

CASES  
DECIDED BY  
THE SUPREME COURT OF CYPRUS  
ON APPEAL  
AND  
IN ITS ORIGINAL JURISDICTION

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[LORIS, STYLIANIDES AND PIKIS, JJ.]

SAVVAS RAFTIS & CO. LTD. AND ANOTHER,  
*Appellants.*

v.

MUNICIPALITY OF PAPHOS,  
*Respondents.*

(*Criminal Appeals Nos. 4271-4272*).

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5 *Constitutional Law—Constitutionality of legislation—A statute is presumed to be constitutional until the contrary is proved beyond all reasonable doubt—Provisions of section 20(3)(a) of the Streets and Buildings Regulation Law, Cap. 96 for the suspension of demolition order for a period of two months—Not contrary to Article 12.3 of the Constitution—Because suspension of the enforcement of a demolition order is not a punishment.*

10 *Sentence—Orders of a Court which qualify as a sentence—Those which have the effect of depriving the fundamental rights of the accused, such as the right to freedom of movement and association and rights to ownership and possession.*

The appellants were found guilty on a charge of commencing

the erection of a building without a building permit and were fined £70 each and ordered to demolish everything referred to in the charges unless a permit was secured within two months in respect thereof.

The demolition order was made under section 20(3)(a) of the Streets and Buildings Regulation Law, Cap. 96 which reads as follows: 5

“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.- 10

(a) 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 no case exceeding two months, unless a permit is obtained in respect thereof in the meantime from the appropriate authority”. 15

Upon appeal against sentence it was mainly contended that the period of two months provided in section 20(3)(a) of Cap 96 was unconstitutional, as repugnant to Article 12.3\* of the Constitution, because (a) it fetters the discretion of the Court and (b) it may not be possible for the examination of an application for a permit within two months by the appropriate authority due to inherent difficulties. 20

*Held*, that the period of two months during which the enforcement of a demolition order may be suspended is not part of the sentence and therefore it is not unconstitutional as being contrary to Article 12.3 of the Constitution 25

*Per Stylianides J, Loris J concurring:*

That a statute is presumed to be constitutional until the contrary is proved beyond all reasonable doubt, that this Court has not been satisfied beyond reasonable doubt, that the provision “but in no case exceeding two months” of the statute is unconstitutional as being contrary to Article 12.3 of the Constitution, 30

\* Article 12.3 of the Constitution reads as follows:

“No law shall provide for a punishment which is disproportionate to the gravity of the offence”

5 that the punishment, the sanction for transgressing the Law,  
 is the order to pull down or remove the building or any part  
 thereof in respect of which the offence was committed; that  
 the period specified in the order, which in no case should exceed  
 two months, is not a period meant to enable the offender to  
 obtain a building permit; that a building permit is a prerequisite  
 to any building operation; that the two-monthly period is a  
 period of grace afforded for the execution of the punishment  
 and if within the period appointed by the Court a building  
 10 permit is obtained, then the accused is absolved from the  
 obligation to comply with the order.

*Per Pikis J., Loris J. concurring:*

15 That for an order of the Court to qualify as a sentence it  
 must have the effect of depriving, in one or more respects, the  
 fundamental rights of the accused, such as the right to freedom  
 of movement and association and the rights to ownership and  
 possession; that it is impossible to fit in the power to suspend  
 a demolition order into the concept of sentence; that the suspen-  
 20 sion of the enforcement of a demolition order is manifestly  
 not a punishment; that far from depriving the accused of any  
 of his rights, the extension of the period of enforcement absolves  
 him of the obligation to comply with the order as soon as possi-  
 ble, that he would otherwise have to and, to that extent, miti-  
 gates his burden; and that, therefore, the regulation of the  
 25 exercise of the power by law, that is fixing the maximum period  
 of extension, does not offend in any way the provisions of Article  
 12.3 of the Constitution the application of which is limited to  
 penal statutes.

*Appeal dismissed.*

30 Cases referred to:

*Stylianou v. Police*, 1962 C.L.R. 152;

*Zavos v. Police* (1963) 1 C.L.R. 57;

*Attorney-General of the Republic v. Ibrahim*, 1964 C.L.R. 195  
 at p. 232;

35 *Board for Registration of Architects and Civil Engineers v. Kyriakides* (1966) 3 C.L.R. 640 at p. 654;

*District Officer of Nicosia v. Hji Yianni*, 1 R.S.C.C. 79;

*Amand v. Secretary of State for Home Affairs* [1942] 2 All E.R.  
 381 at p. 385;

- R. v. Crown Court* [1980] 1 All E.R. 445;  
*R. v. Brogan* [1975] 1 All E.R. 879;  
*R. v. Menocal* [1979] 2 All E.R. 510;  
*R. v. Cuthbertson* [1980] 1 All E.R. 401;  
*Improvement Board of Kaimakli v. Sevastides* (1967) 2 C.L.R. 117; 5  
*Golden Seaside Estate Co. Ltd. v. Municipal Corporation of Famagusta* (1973) 3 C.L.R. 58;  
*Salamis Holdings Ltd. v. Municipality of Famagusta* (1973) 2 C.L.R. 239; 10  
*Municipality of Nicosia v. Pierides* (1976) 2 C.L.R. 1.

### Appeals against conviction and sentence.

Appeals against conviction and sentence by Savvas Raftis & Co. Ltd. and Another who were convicted on the 29th October, 1981 at the District Court of Paphos (Criminal Case No. 2015/81) on one count of the offence of commencing the erection of a building contrary to sections 3(1)(b)(f)(3), 20(3)(5)(4) 3A(3) of the Streets and Buildings Regulation Law, Cap. 96, (as amended) and section 20 of the Criminal Code, Cap. 154 and were sentenced by Laoutas, Ag. S.D.J. to pay £70.- fine each and £70.- costs and a demolition order was issued ordering them to pull down everything referred to in the charges unless a permit was secured within two months. 15 20

*L. Kythreotis*, for the appellant.

*K. Chrysostomides*, for the respondent. 25

*R. Gavrielides*, Senior Counsel of the Republic, as *amicus curiae*.

*Cur. adv. vult.*

The following judgments were read:

LORIS J: I had the opportunity of reading the judgments about to be delivered by Stylianides, J. and Pikiis, J. I agree with both judgments and have nothing useful to add. 30

The first judgment of this Court will be delivered by Stylianides, J., and the judgment of Pikiis, J., will follow.

STYLIANIDES J.: The appellants—a company and its Managing Director—were found guilty by the District Court of Paphos 35

(Laoutas, Ag.S.D.J.) on a charge of commencing the erection of a building contrary to sections 3 (1)(b)(f)(3), 20(3)(5)(4) 3A(3) of the Streets and Buildings Regulation Law, Cap. 96. Laws 14/59, 67/63, 6/64, 13/74, and Cap. 154, s. 20.

- 5 They were fined £70.- each and jointly ordered to pay £70.- prosecution costs. Further a demolition order was issued ordering them to pull down everything referred to in the charges unless a permit was secured within two months in respect thereof.

The appeal was directed against conviction and sentence.

- 10 In the course of the hearing of the appeal learned counsel for the appellants rightly conceded that the appropriate authority for the issue of a building permit is the Municipal Corporation of Paphos and, as they did not obtain a building permit as prescribed by Law, Cap. 96, he abandoned the appeal against  
15 conviction. Furthermore he did not pursue the appeal directed against the monetary part of the sentence imposed by the trial Court. A simple question remained for consideration, that is to say, the constitutionality of the relevant provisions of Cap. 96, notably s. 20(3)(a), respecting the time limit within  
20 which an order must be enforced and, if the submission of the constitutionality is upheld, a second question arises, i.e. the exercise of this Court's discretion in the circumstances of the case.

- 25 Learned counsel for the appellants argued that the period of two months provided in s. 20(3)(a) of the Streets and Buildings Regulation Law, Cap. 96, is unconstitutional as repugnant to Article 12.3 of the Constitution, which reads:-

“No law shall provide for a punishment which is disproportionate to the gravity of the offence”.

- 30 This statutory provision was preserved by Article 188 of the Constitution, being enacted prior to the establishment of the Republic.

- 35 It is perfectly clear from paragraphs (1) and (4) of Article 188 that the Courts of the Republic, in discharging their function of applying the Law, have to construe and apply all Laws preserved in force by Article 188, with such modification as may be necessary to bring them into conformity with the Consti-

tution. The term "modification" in paragraph (4) of Article 188 is defined in paragraph (5) of the same Article as including "amendment, adaptation and repeal". (*Stylianou v. The Police*, 1962 C.L.R. 152; *Michael Demetriou Zavos v. The Police*, (1963) 1 C.L.R. 57).

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As stressed in the case of *The Attorney-General of the Republic v. Ibrahim*, 1964 C.L.R. 195, at p. 232, "it is a basic principle of Constitutional Law that the utmost restraint should be exercised by Courts in approaching the issue of the alleged unconstitutionality of a statute and that, in case of doubt, a Court should lean in favour of the validity of such statute, because a statute is presumed to be constitutional until the contrary is proved beyond all reasonable doubt". (See also *The Board for Registration of Architects & Civil Engineers v. Kyriakides*, (1966) 3 C.L.R. 640, at p. 654).

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A demolition order made under s.20(3)(a) of Cap. 96 amounts to "punishment" within the meaning of that term in paragraph (3) of Article 12. This view is, inter alia, supported by the opening words of subsection (3) of s. 20 of Cap. 96 which clearly provide that such a demolition order shall be made in "addition to any other penalty prescribed by" that section. (*The District Officer of Nicosia v. Georghios Hji-Yianni, of Akaki*, 1 R.S.C.C. 79).

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The provisions of the Law for a demolition order were peremptory until 1963, when it was amended (by Law No. 67 of 1963) so as to bring the statute in conformity with the Consitution, as interpreted in proceedings of such a nature, and was made discretionary.

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Section 20(3)(a) reads as follows:-

"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:-

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- (a) 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 no case exceeding two months, unless a permit is obtained

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in respect thereof in the meantime from the appropriate authority”.

It was submitted by Mr. Kythreotis for the appellants that the time of two months within which a demolition order must  
5 be enforced is unconstitutional in that (a) it fetters the discretion of the Court and (b) it may not be possible for the examination of an application for a permit within two months by the appropriate authority due to inherent difficulties.

We have not been satisfied beyond reasonable doubt, which  
10 is the relevant criterion, that the provision “but in no case exceeding two months” of the statute is unconstitutional as being contrary to Article 12.3 of the Constitution. The punishment, the sanction for transgressing the Law, is the order to pull down or remove the building or any part thereof in respect  
15 of which the offence was committed. The period specified in the order, which in no case should exceed two months, is not a period meant to enable the offender to obtain a building permit; a building permit is a prerequisite to any building operation. The two-month period is a period of grace afforded  
20 for the execution of the punishment and if within the period appointed by the Court a building permit is obtained, then the accused is absolved from the obligation to comply with the order.

In view of our opinion as to the constitutionality of the statu-  
25 tory provision challenged and as the trial Judge gave the maximum period provided by Law, this appeal fails and is dismissed accordingly.

PIKIS J.: I agree with Stylianides, J., that the period during  
30 which the enforcement of a demolition order may be suspended is not part of the sentence and, therefore, the provisions of Article 12.3 of the Constitution are inapplicable. What I wish to add mainly pertains to the definition of sentence in the context of criminal law.

Sentence is that part of the criminal process, usually the end  
35 point, that involves the imposition of sanctions for the infraction of one or more penal laws or regulations. AND criminal, is every proceeding that may result in the punishment of the accused by a court of law claiming jurisdiction over the matter.

(See, inter alia, *Amand v. Secretary of State for Home Affairs* [1942] 2 All E.R. 381, 385, and *R. v. Crown Court* [1980] 1 All E.R. 445).

Normally, there is no difficulty in identifying what part of the judgment of the Court constitutes the sentence. However, need arises in this case to delve into the definition of sentence, in the field of criminal law, somewhat deeper and explore juridically to the degree necessary what constitutes sentence, in order to determine whether the suspension of a demolition order, in contrast to the order itself, amounts to punishment, either on its own or as an inextricable part of the demolition order. The question must be examined in an abstract perspective for we are concerned with a question of constitutionality that must be resolved from the angle of the implications of a demolition order, as may be envisaged from a reading of the law, and its conceivable application in diverse circumstances, independently of the facts of the case.

Nicolaou, D.J., in a judgment extensively cited before us, notably in *The District Officer of Nicosia v. Them. Nicolaou & Bros. Ltd. & Another*, Case No. 21345/79, delivered on 18.9.1980, concluded that the suspension of a demolition order forms part of the sentence and, inasmuch as the period of suspension is pre-determined and not related to the circumstances of individual cases, it offends the provisions of Article 12.3 that require mandatorily, that no punishment shall be disproportionate to the gravity of the offence.

The learned Judge was impressed by the degree to which a demolition order is interwoven with the period set down for its enforcement as to justify the view that the two are inseparable and, therefore, the law in question offensive to the dictates of Article 12.3. In so holding, he took stock of the implications of suspension and the purpose it is, in his view, designed to serve in practice, that is, mainly to afford a last opportunity to the applicant to secure a permit. It is, as indicated, upon the reasoning of the aforementioned judgment that counsel for the applicants founded his arguments on appeal, a reasoning which was largely adopted by counsel for the other parties.

The underlying assumption that suspension is aimed to afford a breathing space for securing a permit, is vulnerable to criticism

and it is not, inevitably, warranted by the law. The most obvious justification for extension, on a review of the objects of the law as a whole, is to afford a degree of latitude to the accused in complying with the order; and if he secures a permit, so much the better for him.

By empowering the Court to put-off the enforcement of the order, it is not intended to whittle down the effect of the basic provisions of the law that require that no building should be erected without prior approval of the appropriate authority evidenced by a permit.

In the course of arguments, I inquired on counsel what would be the position in law from the angle of constitutionality if s.20(3) of the Streets and Buildings Law, Cap. 96, merely provided for the imposition of a demolition order subject to the discretion of the Court, without vesting any additional powers on the Court to suspend its enforcement. To that, we received no clear answer; the question is pertinent because, if the relevant section stripped off the power to suspend the order is constitutionally unobjectionable, it would be contradictory to suggest that the addition of a provision, designed to obviously mitigate some of the effects of a demolition order, is liable to scrutiny under Article 12.3 of the Constitution.

The validity of the submission of unconstitutionality largely depends on the definition of sentence, particularly whether the power to suspend a demolition order is in itself a species of punishment. Some English decisions I traced, shed light on the constituent elements of sentence but none supplies a comprehensive answer. (See, inter alia, *R. v. Brogan* [1975] 1 All E.R. 879 (C.A.); *R. v. Menocal* [1979] 2 All E.R. 510 (H.L.); *R. v. Cuthbertson* [1980] 1 All E.R. 401 (H.L.) ).

Sentence, in the context of criminal law, is the punishment that a competent court may impose, as indicated, for the infringement of penal laws and regulations. For an order of the court to qualify as a sentence, it must have the effect of depriving, in one or more respects, the fundamental rights of the accused, such as the right to freedom of movement and association and the rights to ownership and possession. Because of their limiting effects on the rights of the person affected thereby, a demolition as well as a forfeiture order, have been held to

amount to punishment for purposes of the provisions of Article 12.3 of the Constitution. (See, inter alia, *The District Officer of Nicosia, v. Georghios Hadji Yiannis of Akaki*, Vol. 1, R.S C C., p. 79; *Improvement Board of Kaimakli v. Pelopidas Sevastides* (1967) 2 C.L.R. p. 117; *Golden Seaside Estate Co. Ltd. v. The Municipal Corporation of Famagusta* (1973) 3 C.L.R. 58; *Salamis Holdings Ltd. v. Municipality of Famagusta* (1973) 2 C.L.R. 239; *The Municipality of Nicosia v. Pierides* (1976) 2 C.L.R. 1). The rights of the accused, in this respect, must be broadly considered and include rights incidental to ownership and possession. So, a demolition order may be said to deprive the citizen of the right to put his immovable property to uses of his choice, whereas a forfeiture order deprives the accused of the right to deal, as he chooses, with articles in his possession. A fine has, likewise, dispossessory effects.

It is impossible to fit in the power to suspend a demolition order into the concept of sentence. The suspension of the enforcement of a demolition order is manifestly not a punishment. Far from depriving the accused of any of his rights, the extension of the period of enforcement absolves him of the obligation to comply with the order as soon as possible, that he would otherwise have to and, to that extent, mitigates his burden. It is for similar reasons that the power to suspend a sentence of imprisonment under the Suspension of Imprisonment Law, 1972 (Law 95/72) is constitutionally unobjectionable notwithstanding the pre-determination by law of the period of suspension.

In my judgment, the power vested in the Court to suspend a demolition order is not a penal provision; consequently, any order founded thereon is not a sentence in any sense of the word. Therefore, the regulation of the exercise of the power by law, that is fixing the maximum period of extension, does not offend in any way the provisions of Article 12.3 of the Constitution the application of which is limited to penal statutes.

The brevity of the period of extension serves to remind everyone that he should not embark upon the erection of a building unless he first secures a permit, as required by law.

The appeal is dismissed.

*Appeal dismissed.*