

1980 April 25

[MALACHTOS, DEMETRIADES AND SAVVIDES, JJ.]

DISTRICT OFFICER LIMASSOL AND ANOTHER,  
*Appellants,*

v.

MATHEOS NICOLAOU,  
*Respondent.*

(Criminal Appeal No. 3949).

*Building—Building without permit—Section 3(1)(b) of the Streets and Buildings Regulation Law, Cap. 96—Demolition order—Section 20(3) of the Law—Erection of three sheds on Government forest land—Fact that respondent was tolerated by the authorities in keeping said sheds on site in question for many years does not confer a right on him to frustrate the very purpose for which the law exists—Refusal to make a demolition order amounts to permitting perpetuation of an illegality—Discretion of trial Judge exercised on a wrong basis—Demolition order made, in addition to sentence of £1 fine.*

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Between the years 1950 to 1961 the respondent installed three sheds at locality “Sun Valley” at Troodos which were used as coffee bar and restaurant during winter time for skiers. These sheds were built on government forest land situated within the improvement area of Troodos.

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On 26.3.63 a receipt for the sum of £1 was issued for the first time to the respondent by the Improvement Board of Troodos, in which it was stated that this sum was representing fees for the installation of one hut at Troodos during the winter of 1963. Similar receipts were issued for the years 1965, 1966 and 1967; and on 23.11.1973 the Forest Department, as the responsible authority for forest land under the Forests Law, 1967, issued to the respondent a permit for the use of the site in question which was renewed from year to year until 31.5.1975.

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The respondent was prosecuted and convicted of the offence of erecting a building without a permit, contrary to section 3(1)(b) of the Streets and Buildings Regulation Law, Cap. 96. In passing sentence the trial Judge imposed a fine of £1 and refused to make a demolition order, giving as the main reasons

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for doing so, the behaviour of the authorities in tolerating the situation that was created since 1950, that the sheds were not causing any annoyance to anybody, that the respondent was paying rates and taxes and that a permit has been issued from the Forest Department for the use of the site.

The prosecuting authority appealed against the refusal of the trial Judge to make a demolition order contending that such refusal amounted to a wrong exercise of his discretion and so the sentence imposed was manifestly inadequate in the circumstances of this case.

*Held, (after stating the principles governing the exercise of discretion to make a demolition order under s. 20(3) of Cap. 96—vide p. 104 post) that it cannot be said that the infringement of the law by the respondent was of minor importance; that the reasons given by the trial Judge cannot be considered as valid reasons for refusing to make a demolition order; that the fact that the respondent was tolerated by the authorities in keeping the said sheds on the site in question for so many years by paying occasionally a small amount of money as rates and taxes, does not confer a right on him so as to frustrate the very purpose for which the law exists; that the refusal of the trial Judge to make a demolition order amounts in effect to permitting the perpetuation of an illegality; that, therefore, it is clear that the trial Judge exercised his discretion on a wrong basis; and that, accordingly, the appeal must be allowed and in addition to the penalty of £1.—imposed by the trial Judge, an order is hereby made that the buildings in respect of which the offence has been committed, shall be pulled down and removed within two months as from today, unless a permit is obtained in respect thereof in the meantime from the appropriate authority.*

*Appeal allowed.*

Cases referred to:

*Mayor and Others of Nicosia v. Keravnos*, 20 C.L.R. Part II, 51;  
*District Officer Nicosia v. Haji Yiannis*, 1 R.S.C.C. 79;

*Improvement Board of Kaimakli v. Sevastides* (1967) 2 C.L.R. 117 at p. 124;

*Golden Sea-side Estate Co. Ltd. v. The Municipal Corporation of Famagusta* (1973) 2 C.L.R. 58;

*Municipality of Nicosia v. Pierides* (1976) 2 C.L.R. 1.

Appeal against sentence.

Appeal by the Prosecuting Authority against the inadequacy

of the sentence imposed on the respondent, who was convicted on the 18th September, 1978, at the District Court of Limassol (Criminal Case No. 3087/76) on one count of the offence of erecting buildings on Government land without a permit, contrary to sections 3(1)(b) and 20 of the Streets and Buildings Regulation Law, Cap. 96 and was sentenced by Korfiotis, D.J. to pay £1.—fine but no demolition order was made. 5

*M. Papas with L. Petrides (Mrs.), for the appellants.*

*A. Neokleous, for the respondent.*

*Cur. adv. vult.* 10

MALACHTOS J. read the following judgment of the Court. This is an appeal by the Prosecuting Authority, with the sanction of the Attorney-General of the Republic under section 137(1)(b) of the Criminal Procedure Law, Cap. 155, as the appropriate Authority under the Streets and Buildings Regulation Law, Cap. 96, against the refusal of the District Court of Limassol to make a demolition order upon the conviction of the respondent for erecting on government land known as "Sun Valley" within the improvement area of Troodos three sheds without a permit contrary to section 3(1)(b) and 20 of the said Law. 15 20

According to the evidence adduced before the trial Court the three sheds were originally the bodies of three motor cars from which the engines were extracted and were converted into caravans. They were installed by the respondent between the years 1950 to 1961 at locality "Sun Valley" at Troodos and were used since then as coffee bar and restaurant during winter time for skiers. 25

At the local enquiry, which was carried out on 20.10.1976 it was ascertained that the site on which the sheds in question were installed is plot 4 of S/P 37/5 which is government forest land and is situated within the improvement area of Troodos. 30

On 26.3.1963 a receipt for the sum of £1.—was issued for the first time to the respondent by the Improvement Board of Troodos in which it was stated that this sum was representing fees for the installation of one hut at Troodos during the winter season for the year 1963. Similar receipts were issued for the years 1965, 1966 and 1967. 35

On 23.11.1973 a permit for the use of the site in question was issued by the Forest Department to the respondent for the purpose of keeping on the said site a shed. This permit was 40

valid for the period as from 1.6.1973 to 31.3.1974 and was renewed from year to year till 31.5.1975. It was issued by the Forests Department as the responsible authority for forest land under the Forests Law of 1967, but in no way does it affect  
 5 the powers of the Improvement Board of Troodos as regards building permits under Cap. 96.

It is also in evidence that the respondent as from 1969 took steps to obtain a building permit for the sheds in question but such permit could not be issued as he could not obtain an  
 10 encroachment licence or a lease from the government for the site on which the said sheds are installed.

What gave rise to the present proceedings is that the said site is required by the Cyprus Tourism Organization for tourism development in the area.

15 The defence of the respondent at the trial was that the said sheds were not buildings within the definition of section 2 of the Law, the interpretation section, and so no building permit was required from the Improvement Board of Troodos as provided by section 3(1)(b) of the said Law. This section reads as follows:

20 "3(1) No person shall—

(a) .....

(b) erect, or suffer or allow to be erected a building or demolish or reconstruct or make any alteration, addition or repair to any existing building, or suffer  
 25 or allow any such demolition or reconstruction or any such alteration, addition or repair to be made; without a permit in that behalf first obtained from the appropriate authority....."

30 The definition of "building" in section 2 of the Law reads as follows:

"'Building' means any construction, whether of stone, concrete, mud, iron, wood or other material, and includes any pit and any foundation, wall, roof, chimney, verandah, balcony, cornice or projection or part of a building, or  
 35 anything affixed thereto, or any wall, earthbank, fence, paling or other construction enclosing or delimiting or intended to enclose or delimit any land or space".

The trial Judge, rightly in our view, on the authority of the *Mayor and Others of Nicosia v. Christos Keravnos*, 20 C.L.R.,  
 40 Part II, page 51, found that the said sheds were buildings within

the definition of section 2 of the Law and convicted the respondent, but in passing sentence on him imposed only a fine of £1.— and refused to make a demolition order giving as the main reasons for not doing so, the behaviour of the authorities in tolerating the situation that was created since 1950, that the said sheds are causing annoyance to nobody, the permit from the Forest Department for the use of the site and that the respondent was paying rates and taxes. He also ordered the prosecuting authority to pay the costs of the proceedings. 5

This appeal is taken on the ground that the refusal of the trial Court to issue a demolition order amounts to a wrong exercise of its discretion and so the sentence imposed was manifestly inadequate in the circumstances of this case for the proper enforcement and application of the law. 10

Section 20 of the Law provides for offences and penalties. Subsection 1 of this section reads as follows:— 15

“Any person who contravenes.....any of the provisions of section 3 ..... of this law, or any regulations made thereunder, shall be guilty of an offence and shall be liable to a fine not exceeding £50.....” 20

Subsection 3 of the same section provides that:—

“In addition to any other penalty prescribed by this section, the Court before which a person is convicted for any offence under subsection (1) may order ... that the building or any part thereof, as the case may be, in respect of which the offence has been committed, shall be pulled down or removed within such time as shall be specified in such order, but in any case not exceeding two months, unless a permit is obtained in respect thereof in the meantime from the appropriate authority”. 25 30

It should be noted here that when the Streets and Buildings Regulation Law was re-enacted in 1946, during the British Rule, the making of a demolition order by the Courts under section 20(3) of the Law, was mandatory and was made discretionary by the enactment of Law 67 of 1963 so as to bring it in conformity with our Constitution, as a result of the case of the *District Officer of Nicosia and Georghios Haji Yiannis* 1 R.S.C.C. page 79. In that case it was held that section 20(3) of Cap. 96 in so far as it makes it mandatory upon the Courts, upon conviction of a person under section 20(1) of Cap. 96, to order demoli- 35 40

tion of the building or any part thereof, without exercising a discretion according to the justice and the merits of each particular case, was unconstitutional, as being inconsistent with the provisions of Article 12.3.

5 In the case of the *Improvement Board of Kaimakli v. Pelopidas Sevastides* (1967) 2 C.L.R. 117, the principles are set down as to the exercise of the discretion under section 20(3) of the Law, by our Courts. At page 124 of this report the Court says:-

10 " It is significant in this connection, that the provision of the law in this section for a demolition order, was peremptory until 1963, when it was amended (by Law 67 of 1963) so as to bring the statute in conformity with the Constitution as interpreted in proceedings of such nature, and was made discretionary. But this change cannot be understood or  
15 applied in a manner frustrating the very purpose for which the law exists; and for which the provision about a demolition order is contained in the statute. There may be cases where a demolition order need not be made; where for  
20 instance, some condition in the permit has not been complied with, or there occurred an infringement of minor importance. But this is not one of such cases."

The above principles were followed in the subsequent cases of the *Golden Sea-side Estate Co. Ltd. v. The Municipal Corporation of Famagusta* (1973) 2 C.L.R., 58 and the *Municipality of Nicosia v. Nicos Pierides* (1976) 2 C.L.R. 1.  
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Applying the above principles to the facts of this case it cannot be said that the infringement of the law by the respondent is of minor importance. Neither do we consider the reasons given by the trial Judge as valid reasons for refusing to make a demolition order. The fact that the respondent was tolerated by the  
30 authorities in keeping the said sheds on the site in question for so many years by paying occasionally a small amount of money as rates and taxes, does not confer a right on him so as to frustrate the very purpose for which the law exists. In our view the  
35 refusal of the trial Judge to make a demolition order amounts in effect to permitting the perpetuation of an illegality and, therefore, it is clear that he exercised his discretion on a wrong basis.

Consequently, we allow the appeal and in addition to the

penalty of £1.—imposed by the trial Judge, an order is hereby made that the buildings in respect of which the offence has been committed, shall be pulled down and removed within two months as from today, unless a permit is obtained in respect thereof in the meantime from the appropriate authority.

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The respondent is ordered to pay £25.—costs of the appeal.

The order for costs made against the prosecuting authority by the trial Judge is hereby cancelled.

*Appeal allowed.*