1983 October 10

[A. LOIZOU, LORIS AND PIKIS, JJ.]

1. SAC MALCOLM BRIAN HARDMAN JENKINSON,
2. SAC SHAUN KELLY,

Appellants,

v.

THE POLICE

Respondents.

(Criminal Appeals Nos. 4467–4468).

Criminal Law—Sentence—Young offender (aged 21)—Imprisonment —Generally speaking should be avoided unless otherwise called for—One month's imprisonment for stealing two flags valued at £13—Appellants members of the Royal Air Force stationed in Cyprus—Undue weight given to fact that leniency shown by Court on previous occasions when British soldiers stole flags, not appreciated—Not a case of taking judicial notice of a prevalent offence—Grave consequences entailed by sentence of imprisonment on future life and career of appellants—Sentence manifestly excessive—Substituted by recongizance in the sum of £100 for one year.

The two appellants pleaded guilty of the offence of stealing two flags valued at £13 and they were sentenced to one month's imprisonment. They were both aged 21 and members of the Royal Air Force (RAF) stationed in Platres. The first appellant was married and his wife was not in Cyprus. The second appellant was single. The first one was on a nine years engagement with RAF and the second on a seven years engagement. The trial Judge in the course of the proceedings made certain comments to the effect that on three or four occasions British soldiers stole flags of the Republic of Cyprus and that he had repeatedly warned that this sort of behaviour should stop. In passing sentence he, also, referred to that fact and that the leniency shown by the Court on such previous occasions had been misunderstood and had not been appreciated.

Upon appeal against sentence:

Held, per A. Loizou, J., Loris and Pikis, JJ. concurring, that with his remarks the trial Judge might be misunderstood that he had approached the matter in such a manner as if with the sentence he was minded to and indeed in fact imposed he was making these two appellants pay also for the misdeeds of others as it could not clearly be said that it was merely a case of just taking judicial notice of the prevalence of offences for which a Judge is entitled and in respect of which he had a duty to impose the appropriate, in the circumstances, deterrent sentence; that the circumstances under which the offence in respect of which the appellants were sentenced reveal nothing more than a youthful folly and it should have been treated in that spirit; that imprisonment, generally speaking, on young people, unless otherwise called for, should, as far as possible, be avoided the more so when it entails grave consequences on the future life and career of the accused, as in this case; that the sentence imposed on the appellants is manifestly excessive and it would have equally met the requirements of the administration of justice if, taking into consideration both the circumstances of the two appellants, each one of them was ordered to enter into his own recognizance in the sum of £100.- for one year to come up for judgment if and when called upon and that he would not be called upon so long as he commits no similar offence.

Per Loris, J.: The trial Judge failed to individualize the case to the degree necessary to fit the offender;

Per Pikis, J.: That the impression that is apt to be conveyed by the emphasis laid by the trial Judge on previous warnings of his to other offenders is that the administration of justice is personalised whereas it should be ministered upon a basis of universality and made to rest upon premises susceptible to objective scrutiny; that the conclusion of the trial Judge was reached without inquiry into whether the warnings came to the notice of the accused; and that, moreover, the prevalence of the offences was judged from the angle of the personal experience of the judge and not from a wider perspective that should encompass the administration of justice in Cyprus as a whole, or parts of it.

Appeals allowed.

Appeals against sentence.

Appeals against sentence by Sac Malcolm Brian Hardman Jenkinson and another who were convicted on the 15th September, 1983 at the District Court of Limassol (Criminal Case No. 13921/83) on one count of the offence of stealing contrary to sections 255, 262 and 20 of the Criminal Code, Cap. 154 and were sentenced by Fr. Nicolaides S.D.J. to one month's imprisonment.

C.P. Erotocritou with *P. Mouaimis*, for the appellants

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

The following judgments were given.

A. LOIZOU J.: By these two appeals which have been heard together in view of their nature, the appellants complain against the sentence of one month's imprisonment imposed on them by the District Court of Limassol, upon their having been found guilty on their own plea of the offence of stealing, contrary to ss. 255, 262 and 20 of the Criminal Code, Cap. 154.

According to the particulars of the offence as set out in the charge sheet, the two appellants on the 10th July, 1982, at the locality "Asprokremnos", area of Platres, in the District of Limassol, did steal two flags valued at C£13.- the property of the Democratic Labour Organization of Cyprus (DEOK).

The two appellants, both aged 21, are members of the Royal Air Force (RAF) stationed at Platres. The first appellant (appellant in Criminal Appeal No. 4467) is married but his wife was not in Cyprus. The second appellant (appellant in Criminal Appeal No. 4468) is single. The first one is on a nine year engagement with RAF and the second on a seven year engagement.

On the night in question the two appellants who had been preparing the organization and function of a sports event at Troodos and after having successfully completed their work, had a coca-cola and two beers and they were in good spirit. At about 1.30 a.m. on their way back to Platres, they took away two flags, one of the Republic of Cyprus and the other of Greece, from the entrance of a summer camping place of

the Democratic Labour Organization (DEOK). The next day having realized the significance of what they did, they decided to return the two flags to the Military Police. They drove down in their car to a Non Commanding Officer's house and they left them on the door-step. Later, however, they made a clean breast of it to their Commissioned Officer and expressed their sorrow for what they did.

Their defending counsel in his plea in mitigation before the trial Court, reiterated their sorrow and apologies to all concerned, emphasizing that in no way they intended to offend anybody.

The learned trial Judge in the course of the proceedings made certain comments to the effect that on three or four occasions British soldiers stole flags of the Republic of Cyprus and that he had repeatedly warned that this sort of behaviour should stop. In passing sentence he also referred to that fact and that the leniency shown by the Court on such previous occasions had been misunderstood and had not been appreciated.

Viewing the case on its totality, I have felt that with his remarks the trial Judge might be misunderstood that he had approached the matter in such a manner as if with the sentence he was minded to and indeed in fact imposed he was making these two appellants pay also for the misdeeds of others, as it could not clearly be said that it was merely a case of just taking judicial notice of the prevalence of offences for which a Judge is entitled and in respect of which he had a duty to impose the appropriate, in the circumstances, deterrent sentence.

To may mind the circumstances under which the offence in respect of which the appellants were sentenced, reveal nothing more than a youthful folly and it should have been treated in that spirit. Imprisonment, generally speaking, on young people, unless otherwise called for, should, as far as possible, be avoided. More so when it entails grave consequences on the future life and career of the accused, as in this case, where under existing Military Regulations custodial sentences, except for special circumstances which do not exist in this case, bring about their dismissal from the service and in addition to anything else

results in great financial loss, apart from the opportunity of continuing the career of their choice in respect of which they have had so far a good record, as the Court had been assured by their Commanding Officer.

Indeed Counsel for the respondents has in all fairness approaching the case in its right perspective, did not press it and we are much grateful to him. In my view the sentence imposed on the appellants is manifestly excessive and it would have equally met the requirements of the administration of justice if, taking into consideration both the circumstances of the offence and the personal circumstances of the two appellants, each one of them was ordered to enter into his own recognizance in the sum of C£100.- for one year to come up for judgment if and when called upon and that he would not be called upon so long as he commits no similar offence.

PIKIS J.: I wholly agree with whatever has fallen from Brother Justices A. Loizou and Loris, and concur to the proposed order. That I add something of my own, is solely due to my concern about an aspect of the case I regard as highly unsatisfactory. It is this: The emphasis laid by the trial Judge on previous warnings of his to other offenders convicted of similar offences as a measure for the determination of the sentence. The impression that is apt to be conveyed, is that the administration of justice is personalised, whereas it should be ministered upon a basis of universality and made to rest upon premises susceptible to objective scrutiny.

In his short judgment the trial Judge, after noting previous warnings given to British soldiers convicted of similar offences, he concludes:

> "I feel that I am not prepared to show the leniency that I showed in the past and, as a result, the accused are sentenced to one month's imprisonment".

The conclusion was reached without inquiry into whether the warnings came to the notice of the accused then standing convicted before him, be it whether they ought to have come to their notice. Moreover, the prevalence of the offences was judged from the angle of the personal experience of the Judge

and not from a wider perspective that should encompass the administration of justice in Cyprus as a whole, or parts of it.

I do not wish to minimise judicial discretion in the determination of sentence, only to identify the principles that should underlie its exercise.

LORIS J.: I agree with my brother Judge Loizou; it is apparent that the trial judge failed to individualize the case to the degree necessary to fit the offender.

A. LOIZOU, J.: In the result both appeals are allowed. Sentence of imprisonment imposed on each appellant is set aside and an order is hereby made that each appellant shall enter into his own recognizance in the sum of C£100.- for one year to come up for judgment as and when called upon. He will not be called upon so long as he commits no similar offence.

Appeals allowed.