1983 February 1

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

XENAKIS ANDREOU PARASKEVA,

Appellant.

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 4351).

Criminal Procedure—Plea of guilty—Appeal against conviction after plea of guilty—Facts as presented by the prosecution not disclosing the offence to which appellant pleaded guilty—Retrial ordered—Sections 135(2) *and* 145(1)(*d*) *of the Criminal Procedure Law, Cap.* 155 *and section* 25(2) *of the Courts of Justice Law,* 1960 (*Law* 14/60)—*Section* 145(1)(*c*) *of Cap.* 155 *applicable only where there has been a conviction after a plea of not guilty.*

Criminal Law—Sentence—Narcotic drugs—Seriousness of the offence—Mitigating factors—Age (17), *excellent character and clean record of appellant—And fact that he confessed and delivered to the police the small quantity of drugs in his possession—Sentence of nine months' imprisonment reduced.*

The appellant pleaded guilty on two counts of the offences of possession of 519.5 grams of cannabis resin (count 1) and of possession of the same quantity with intent to supply same to others (count 2); he also pleaded guilty on another count (count 5) of the offence of possession of 1.4 grams of cannabis resin and was sentenced to two years' imprisonment on count 2 and nine months' imprisonment on count 5. No sentence was imposed on him on count 1.

Regarding counts 1 and 2 the facts were that appellant was arrested by the Police when he went with his co-accused to the spot where the latter had hidden the drugs subject matter of the counts, and when the co-accused picked up the drugs. Regarding count 5 the drugs were found in appellant's house.

Upon appeal against conviction on counts 1 and 2, after a plea of guilty, it was contended that the facts as stated before the trial Court in support of the charge did not disclose the commission of the offence to which the appellant pleaded guilty; and upon appeal against the sentence of nine months' imprisonment on count 5 it was contended that the sentence was manifestly excessive and wrong in principle taking into consideration the young age of the appellant who was under 18 years, the fact that upon arrest he confessed in his voluntary statement and made a clean breast of everything he knew and delivered to the Police the small quantity of drugs which was in his possession.

Held, (1) that on the facts as presented by the prosecution before the trial Court and from the voluntary statement of the appellant, the appellant at no time came into possession, as charged, of the drugs referred to in counts 1 and 2, as his co-accused was arrested before he had delivered anything to the appellant; that in the result, this appeal may be treated as an appeal against conviction on counts 1 and 2 and the conviction on such counts will be set aside and in the exercise of this Court's powers under section 145(1)(d) of the Criminal Procedure Law, Cap. 155, an order for a new trial to take place before a competent Court sitting with a different composition is made; that with regard to the submission of counsel for the respondent for the conviction of the appellant on new counts under section 145(1)(c) of the Criminal Procedure Law, for an attempt to commit the offence and for conspiracy, this Court is unable to agree with him because section 145(1)(c) of Cap. 155 is only applicable in cases where there has been a conviction after evidence has been heard and not where there has been a conviction based on a plea of guilty as in the present case.

(2) That though offences connected with narcotic drugs are very serious in addition to its duty to see that offences of this nature are severely punished, it is also the duty of the Court to take into consideration the young age of an offender, his character and good record, his whole attitude after his arrest, and balance all these factors against the seriousness of the offence committed; that with these principles in mind and considering all the circumstances of this case relating to the offence under count 5, the fact that the appellant is a young person under the age of 18, of excellent character and with no previous convictions,

the fact that from the very first moment he confessed and delivered to the police the small quantity of drugs he possessed and also the report of the Probation Officer, the appellant will be given a chance to reform and as a result his sentence of nine months' imprisonment will be reduced to one of imprisonment for such a period as from the date of his conviction the 13th September 1982, till to-day, to allow his immediate release.

Appeal against conviction on counts 1 and 2 allowed; retrial ordered. Appeal against sentence on count 5 allowed.

Cases referred to:

Athlitiki Efimeris "O Filathlos" v. Police (1967) 2 C.L.R. 249 at pp. 252, 253;

Polycarpou v. Police (1967) 2 C.L.R. 152;

Maos v. Republic (1971) 2 C.L.R. 191;

Howell v. Republic (1972) 2 C.L.R. 111;

Makki v. Republic (1972) 2 C.L.R. 76;

Atia v. Police (1979) 2 C.L.R. 214.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Xenakis Andreou Paraskeva who was convicted on the 13th September, 1982 at the Assize Court of Famagusta (Criminal Case No. 6129/82) on two counts of the offence of possessing cannabis resin contrary to sections 2, 3, 6(1)(2), 30 and 31 of the Narcotic Drugs Law, 1977 (Law No. 29/77) and on one count of the offence of possessing cannabis resin with intent to supply others contrary to sections 2, 3, 6(1)(3), 30 and 31 of the above law and was sentenced by Papadopoulos, P.D.C., Constantinides, S.D.J. and Eliades, D.J. to two years' imprisonment on the possession with intent to supply others count and to nine months' imprisonment on one of the other two counts, with no sentence passed on the remaining count; sentences to run concurrently.

E. Efstathiou, for the appellant.

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

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: The appellant, a 17 year old waiter, was charged

as accused 2, together with a sailor of a ship, aged 29, as accused 1, before the Assize Court of Larnaca on an information containing five counts for offences related to narcotic drugs of which Counts 1 and 2 were preferred against both accused Counts 3 and 4 against accused 1 only and Count 5 against accused 2 only.

Count 1 was in respect of possession of 519.5 grms. of cannabis resin, contrary to sections 2, 3, 6(1) & (2), and 30 and 31, of the Narcotic Drugs Law 29/77.

Count 2 for possession of the same quantity with the intent to supply same to others, contrary to sections 2, 3, 6(1) & (3) and 30 and 31 of the same law.

Count 3 for possession of 3,548 grms. of cannabis resin, contrary to sections 2, 3, 6(1) & (2), 30 & 31 of the Law.

Count 4 for possession of the same quantity with intent to supply to others, contrary to sections 2, 3, 6(1) & (3), and 30 and 31 of the Law.

Count 5 for possession of 1.4 grms. of cannabis resin, contrary to sections 2, 3, 6(1) & (2), 30 and 31 of the Narcotic Drugs Law.

The maximum punishment provided under Schedule 1 of Law 29/77 is for mere possession under section 6(2), five years' imprisonment on an indictment before the Assize Court and for offences under section 6(3) for possession with intent to supply to others, 14 years' imprisonment on an indictment before the Assize Court.

Both accused pleaded guilty to the respective charges against them and accused 1 was sentenced to three years' imprisonment on each of counts 2 and 4 to run concurrently, and no sentence was imposed on him on counts 1 and 3 and the appellant was sentenced to two years' imprisonment on count 2 and nine months' imprisonment on count 5, and no sentence was imposed on him on count 1.

The appellant appealed both against his conviction on counts 1 and 2 and the sentence imposed on him on counts 2 and 5. Accused 1 did not lodge an appeal.

The facts of the case are shortly as follows:-

On the 6th August, 1982, accused 2 visited prosecution witness Savvas Charalambous who was a colleague of his working with him at a billiards room at Larnaca; he had a conversation with him and told him that he had available five kilos of 'hashish' and whether he was interested to buy or whether he knew any friend of his to sell it. Witness 1 told him that he was interested and willing to purchase it. The Police, after information, contacted the said witness who told everything he knew to the Police and willingly offered to help them in arresting the culprits. Witness 1 went with accused 2 to a disco where they met accused 1 and where the supposed delivery was to take place. In the meantime the Police, who had information that the quantity was hidden somewhere outside the fenced area of the harbour where the informer had seen the accused 1 hiding something behind a pile of stones, had visited the place and found that it was cannabis resin hidden under some tiles. The Police made their plans for arresting the persons involved who would go there and collect it and were guarding the place. Accused 1 and 2, together with P.W.1 left the disco and they went to the place where the delivery was to take place. When they arrived at the place and as soon as accused 1 approached the place where he had previously hidden the cannabis and stooped and picked up the drugs, the Police who were hiding rushed and pointing their guns towards them, they immobilized them and they arrested both accused. After their arrest both accused admitted the commission of the offence and accused 1 led the Police to the ship where he took from his cabin and delivered to them three plates of cannabis resin which he had hidden in the ceiling of his cabin. Underneath his bed the Police found two other small plates of cannabis.

Accused 2 gave a voluntary statement to the Police on the 8th August in which he made a clean breast of the case and in which he mentioned the circumstances under which he came to meet accused 1 who gave him a small quantity of cannabis resin which he took to his house and who told him that if he could find purchasers he had a large quantity to sell and that he was going to make a profit out of it. Accused 2 met his friend, P.W.1, and told him everything about the case and asked him if they could find purchasers for the sale to them of the drugs

proposed by accused 1. P.W.1 agreed to participate and it is under these circumstances that they all met at the discoteque on the evening of the 7th August and proceeded to the scene of the crime. The accused expressed full repentance for what he did and as a result of his confession the Police visited his house where the accused handed over to them a quantity of 1.4 grms. of cannabis resin which was the one given to him by accused 1.

Learned counsel for the appellant in arguing the appeal against conviction, after a plea of guilty, contended that the facts as stated before the trial Court in support of the charge did not disclose the commission of the offence to which the appellant pleaded guilty. Both from the facts stated by the prosecution and the voluntary statement of the accused, counsel submitted, what appears is that the appellant was arrested before he took any delivery of the drugs and before such drugs came into his possession as accused 1 was arrested before delivering anything to appellant and no facts were put before the Court that the appellant had any knowledge that the said drugs were hidden there by accused 1. In support of his argument that an appeal against conviction after a plea of guilty can be made, he relied on the provisions of section 145(b) of the Criminal Procedure Law, Cap. 155.

Learned counsel for the respondent, on the other hand, submitted that the appellant was defended by counsel at the trial and had pleaded guilty to the charge and was rightly convicted on counts 1 and 2. He contended that the facts as stated before the trial Court were sufficient to establish the commission of the offence to which the appellant pleaded guilty but in any event if this Court came to a different conclusion, the Court is vested with power, under section 145(1)(c) of the Criminal Procedure Law, to set aside the conviction and convict the appellant of any offence of which he might have been convicted by the trial Court on the evidence which has been adduced and sentence him accordingly, such other offences in the present case being conspiracy or attempt to commit the offence.

Under the provisions of section 135(b) of the Criminal Procedure Law, Cap. 155, as amended under the provisions of section 25(2) of the Courts of Justice Law, 1960, a person who has been convicted and sentenced by any Court upon a plea

of guilty, shall only be entitled to appeal against conviction "on the ground that the facts alleged in the charge or information to which he pleaded guilty did not disclose any offence."

The Supreme Court in considering the powers of the Court under section 135(b) of Cap. 155, had this to say in *Athlitiki Efimeris 'O FILATHLOS'* v. *The Police* (1967) 2 C.L.R. 249 at pp. 252, 253:

> "It appears, however, that this question was considered by the High Court of Justice in 1963 in the case of *Ioannis Stylianou Klonarou* v. *The District Officer*, (1963) 1 C.L.R. 47. In that case it was held by the High Court that, in addition to the provisions of section 135(b) of the Criminal Procedure Law, where a plea of guilty had been recorded the Court could also entertain an appeal against conviction if it appeared—
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> (a) that the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or
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> (b) that upon the admitted facts he could not in law have been convicted of the offence charged (per Avory J. in *R.* v. *Forde* [1923] 17 Cr. App. R. 99 at pp. 102–3; Archbold, 36th Edition, para. 926, page 337).
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> Applying these principles to the facts of the case, considering the record of the proceedings before the trial Judge, as well as the charge and the particulars of the offence and the full article which formed the subject-matter of the charge and having heard counsel for the appellant, we are of the view that upon the admitted facts the appellants could not in law have been convicted of the offence of publishing an article calculated to lower the authority of a judge, which was the act stated in the alternative in the particulars charging the offence".

In the circumstances of that case, however, the Supreme Court found that though the accused could not be found guilty of the act alleged in the alternative, directed the amendment of the charge by the deletion of the part alleged in the alternative (as to the power of the Court under section 135(b) of Cap. 155, see also *Polycarpou* v. *The Police* (1967) 2 C.L.R., 152).

Having gone through the record of the case, we are of the view that on the facts as presented by the prosecution before the trial Court and from the voluntary statement of the appellant, the appellant at no time came into possession, as charged, of the drugs referred to in counts 1 and 2, as accused 1 was arrested before he had delivered anything to the appellant. In the result, we have reached the conclusion that his appeal may be treated as an appeal against conviction on counts 1 and 2 and we set aside the conviction on such counts and in the exercise of our powers under section 135(1)(d) of the Criminal Procedure Law, Cap. 155, we make an order for a new trial to take place before a competent Court sitting with a different composition.

As to the submission of counsel for the respondent for the conviction of the appellant on new counts under section 145(1)(c) of the Criminal Procedure Law, for an attempt to commit the offence and for conspiracy, we find ourselves unable to agree with him.

Section 145(1)(c) of Cap. 155 is only applicable in cases where there has been a conviction after evidence has been heard and not where there has been a conviction based on a plea of guilty as in the present case.

Having dealt with the appeal on conviction on counts 1 and 2, we are now coming to consider whether the sentence of nine months' imprisonment imposed on the appellant on count 5, is manifestly excessive or wrong in principle.

Learned counsel for appellant in addressing this Court submitted that the sentence imposed upon the accused was manifestly excessive and wrong in principle taking into consideration the young age of the accused who is under 18 years, the fact that upon arrest he confessed in his voluntary statement and made a clean breast of everything he knew and delivered to the Police the small quantity of drugs which was in his possession.

Learned counsel for the respondent, on the other hand, submitted that the sentence was not wrong or manifestly excessive taking into consideration the serious nature of such offences.

We agree with the submission of counsel for the respondent

that offences connected with narcotic drugs are very serious. The seriousness of such offences and the fact that possession of narcotic drugs has become a social menace and should be faced with severe sentences, has been stressed in a number of cases (vide, inter alia, *Maos* v. *The Republic* (1971) 2 C.L.R., 191; *Howell* v. *The Republic* (1972) 2 C.L.R., 111; *Ibrahim Makki* v. *The Republic* (1972) 2 C.L.R. 76; *Atia* v. *The Police* (1979) 2 C.L.R. 214).

Nevertheless, we are of the view that in addition to its duty to see that offences of this nature are severely punished, it is also the duty of the Court to take into consideration the young age of an offender, his character and good record, his whole attitude after his arrest, and balance all these factors against the seriousness of the offence committed. With these principles in mind and considering all the circumstances of this case relating to the offence under count 5, the fact that the appellant is a young person under the age of 18, of excellent character and with no previous conviction, the fact that from the very first moment he confessed and delivered to the Police, the small quantity of drugs he possessed and also the report of the Probation Officer, we have decided to give the appellant a chance to reform and as a result we reduce his sentence of nine months imprisonment to one of imprisonment for such a period as from the date of his conviction the 13th September, 1982, till to-day, to allow his immediate release.

In the result, the appeal against sentence on count 5 is allowed and the sentence is reduced to the extent hereinabove mentioned.

Order for retrial on counts 1 and 2, as already made, before a differently composed Bench.

Appeal allowed.