his conviction of the offence under section 171(a) should be set aside; but, in the exercise of our powers under section 145 (1) (c) of the Criminal Procedure Law, Cap. 155, we have no difficulty in convicting him in respect of the offence under section 173 of Cap. 154, namely of an attempt to commit the offence of which he was found guilty.

There remains to deal now with the sentence to be passed upon the Appellant for the offence of which we have convicted him.

It is, no doubt, an offence of a serious nature; and there cannot be any analogy with the punishment imposed, as aforementioned, on the young complainant, who has been the victim of the immoral tendencies of the Appellant. Such kind of depraving conduct, as that of the Appellant, is regarded, as was pointed out in *Peristianis* v. *The Police* (1969) 2 C.L.R. 137, as an evil condemned by society; actually, in Cross on the English Sentencing System (p. 140) it is stated that the most convincing reason for heavy punishment for homosexual offences—and

heavier than punishment for heterosexual offences—is that society as a whole disapproves of them very strongly.

In the case of *Harris*, 55 Cr. App. R. 290, which was cited to us by counsel for the Appellant, for conduct in public, against a female, of perhaps worse nature than that in the present case, a sentence of eighteen months' imprisonment was described as not excessive, but as meriting anxious consideration by the Court of Appeal.

The sentence in each case has to be assessed on the basis of the particular merits of the case and bearing in mind, too, the moral concepts of the country where it has been committed. Also, it has to be determined in the light of the personal circumstances of the individual on whom it is to be imposed. The Appellant was sent to prison for five years, not very long ago, for the offences of causing grievous harm to, and indecently assaulting, a female. In the circumstances we do not think that we can avoid imposing a rather long sentence of imprisonment; he is, therefore, sent to prison for one year as from the date of his conviction by the trial Court.

Appeal dismissed.