1979 January 9

[HADJIANASTASSIOU, DEMETRIADES AND SAVVIDES, JJ.]

CHARALAMBOS CHOMATENOS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No* 3951).

Criminal Law—Sentence—Common assault and disturbance—Seven months' imprisonment suspended for three years' and probation for twelve months—Appellant a lawyer and a first offender—Conducting his case personally but failing to cross-examine witnesses on the alleged incident—Individualization of the sentence—Choice of imprisonment not warranted for a first offender—Trial Judge allowed himself to be influenced by matters which should not affect the sentence—Sentence wrong in principle and manifestly excessive—Substituted by binding over.

Court of Appeal—Appeal against sentence—Principles on which Court of Appeal interferes with sentence imposed by trial Court.

The appellant, who is a lawyer, on seeing the complainant coming from the opposite direction, in a street at Kornos village, picked up a stone and started chasing him. The complainant turned to a side road, he slipped and fell down and the appellant went and stood over him in order to hit him with a stone. The complainant got hold of appellant's hands and then his father came and managed to take him away. After this incident whenever the appellant met the complainant he was insulting him and was picking up a stone. He was found guilty on two counts of the offences of common assault and disturbance and was sentenced to 7 months' imprisonment, suspended on condition that he would not commit, within a period of 3 years another offence punishable by imprisonment and was also placed on probation for a period of 12 months, on the first count and no sentence was passed on him on the second count. He conducted his defence

in person, but he has not cross-examined the witnesses with regard to the alleged incident and the whole cross-examination had nothing to do with the issues of the case. Nor did he call any witnesses and in the unsworn statement which he make he did not refer to the question of assault.

In giving judgment the trial Court observed that "it is obvious we are facing a sad situation of the accused, which ought to occupy the attention of other authorities".

Upon appeal against sentence the appellant contended that the sentence was a very severe one in that he was prevented from exercising his profession once he was bound to reside only at Kornos; and that the imposition of imprisonment was a heavy sentence.

Held, (*1*) that in view of the observation made by the trial Judge that this was a sad case, the punishment of imprisonment was not warranted in the particular circumstances; that the leading tendency in the development of judicial sentencing policy in recent years, has been the growing recognition by the Courts of the principle of individualization of the sentence; that in the present case the appellant was charged with common assault and disturbance, and the choice of imprisonment for a first offender was not warranted and this Court is not prepared to endorse the decision and impose a sentence of imprisonment.

(2) (*After stating the principles on which the Court of Appeal will interfere with a sentence imposed by trial Court—vide* pp. 123–4 *post*) that, as the trial Judge allowed himself to be influenced by matters which should not affect the sentence, this Court has decided to interfere and it thinks that the proper sentence is to bind over the appellant in the sum of £500.—to keep the peace and be of good behaviour for a period of two years, because the sentence was wrong in principle and manifestly excessive.

Appeal allowed.

Cases referred to:

Iroas v. *Republic* (1966) 2 C.L.R. 116 at p. 118;

Patitoutsis v. *Police* (1966) 2 C.L.R. 77.

Appeal against sentence.

Appeal against sentence by Charalambos Chomatenos who was convicted on the 30th September, 1978 at the District Court

of Larnaca (Criminal Case No. 9638/77) on two counts of the offences of common assault and disturbance contrary to sections 242 and 95, respectively, of the Criminal Code Cap. 154 and was sentenced by Constantinides, D.J. to a suspended sentence of 7 months' imprisonment and was further placed under the supervision of the Probation Officer for 12 months on the first count and no sentence was passed upon him on the second count.

Appellant appeared in person.

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

HADJIANASTASSIOU J. gave the following judgment of the Court. On September 30, 1978, at the Larnaca District Court, the appellant Charalambos K. Chomatenos, a lawyer, was found guilty on two counts, (1) of common assault contrary to s. 242 of the Criminal Code Cap. 154, and (2) of disturbance contrary to s. 95, and was sentenced on the first count to 7 months' imprisonment, suspended on condition that the appellant would not commit, within a period of 3 years another offence punishable by imprisonment; he was also placed on probation for a period of 12 months. No sentence was passed for the 2nd count.

The facts can be put very shortly and are these:- On September 13, 1977, at 7.20 p.m., the complainant, Alecos Georgiou of Kornos village was on his way to find a car in order to take him to a doctor. On his way, he noticed that the accused was coming from the opposite direction. When the accused saw him, he picked up a stone and started running after him. He turned to a side road, but he slipped and fell down. Then the accused came and stood over him in order to hit him with that stone. The complainant got hold of the accused's hands and when accused's father arrived he managed to take him away. The complainant added that after that incident, every time he met the accused, he was insulting him and was picking up a stone.

There was further evidence by a certain Panayiotis Paraskeva Kashia, who knew both the accused and the complainant, and said that he was the coffee shop keeper of the village. On that date whilst he was cleaning, he heard somebody shouting

"am ill, I am ill". Then he saw the complainant running ahead and the accused running after him holding a stone. By the time he went out of the coffee shop, he noticed that the two had covered a distance of 50 meters and he saw them both on the ground. The accused was on top of the complainant. He started shouting and then the father of the accused arrived and took his son away.

The matter was reported to the police, and P.C. Andreas Charalambous visited the village of Kornos and the previous witness handed over to him the stone the accused was holding. On September 30, 1978, the trial Court at the close of the case for the prosecution, called on the accused to make a statement, and the accused told the Court that the complaint against him was a conspiracy. He further addressed the Court to the effect that the prosecution has failed to establish against him a prima facie case to support the charge because of lack of evidence and because the complainant was a fictitious person and an unknown foreigner.

The trial Court, having informed the accused that there was sufficient evidence, requiring him to make his defence, and having explained to him his rights, he said:- "Since the Court has reached a decision on the evidence given, I have nothing to say but I am making this statement: The evidence presented was insufficient to support the charge because no reason was given why I have assaulted the complainant". With that statement in mind, the trial Court then asked the accused whether he intended to call any witnesses, and his reply was "I do not propose calling witnesses, I will not take part in this procedure". In conclusion, the accused said: "Justice will fall on the heads of those who are plotting against me".

The trial Court, facing no doubt a very difficult situation because of the extraordinary behaviour of the accused who apparently was not in a position to conduct properly his case, said that the accused has failed to cross-examine the witnesses with regard to the incident alleged against him and that the whole cross-examination of the two witnesses had nothing to do with the issues in this case. The accused referred to plotters against him and branded the complainant as being a paid murderer who appeared with a false name. Then the Court went on to add that the accused, without taking the oath, made only

a statement, and although he repeated the words referred to earlier, again he omitted to refer to the question of assault. The Court made this observation "It is obvious we are facing a sad situation of the accused, which ought to occupy the attention of other authorities". The Court finally accepted the uncontradicted evidence of the prosecution, and found the accused guilty on both counts. He also made an order for the payment of £21,675 mils costs against the accused.

On appeal, the appellant argued at length that the sentence was a very severe one and that he was prevented from exercising his profession once he was bound to reside only at Kornos; and that the imposition of imprisonment was a heavy sentence. He further complained that the trial Court acted contrary to the proper administration of justice, once it failed to refer in its judgment about the credibility of the complainant.

Having considered the argument of the appellant, we find ourselves in agreement with the learned Judge that it is a sad case. It is unfortunate that a lawyer, for reasons which are not before us, conducted his own case in a most appalling manner.

Turning now to the sentence, we think that in view of the observation made by the Judge himself that this was a sad case, the punishment of imprisonment was not warranted in the particular circumstances, and we express our appreciation to counsel appearing for the Attorney-General who argued that from the totality of the evidence, leniency was required in the case of the appellant. We have taken, of course, into consideration that the Judge has weighed in his mind the pros and cons of the accused, but as we said earlier, in other cases, the leading tendency in the development of judicial sentencing policy in recent years, has been the growing recognition by the Courts of the principle of individualization of the sentence. In the present case, the appellant was charged with common assault and disturbance, and the choice of imprisonment for a first offender was not warranted, and we are not prepared to endorse the decision and impose a sentence of imprisonment. In interfering, we have not lost sight of the fact that responsibility for the choice of sentence rests primarily with the trial Court. The circumstances under which the Court may interfere with the sentence imposed by the trial Court were discussed in a number of cases. In the

case of *Michael Afxentis "Iroas"* v. *The Republic*, (1966) 2 C.L.R. 116, the Court said at p. 118:-

> " This Court has had occasion to state more than once in earlier cases, that the responsibility of imposing the appropriate sentence in a case, lies with the trial Court. 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".

As we are of the view that the trial Judge allowed himself to be influenced by matters which should not affect the sentence, we have decided to interfere and we think that the proper sentence in this case is to bind the appellant over in the sum of £500 to keep the peace and be of good behaviour for a period of 2 years, because in our view, the sentence was wrong in principle and manifestly excessive. (See also *Panayiotis Georghiou Alexandrou "Vrakas" "Patitoutsis"* v. *The Police*, (1966) 2 C.L.R. 77).

Sentence of imprisonment and the order of supervision are set aside. Appeal allowed.

Appeal allowed.