1985 March 20

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

1. AHMAT ALI EL-ETRI,
2. MOHAMED FOUAD GAGHI,
3. BASSAM ABDUL RAHMAN ZREIKA,

Appellants,

v.

THE REPUBLIC,

Respondent.

(Criminal Appeals Nos. 4582-84).

Criminal Law—Sentence—Unlawful possession of controlled drugs (heroin) and possession of the same drugs with intent to supply them to others—Need for deterrent sentences —And need that Cyprus should not be used as a transit place by foreign nationals for drug trafficking—Sentence of four year's imprisonment not excessive—Not increased with reluctance.

Criminal Law—Sentence—Entrapment—When it can be a mitigating factor.

Criminal Law—Sentence—Disparity of sentence as a ground of appeal—Principles applicable.

The appellants, who came from Lebanon, pleaded guilty to the offences of unlawful possession of controlled drugs of class "A"—heroin—and of possession of the same drugs with intent to supply them to others and were each sentenced to four years' imprisonment. The offences were disclosed following the entrapment of the appellants by the Police.

Upon appeal against sentence:

Held, that entrapment can be a matter of mitigation where the offender was not the prime mover in the scheme and might have refrained from committing any offence if he had not been tempted; that this Court cannot ignore the fact that appellants have by their act and conduct

evinced a highly organised system of operation and experience in carrying it out as well as the fact that the drug to be traded was a Class "A" controlled substance, generally described as one of the hardest in narcotics and the worse for the health of the people; that they were trading in death and for such offences deterrent sentences are essential for more reasons than one; that Cyprus, as the cases that come before the Courts show, has been used on occasions as a transit place mainly by foreign nationals for drug trafficking; that Courts have a duty to make Cyprus an uninviting place for such visitors; that, therefore, there is no merit in the appeals against sentence and it is with great reluctance that the sentence is not increased (Statement of Stylianides, J. in *Sultan* v. *Republic* (1983) 2 C.L.R. 121 at p. 124 fully endorsed).

Held, further, that in the present circumstances there were no marked differences in the extent of complicity or in the personal circumstances of the offenders to justify a differentiation in the sentences imposed which might be the ground of a successful complaint for disparity on appeal before this Court.

Appeal dismissed.

Cases referred to:

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

R. v. *Molins & Robson, Times* 27 October, 1972;

Esper v. *Republic* (1972) 2 C.L.R. 73;

Loizou v. *Republic* (1971) 2 C.L.R. 196;

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

Sultan v. *Republic* (1983) 2 C.L.R. 121;

Kyriakides v. *Republic* (1983) 2 C.L.R. 94;

R. v. *Sang* [1979] 2 All E.R. 1222 at p. 1243.

Appeal against sentence.

Appeal against sentence by Ahmat Ali El-Etri and others who were convicted on the 11th October, 1984 at the As-

size Court of Limassol (Criminal Case No. 12711/84) on one count of the offence of unlawful possession of controlled drugs contrary to section 2, 3, 6(1)(2), 30 and 31 of the Narcotic Drugs and Psychotropic Substances Law, 1977 (Law No. 29/77) (as amended by Law No. 67/83) and on one count of the offence of possession of controlled drugs with intent to supply them to others contrary to sections 2, 3, 6(1)(3), 30 and 31 of the above law and were sentenced by Hadjitsangaris, P.D.C., Artemis S.D.J. and Stavrinides, D.J. to concurrent terms of four years' imprisonment on each count.

L. N. Clerides with C. Clerides and N. Papamiltiadous for appellants 1 and 3.

A. Paschalides, for appellant 2.

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

Cur. adv. vult.

A. Loizou J. read the following judgment of the Court. The three appellants were found guilty on their own plea by the Limassol Assize Court on two counts. The first for unlawful possession of controlled drugs of Class "A" of Part 1, of the First Schedule, contrary to sections 2, 3, 6(1)(2), 30 and 31 of the Narcotic Drugs and Psychotropic Substances Law, 1977 (Law No. 29 of 1977) as amended by Law No. 67 of 1983. The second for possession of the same drugs with intent to supply them to others contrary to ss. 2, 3, 6(1)(3), 30 and 31 of the same Law.

The drug in question was 947 grams of Diamorphine heroin and the circumstances under which it was found in their possesion and bore out the said offences were explained by learned counsel for the prosecution from which, for the purposes of this appeal, brief reference may be made to certain relevant aspects.

The Police had information that there had been a plan in progress for the supply of one kilogram of narcotics and it put into operation its own plan for the arrest of the person or persons who were involved in this crime as well as the discovery and seizure of the heroin as a matter of its constant concern and aim. A certain Alama gave information to the Police that the second appellant was searching

for a prospective purchaser or purchacers of one kilogram of heroin. The Police gave the, go ahead, to him. The second appellant went back to Beirut and contacted appellant 1, who was the person who could supply the heroin and arrangements were made for its transportation to Cyprus by the fourth person that was involved in the case ex-accused 2, who has not appealed against his conviction and sentence. He also contacted appellant 3. On the 17th May, 1984 the fourth appellant and ex-accused 2, arrived in Cyprus on board the ship "Carol S", whereas appellant 1, had already arrived here as from the 15th of that month. Appellant 3, carried wherever he went this kilogram of heroin in a corset which he was wearing specially for the purpose. The appellants stayed at the "Continental" hotel in Limassol. Appellant 3, gave the heroin to ex-accused 2, who in his turn gave it to appellant 1. The whole scheme was under constant police surveillance and the aim was to arrest them when they would be handing it over to the so called purchaser. Indeed in the afternoon of the 17th May, appellant 1 and ex-accused 2, hired a self drive car for the purpose. They stopped somewhere on the Limassol-Nicosia road. They opened the bonnet of the car pretending that it had some mechanical trouble so that they would not raise any suspecion. At that moment the Police approached them, appellant closed the bonnet, run, got into the car and tried to leave, but the Police gave chase and arrested him further down the road. At the same time the second one, ex-accused 2, tried to run away but he was also arrested.

The Police being fully informed of their movements and plans arrested afterwards appellants 2 and 3.

In the car in question which was a "Z", hire car, the Police found in a leather-bag the heroin which was examined at the Government laboratory and was found to contain 35% of heroin. The appellants made voluntary statements to the Police. They were then formally charged and gave their answers.

In their address in mitigation counsel for the appellants, after referring to the personal circumstances of their respective clients and the tragic conditions prevailing in Lebanon, their country, prayed for the leniency of the Court on the additional ground that the Police had used an agent provocateur in the case, or as this method of Police inve-

stigation is some times called they "laid an entrapment". The Assize Court in passing sentence took cognizance of the seriousness of the offences and in particular of offences involving the supply to others of such drugs and the desirability in the public interest of meeting out long terms of imprisonment on such offenders. (See *Michael Howell* v. *The Republic* (1972) 2 C.L.R. 111; *R. V. Molins & Robson, Times Newspaper,* 27 October, (1972); *Hachem Mohamed Esper* v. *The Republic* (1972) 2 C.L.R. 73; *Georghios Loizou* v. *The Republic* (1971) 2 C.L.R. 196).

In this respect and as indicative of the attitude of this Court regarding the trafficking of narcotics reference may also be made to the more recent cases of *Atia* v. *The Police* (1979) 2 C.L.R. 214; *Ahmat Hassan Sultan* v. *The Republic* (1983) 2 C.L.R. 121; and *Kyriakides* v. *The Republic* (1983) 2 C.L.R. 94.

In approaching the question of entrapment or the use of agent provocateur the Assize Court referred to the case of *Kyriakides* (supra) where an extensive analysis is to be found of the legal situation by reference also to English decisions. It also referred to a statement of the Law from Glanville Williams, Criminal Law, 1978, Elition, where at p. 550 it is stated:

> "Of course, entrapment can be a matter of mitigation where the offender was not the prime mover in the scheme and might have refrained from committing any offence if he had not been tempted. Entrapment is not even mitigation if undercover agents merely pretend that they are in the market to buy things like drugs or obscene publications, and do not use extraordinary persuasion in order to overcome reluctance. The courts recognise that consensual offences (such as in the realm of sex, drink, drugs and gambling) generally cannot be detected without some testing of suspects, and criminal organisations frequently have to be infiltrated by police spies who must necessarily show enthusiasm for the undertaking".

We subscribe fully to the aforesaid passage as well as to the statement of the Law in *Kyriakides* case. No doubt entrapment is not a substantive defence in a criminal case but only a matter which way be relevant in mitigation of sentence, yet, the use of police informers and under cover

agents may not even be a mitigation in cases regarding the discovery of drugs if in particular no exceptional persuasion is used to overcome reluctance, as offences like trading in drugs have to be faced with legitimate means though not always absolutely. As it was put by Lord Scarman in the case of *R.* v. *Sang* [1979] 2 All E.R. 1222 at p. 1243, "there are other more direct less anomalous ways of controlling police and official activity than by introducing so dubious a defence into the Law."

The Assize Court took cognizance of the extent of the use by Police of their informer and the entrapment laid by them on the appellants and the plan they had laid on for these traffickers of heroin and imposed sentences of imprisonment of four years on each one of the appellants, out of five years maximum sentence provided for the first count of mere possession of controlled drugs of Class "A" and 14 years for possession of such drugs with the intent to supply them to others.

We have considered very carefully what has been said by learned counsel on behalf of the appellants but we cannot, ignore the fact that they have by their act and conduct evinced a highly organised system of operation and experience in carrying it out as well as the fact that the drug to be traded was a Class "A" controlled substance, generally described as one of the hardest in narcotics and the worse for the health of the people. They were trading in death and in our view for such offences deterrent sentences are essential for more reasons than one. Cyprus, as the cases that come before the Courts, show, has been used on occasions as a transit place mainly by foreign nationals for drug trafficking. The Courts have a duty to make Cyprus an uninviting place for such visitors. No doubt the Assize Court did consider the entrapment used by the Police as a mitigating factor, if we bear in mind the sentences imposed in cases involving cannabis where the brackets of sentencing are lower than those for heroin.

Before concluding we would like to deal with the point raised by counsel for the appellants regarding the disparity of sentence. On this point it is sufficient to say that in the present circumstances there were no marked differences in the extent of complicity or in the personal circumstances of the offenders to justify a differentiation in the sentences

imposed which might be the ground of a successful complaint for disparity on appeal before us.

Finally we would like to refer to what was said in the case of *Sultan* (supra) by Stylianides, J., who in delivering the judgment of the Court expressed its attitude regarding the point made by counsel for the appellants before the trial Court about the tragic situations prevailing in Lebanon, the country of the appellants. He said at p. 124.

> "Cyprus nowadays, due to the plight that befell on Lebanon, has become a transit camp for narcotics and this offence is a prevalent one. The Courts of this country have to impose severe sentences of imprisonment to stamp out the social evil of narcotics for the protection not only of the people of Cyprus but of the people all over the world, as this offence is an international one. The Supreme Court time and again stressed that offences involving narcotic drugs have to be faced sternly by the Courts. The possession, trafficking and dealing with narcotics is a social evil against which an international campaign is being waged."

We endorse fully the aforesaid statement and we find no merit in these appeals against sentence. It was in fact with great reluctance that we did not increase same. By merely dismissing the appeals we should not be taken as considering this range of sentences as being but only within the minimum of the range for trafficking in heroin.

The appeals are therefore dismissed.

Appeals dismissed.