1989 March 23

(DEMETRIADES, KOURRIS, BOYADJIS, JJ.)

THE POLICE,

Appellant,

v.

ANDREAS IOANNOU,

Respondent.

(Criminal Appeal No. 5079).

Sentence — Common assault contrary to section 242 of the Criminal Code, Cap. 154 — Assaulting a referee of a football match with the result that the match was interrupted — Fine of £40 and an order binding over the appellant for two years in the sum of £200 to keep the law — A sentence too lenient in the circumstances — Replaced by six weeks' imprisonment.

Sentence — Mitigating factors — Drunkenness — Whether, in general, a factor affecting sentence — Whether in common assault cases drunkeness is a mitigating factor — Second question determined in the negative.

Sentence — Mitigating factors — Common assault — Absence of actual bodily harm occasioned thereby — It is not a mitigating factor, because if such harm had been occasioned, the appellant would have been guilty of a more serious crime.

Sentence — Appeal against, on ground of inadequacy — Principles governing interference by the Court of Appeal — The same as those applicable in cases where the appeal is directed against the sentence, as being excessive — Afxenti «Iroas» v. The Republic (1966) 2 C.L.R. 116 cited with approval.

Sentence — Mitigating factors — Confession to police and plea of guilty — Should carry little weight, when there is in fact little other alternative to the accused.

In this case the respondent, who was among the spectators of a football match, entered the securely enclosed football ground during an incident, arising out of protests of the players of the one team against a particular decision of the referee and assaulted the referee.

The trial Judge treated as mitigating factors the fact that the respondent was at the time under the influence of drink, the fact that the referee did not sustain actual bodily harm and the facts that the accused confessed his crime to the police and pleaded guilty to the charge In the light of such factors and of the respondent's personal circumstances, the trial Judge imposed on the accused a fine of £40 and bound him over in the sum of £200 for two years to keep the peace

Hence this appeal

Held, *allowing the appeal* (1) The principles governing interference with a sentence on appeal on the ground that it is inadequate are the same with those applicable in case of appeal on the ground that it is excessive This Court will not interfere, unless The trial Court misdirected itself on the facts or the law, or allowed itself to be influenced by a matter, which should not affect the sentence or when the sentence is manifestly excessive

(2) In this case the trial Court failed to give sufficient weight to the seriousness of the offence This includes the fact of the interruption of the match, whereby thousands of people were disappointed Both the trial Court and this Court may take judicial notice of the prevalence of these offences

(3) The fact that no actual bodily harm resulted from the assault is not a mitigating factor, because, if it had resulted, the respondent would have been guilty of a more serious crime (section 243 of Cap 154)

(4) Drunkenness is sometimes treated as a mitigating factor, sometimes as an aggravating factor, in common assault cases it is not a mitigating factor

(5) A confession to the police should carry little weight in cases, where there is no other reasonable alternative open to the accused as in this case, where the crime was committed before thousands of people

Appeal allowed Six weeks' imprisonment on respondent

Cases referred to

Attorney-General v Vasiliotis (1967) 2 C L R 20,

Afxenti «Iroas» v The Republic (1966) 2 C L R 116,

Attorney-General v Mavrokefalos (1966) 2 C L R 93,

R v Morton [1908] 1 Cr App Rep 225,

Politis v The Police (1973) 2 C L R 211,

Smith and Another v. The Police (1969) 2 C.L.R. 189;

Kourris v. The Police (1970) 2 C.L.R. 53;

R. v. Paton [1982] Crim L.R. 58;

R. v. Lindley [1980] 2 Cr App. Rep. (S)3;

R. v. Bradley [1980] 2 Cr. App. Rep. (S)12;

R. v. Gingell [1980] Crim L.R. 661.

Appeal against inadequacy of sentence.

Appeal by the Attorney-General of the Republic against the inadequacy of the sentence passed on the accused by the District Court of Limassol (N. Nicolaou, Ag. S.D.J.) in Criminal Case No 30918/88 whereby he was sentenced to pay £40.- fine and was further bound over in the sum of £200.- for two years on one count of the offence of common assault contrary to section 242 of the Criminal Code, Cap. 154.

M. Kyprianou, Senior Counsel of the Republic, for the appellant.

Respondent appeared in person.

Cur. adv. vult

DEMETRIADES J.: The judgment of the Court will be delivered by Boyadjis, J.

BOYADJIS J.: On December 27, 1988 the respondent appeared in the District Court of Limassol charged on one count of common assault contrary to section 242 of the Criminal Code, Cap. 154, as amended by Law No. 166 of 1987. He was convicted on his own plea of guilty and was sentenced to pay a fine of £40. He was further bound over in the sum of £200 for two years to keep the law. Exercising his rights under section 137(1)(b) of the Criminal Procedure Law, Cap. 155, the Attorney-General of the Republic now appeals against the aforesaid sentence on the ground that it is manifestly inadequate.

The case derives from a shameful incident which occurred on the afternoon of December 26, 1988, in the Tsirion Stadium, at Limassol, during the course of a football match between the two Limassol teams of AEL and APOLLON. The respondent, who is a married man and the father of three children, employed as a taxi driver, and who has no previous convictions during the last 10

years, was one of the spectators who crowded the stadium to watch the game The second part of the game had just began when an incident had occurred between two rival players as a result of which the referee showed a red card to the player of APOLLON team Other players of that team approached the referee protesting against his decision The referee started withdrawing backwards It was at this stage that, from the area reserved for the spectators where he was supposed to be, the respondent found himself within the securely enclosed football ground How and when he managed to do that remained unexplained He ran towards the referee and using his hand gave a blow on the referee's head and continued his running in an unsuccessful attempt to escape the consequences of his act He was arrested on the spot by the police As a result of the violent blow which he received the referee fell on the ground The respondent was at the time under the influence of large quantity of alcohol which he had consumed with friends at lunch time As a result of this disgraceful incident the game was interrupted

Learned counsel for the respondent submitted to the trial judge that his client's case was not one of hooliganism in football matches but it was an unfortunate and isolated case of common assault largely due to the respondent's intoxication Fortunately, he added, the assault did not occasion any bodily injury to the victim He concluded his plea for leniency by invoking the family obligations and the clean record of the respondent during the last 10 years

The trial Court recorded the reasons for which it imposed on the respondent the sentence challenged by this appeal It rightly described the offence which the respondent had committed as a serious one It made particular reference to two aggravating circumstances First, that he had entered the enclosed ground where the match was played and where he had no right to be Secondly, he assaulted the victim whilst the latter was carrying out his duties as the referee of the game It then referred to the following four mitigating factors which it took into account in measuring the appropriate sentence First, that the respondent acted under the influence of drink Secondly, the charge against the respondent was one for common assault which did not occasion any actual injury to the victim Thirdly, the respondent made an immediate admission and entered a plea of guilty to the charge And fourthly, the personal and family circumstances of the respondent to which we have already referred

Learned counsel for the appellant submitted that, in assessing the appropriate sentence, the trial Court misdirected itself as to the principles applicable in that: (i) it omitted to attribute sufficient weight to the seriousness of the offence and to the need of deterrence; (ii) it was influenced by matters which should not, in the circumstances of this case affect the sentence and (iii) it attributed to circumstances which constitute mitigating factors greater weight than they deserve. The result of the misconception, counsel added, was for the trial Court to assess and impose on the respondent a sentence which is manifestly inadequate. He further submitted that the trial Court could and should take judicial notice of the fact that violent behaviour in football grounds has become prevalent phenomenon. He concluded by inviting us, in re-assessing the sentence, to take ourselves judicial notice of the fact that assaults and other violent behaviour are of common recurrence in football matches.

The respondent is not represented by counsel in this appeal. He refused an offer of the Court to appoint for him a defence counsel at the expense of the State if he so wished. He made a short statement in his own defence giving emphasis to his bad financial condition during the last years and to the fact that he has been declared bankrupt. He concluded by praying for the indulgence of the Court.

In the case of the *Attorney-General of the Republic v. Neophytos Nicola Vasiliotis* (1967) 2 C.L.R. 20, it was said that in its approach to an appeal against sentence on the ground that it is manifestly inadequate, the Supreme Court follows the same principles applicable to appeals against sentence on the ground that it is manifestly excessive. Reference is then made to the case of Afxenti *«Iroas» v. The Republic* (1966) 2 C.L.R. 116, where these principles, consistently applied ever since, were laid down in the following terms at p. 118:

> «This Court has had occasion to state more than once in earlier cases, that the responsibility of imposing the appropriate sentence in a case, lies with the trial Court. The Court of Appeal will only interfere with a sentence so imposed, if it is made to appear from the record that the trial Court misdirected itself either on the facts or the law; or, that the Court, in considering sentence, allowed itself to be influenced by matter which should not affect the sentence; or, if it is made to appear that the sentence imposed is manifestly excessive in the circumstances of the particular case.»

We are unanimously of the opinion that the trial Court misdirected itself as to the principles which must guide the Court in administering the Criminal Law and in imposing sentence, in that: (a) it failed to give sufficient weight to the seriousness of the offence in the circumstances in which it was committed by the present respondent, which include the fact that the result of his behaviour was the interruption of the football match with the consequent disappointment of the thousands of peaceful supporters of both teams who paid their tickets and entered the stadium rightfully expecting to enjoy the game from beginning to end. It also failed to pay sufficient heed to the need that the sentence should carry sufficient deterrent effect on persons who cannot control their behaviour in public gatherings, especially football grounds, at a time that violent behaviour either in the form of isolated incidents or of hooliganism, is becoming increasingly common. The trial court, and even this Court on appeal, may take judicial notice, virtute officio, of the prevalence of this kind of offences in football matches. See in this respect the case of *The Attorney-General of the Republic v. Yiannacos P. Mavrokefalos* (1966) 2 C.L.R. 93.

The trial Court has also erred in treating as a mitigating circumstance the fact that the common assault committed by the respondent did not occasion to the victim any actual bodily injury, and in allowing to be influenced thereby in its assessment of the appropriate sentence. If the assault had occasioned to the victim actual bodily injury, the respondent would be charged with the more serious offence of assault occasioning actual bodily harm under section 243 of the Criminal Code, which carries the maximum punishment of imprisonment for three years, instead of one year provided for in section 242 under which the respondent has been convicted. There are many cases, like the present one, where the same set of circumstances constitute two distinct offences, one less serious and one more serious, with the only difference that there is an additional circumstance which though present in the latter case is absent in the former case. Such additional circumstance, usually is in the form of the special capacity under which the offender acts, or in the form of a particular intention which he has in doing the act, or in the form of particular results which the same unlawful act brings about. If, because of the absence of this particular circumstance, the offender is charged with the less serious offence, he cannot, upon his conviction, rely in mitigation of sentence on the absence of this additional circumstance.

As far as sentencing is concerned, drunkenness is sometimes treated as a mitigating factor, sometimes as an aggravating factor and sometimes as a neutral factor. Decided cases here and in England do not clearly establish in which offences or under which circumstances drunkenness amounts to either mitigation or to aggravation or, is simply ignored. In cases where intoxication affects the guilty intention which the offender must have, it operates as a mitigating factor. See for instance *Rex v. Morton* [1908] 1 Cr. App. R. 225, a case concerned with burglarious entry in a house, *Tassos Savva Politis v. The Police* (1973) 2 C.L.R. 211, a case concerned with the offence of stealing a motor-cycle, and *Francis Kenneth Smith and Another v. The Police* (1969) 2 C.L.R. 189, also concerned with stealing and causing malicious damage to a boat, *Demetris Michael Koumis v. The Police* (1970) 2 C.L.R. 53, where a sentence of three years' imprisonment imposed on a blind man of 65 years of age, convicted on a count charging him with aggravated assault which he committed whilst being drunk, is the only decision that we could trace where drunkenness was treated as a mitigating factor in assault cases. Vassiliades P. said the following at p. 56 of the report:

«The trial Judge does not seem to have taken into consideration the state of appellant's mind at the material time. The appellant was obviously in a state of drunkenness. Drink may, as a rule, not afford a legal defence; but it is a condition which must be taken into consideration as one of the facts of the case. It must certainly be taken into account in measuring sentence. It may be a reason for imposing a heavier sentence or a lighter one, depending on the relevant circumstances in each case.»

In the chapter on Mitigation in his book Principles of Sentencing, D.A. Thomas writes the following concerning drink at p. 209:

«While intoxication is associated with a wide variety of offences, it is rarely recognised as a substantial mitigating factor when standing alone. In Kirkland a man of 21 with no previous convictions was sentenced to three years' imprisonment for setting fire to the home of his former employer. The Court accepted that the appellant was 'normally a level-headed young man' and that 'this offence came to be committed because the appellant had had far too much to drink'; however, the offence was such that three years was the lowest term which would adequately reflect its

gravity, and 'the courts do not normally take drunkenness into account as a mitigating factor'. The sentence was upheld. In Kirk the appellant was sentenced to four years for stabbing a man in a fight, following his ejection from a club. The Court accepted that 'the appellant had too much to drink' but upheld the sentence with the comment that 'whatever the situation, there was no justification for drawing a knife'. In Drever a man of previous good character broke into a house in the early hours of the morning and raped the occupant, a single woman in her late fifties. Despite evidence that the appellant had been drinking heavily during the evening before the offence, the Court refused to vary his sentence of seven years' imprisonment.

Drunkenness, while having little or no independent mitigating effect, may add some marginal weight to other more substantial mitigating factors.»

In Sentencing Law and Practice, by C.K. Boyle and M.J. Allen, 1985 Edition, we read the following at p. 275:

«Drunkenness, it would appear, will not be regarded as a mitigating factor (*Paton* [1982] Crim. L.R. 58), and has been described as an aggravating factor (*Lindley* [1980] 2 Cr. App. R. (S) 3 *Bradley* [1980] 2 Cr. App. R. (S) 12).»

In *R. v. Paton* (supra) the appellant, a young man of 22 years of age, pleaded guilty to robbery and assault with intent to rob. He had stolen 5p. from a young man whom he had threatened with a knife and had punched him in the stomach. One hour later he threatened an elderly man with a knife demanding money from him. He ran away when the man retaliated by threatening to hit the appellant with a bottle. At the time of the offence the appellant was drunk. It was held that the offences were very serious and that «anyone who takes a knife to another person in the course of a robbery would get no mercy, whether he was drunk at the time or not.»

The decision in *Paul Lindley* (supra) affords an instance where drink was regarded as an aggravating matter. The charge against the appellant was that he had in his house unlawful sexual intercourse with his step daughter and her friend, both aged 14 whilst under the influence of drink.

Reference in some detail should lastly be made on the subject of drunkenness to the decision in the case of *John William Bradley*

(supra), where the appellant, a youth of 18 of previous good character, punched a police officer in the face as the officer was arresting him on suspicion of stealing from a bookshop. He punched a second police officer when he was taken to a detention room. He was drunk at the time of the offences. He was sentenced to six months' imprisonment. Holding that the sentence was entirely correct, the Lord Chief Justice said the following at p 13:

«The appellant, as I have indicated, received six months' immediate imprisonment. This Court finds nothing in the case to indicate that that sentence was other than entirely correct. It is said that he was in drink. So he was. But the day is long past when somebody can come along and say 'I know I have committed these offences, but I was full of drink.' If the drink is induced by himself, then there is no answer at all. It is said it is out of character. So it was. He has a clean character. He has no previous convictions at all. It was said that he is a good son of his mother and he has a number of other skills as a citizen.

The plain fact is that on this afternoon he behaved himself in such a manner as to make it absolutely imperative that some suitable condign punishment should be imposed upon him. That was done and the appeal is dismissed.»

It follows from the above that the self imposed drunkenness of the respondent, which in the circumstances of the present case stands alone, deserves very little, if any, weight as a mitigating factor. By applying the recent English approach, it deserves no weight at all. Yet, judging from the fact that, in its reasons for the sentence imposed, the trial Court made more than once specific reference to the drunkenness of the respondent as a mitigating factor, and from the kind of sentence which it ultimately imposed on the respondent, it is evident that it had attributed to the respondent's plea of drunkenness undue weight.

The trial Court has also erred in attributing undue weight to the fact, as it put it, that the respondent confessed his guilt immediately to the police and to the Court. Although some allowance should be made in all cases where an accused person pleads guilty, the confession to the police and the plea of guilty of the respondent in this case must be evaluated in the light of the fact that he committed the offence in the eyes of thousands of persons and, though it was evident that it was impossible for him successfully to deny his guilt, his first reaction to his arrest by the policemen who had chased him was to let him go. A confession made in the

present circumstances, where no other alternative is open to the offender, should carry very little weight as a mitigating factor for the simple reason that the principle that sentences, even for serious offences, should not be such as to discourage people from making a clean breast of what they have done, when they are arrested by the police and from helping the police to undo the consequences of their law-breaking or to bring to justice their accomplices, has no application.

For all the above reasons we are satisfied that, in assessing sentence in the present case, the trial Court has erred too much on the side of leniency and that the sentence which it has imposed is so manifestly inadequate and wrong in principle that has to be reconsidered under the provisions of section 145(2) of the Criminal Procedure Law, Cap. 155.

By attributing the proper weight to all relevant factors applicable in this case including all matters personal to the respondent which, however, should not be allowed to outweigh the requirement of properly applying the law, we have reached the conclusion that a sentence of immediate imprisonment is inescapable. Only a sentence of imprisonment would meet the requirement of indicating in the most practical way the seriousness of the offence in the circumstances in which the respondent has committed it and of acting as deterrent to other potential offenders.

Regarding the term of the sentence we think that it is not necessary that it be long. We agree in this respect with the judgment of Lord Lane C.J. in *R. v. Gingell* [1980] Crim. L.R. 661, which appears to suggest that shorter sentence of imprisonment, in cases of violence, may suffice where the offence can be seen, as in the present case, as an isolated and spontaneous occurrence and not as associated with hooliganism. A term of 6 weeks' imprisonment out of the maximum of 52 weeks' imprisonment provided by law is, in our view, sufficient.

We, therefore, allow the appeal, set aside the sentence imposed by the trial Court and we substitute it with a sentence of imprisonment for six weeks to run from today.

Appeal allowed. Sentence of the District Court substituted as above.