1976 December 3

[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

ANASTASSIOS LOIZOU NICOLAOU,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3756).

Evidence—Confessions by accused to police—Voluntariness—Admissibility—Accused wounded on the face while in police custody—Need for great caution to be exercised by trial Courts when considering issue of voluntariness of a confession—No adequate explanation given as regards how accused came to be wounded—Not safe to treat confession as being admissible evidence.

Criminal Procedure—Charge—Defectiveness—Particulars of offence—Place of commission of offence—No objection by appellant's Counsel at any stage of the trial—No prejudice suffered by appellant, in the circumstances of this case, in conducting his defence—Section 153 *of the Criminal Procedure Law, Cap.* 155.

Criminal Law—Stealing postal matter—Section 264 *of the Criminal Code, Cap.* 154 *— Evidence — Appellant's confession — Police officers' evidence that postal matter found at appellant's home believed by trial Court—Confession excluded—Appellant would have been inevitably convicted on the basis of the police officers' evidence, even if his confession had never been admitted in evidence —No miscarriage of justice— Proviso to section* 145 (1) (*b*) *of the Criminal Procedure Law, Cap.* 155.

Criminal Law—Sentence—Stealing postal matter—Section 264 *of the Criminal Code, Cap.* 154*—Post office employee stealing on five occasions postal matter—Concurrent sentences of six months' imprisonment—Not excessive.*

Criminal Procedure—Appeal—Substantial miscarriage of justice—Proviso to s. 145 (1) (b) of the Criminal Procedure Law, Cap. 155—Principles governing application of.

The appellant, an employee of the Larnaca Post Office, was convicted on nine counts of the offence of stealing postal matter and was sentenced to concurrent sentences of six months' imprisonment on each count.

The conviction was based on, *inter alia*, a confession, which appellant made while in police custody, soon after his arrest on September 6, 1975. There was medical evidence to the effect that appellant had a bruise around his left eye on September 12, 1975 which appeared to be two or three days old. The trial Judge, however, has not treated the bruise as being relevant to the issue of voluntariness of the confession.

After the Court of Appeal had indicated, in the course of this Appeal, that appellant's confession should not have been admitted in evidence* counsel for the respondents agreed that the convictions of the appellant on counts 1, 3, 4 and 9 could not be supported, but he invited the Court to sustain the appellant's convictions on counts 5, 6, 15, 16 and 17 on the basis of the remainder of the evidence. Each of these counts related, respectively, to one of five letters which were addressed, through the post, to persons other than the appellant, and were never intended to be kept in his possession; such letters were found at his home, when it was searched by the police on September 6, 1975.

In arguing the appeal in respect of the remaining aforesaid counts, counsel for the appellant submitted:

(a) that the trial Court ought not to have accepted the evidence of two police officers regarding the discovery, at the appellant's home, of the said five letters; and that since the convictions were based both on this evidence and on the confession and once the confession ought to have been excluded it was not right to uphold the convictions on these counts on the basis of the remainder of the evidence;

* See p. 64 *post*.

(b) that counts 5 and 6 were defective because there was no clear indication as to whether the offences charged therein were committed within the territory of the Republic or within the territory of the British Sovereign Base Area of Dhekelia;

(c) since the convictions of the appellant in respect of four counts, out of nine, have been set aside the sentence should be reduced in respect of the remaining counts.

Held, (1) the onus is always on the prosecution to establish the voluntariness of a confession. As great caution should be exercised when the issue of the voluntariness of a confession is under consideration by a trial Court (see *Ioannides* v. *The Republic* (1968) 2 C.L.R. 169) and as no adequate explanation was given as regards how the appellant came to be wounded during the period while he was in police custody, it was not safe to admit his confession in evidence.

(2) As no relevant objection was taken by appellant's counsel at any stage of the trial and as the appellant ought to have known that the letters to which the said counts related were found at his home, no possible prejudice could have been suffered by him in conducting his defence. And this is not an instance in which any innacuracy or uncertainty in describing the offences charged by means of the said counts 5 and 6 could lead to the convictions of the appellant thereon being set aside on appeal (see section 153 of the Criminal Procedure Law, Cap. 155).

(3) (a) The trial Judge believed the police officers that the five letters were found in the pocket of a jacket of the appellant during the search by them of his home and disbelieved the version to the contrary of the appellant, and we see no reason to interfere with this finding of the trial Judge. The circumstances in which the letters in question were found warranted the conclusion of the trial Judge that the appellant had stolen the letters; there can, therefore, be no doubt that they were in his possession in contravention of section 264 of the Criminal Code, Cap. 154.

(3) (b) This is a proper case in which to apply the proviso to section 145 (1) (b) of the Criminal Procedure Law, Cap. 155

(see *Vouniotis* v. *The Republic* (1975) 5 J.S.C. 524*) as there can be no doubt at all that the appellant would have been inevitably convicted by any court on the five counts in question on the basis of the evidence about the finding at his home of the five letters even if his confession had never been admitted in evidence; we are, therefore, satisfied that no miscarriage of justice has occurred in this respect.

Appeal against conviction on counts 5, 6, 15, 16 and 17 dismissed and allowed in relation to counts 1, 3, 4 and 9.

(4) As the sentences of imprisonment passed upon the appellant were concurrent and as he still stands convicted of having stolen, on five occasions, postal matter, and he has thus betrayed the trust that was placed in him by virtue of his office in the public service, the sentence of six months' imprisonment for this kind of offence is not manifestly excessive: on the contrary it is on the lenient side.

Appeal against conviction partly allowed; appeal against sentence dismissed.

Cases referred to:

Ioannides v. *The Republic* (1968) 2 C.L.R. 169;

Chrysanthou v. *The Police* (1970) 2 C.L.R. 95;

Kaourmas and Another v. *The Republic* (1973) 2 C.L.R. 6;

Vouniotis v. *The Republic* (1975) 5 J.S.C. 524 (to be reported in (1975) 2 C.L.R.).

Appeal against conviction and sentence.

Appeal against conviction and sentence by Anastassios Loizou Nicolaou who was convicted on the 28th September, 1976 at the District Court of Famagusta (Criminal Case No. 2901/75) on nine counts of the offence of stealing postal matter, contrary to section 264 of the Criminal Code, Cap. 154 and was sentenced by Artemis, D.J. to six months' imprisonment on each count, the sentences to run concurrently.

A. Pandelides, for the appellant.

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

Cur. adv. vult.

* To be reported in (1975) 2 C.L.R.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: The appellant has appealed against his conviction on nine counts (Nos. 1, 3, 4, 5, 6, 9, 15, 16 and 17 in the charge) charging him that in August 1975, he stole, on divers occasions, postal matter, contrary to section 264 of the Criminal Code, Cap. 154. He was sentenced to six months' imprisonment on each count, as from September 28, 1976, the sentences to run concurrently.

At all material times the appellant was an employee of the Larnaca post office. His conviction was based on, *inter alia*, a confession which he made while he was in custody at the police station in Larnaca on September 6, 1975, soon after his arrest on the same day.

During the hearing of this appeal we have indicated that we were of the view that it was not safe for the trial court to treat the confession as being admissible evidence. There existed evidence given by a Government medical officer, which was not rejected by the trial Judge, to the effect that on September 12, 1975, the appellant was examined by the said medical officer at the Larnaca hospital and he was found to have a bruise around his left eye which appeared to be about two or three days old. The appellant had remained in police custody ever since his arrest on September 6, 1975, and, apparently, the bruise, which was, according to the medical evidence, caused on September 9 or 10, was treated by the Judge as not being relevant to the issue of the voluntariness of the confession, which had been made on September 6. In view, however, of the fact that the onus is always on the prosecution to establish the voluntariness of a confession, and in the light of all that this Court has said, on many occasions, regarding the great caution which should be exercised when the issue of the voluntariness of a confession is under consideration by a trial Court (see, *inter alia*, *Ioannides* v. *The Republic*, (1968) 2 C.L.R. 169, and the case-law cited therein), we formed the opinion that, as no adequate explanation was given as regards how the appellant came to be wounded on the face during the period when he was in police custody, it was not safe to admit his confession in question in evidence; even though it appeared, due to the time factor, that the bruise on the face of the appellant could not be directly related to his confession, we think that, in the circumstances of the present

case, the Judge ought to have excluded the confession in the exercise of his relevant discretionary powers.

After we had indicated, in the course of this appeal, that the confession should not have been admitted in evidence, counsel for the respondents agreed that the convictions of the appellant on counts 1, 3, 4 and 9 could not be supported, but he invited us, nevertheless, to sustain the appellant's convictions on counts 5, 6, 15, 16 and 17 on the basis of the remainder of the evidence.

Each one of these five counts relates, respectively, to one of five letters which, as has been established beyond any doubt, were addressed, through the post, to persons other than the appellant, and were never intended to be kept in the possession of the appellant; yet, such letters were found at his home, when it was searched by the police on September 6, 1975.

It was submitted by counsel for the appellant that the trial court ought not to have accepted the evidence of two police officers regarding the discovery, at the appellant's home, of the said five letters. We see no reason whatsoever for interfering with the finding of the trial Judge on this point. The Judge believed the police officers that the five letters were, indeed, found in the pocket of a jacket of the appellant during the search by them of his home and disbelieved the version, to the contrary, of the appellant and of his witnesses.

The circumstances in which the letters in question were found warranted, in our view, the conclusion of the trial Judge that the appellant had stolen the letters; there can, therefore, be no doubt at all that they were in his possession in contravention of section 264 of Cap. 154.

In relation to two of the counts concerned, namely counts 5 and 6, the particulars of the offence state that the stealing took place between Larnaca and Ormidhia, and not solely in Larnaca, as stated in respect of counts 15, 16 and 17.

No objection was raised at the trial—where the appellant was being defended by counsel other than the one appearing for him in this appeal—regarding the particulars of the offences charged by means of counts 5 and 6. But it has been submitted before us that such counts are defective because there is no

clear indication as to whether the offences in question were committed within the territory of the Republic or within the territory of the British Sovereign Base Area of Dhekelia, which has to be crossed when one proceeds from Larnaca to Ormidhia; and reference has been made, in this connection, to our case-law, such as *Chrysanthou* v. *The Police*, (1970) 2 C.L.R. 95 and *Kaourmas and another* v. *The Republic*, (1973) 2 C.L.R. 6, as well as to section 4 of the Criminal Code (Amendment) Law, 1962 (Law 3/62), which amended Cap. 154 in order to make provision enabling the trial within the Republic of certain offenders who have committed offences outside the territory of the Republic.

We do not think that this is an instance in which any inaccuracy or uncertainty in describing the offences charged by means of counts 5 and 6 could lead to the convictions of the appellant thereon being set aside on appeal; section 153 of the Criminal Procedure Law, Cap. 155, provides as follows:-

> " No judgment, finding, sentence or order of a trial Court shall be reversed or altered on appeal on account of any objection to any charge, information, summons or warrant for any alleged defect therein in any matter whether of substance or form unless such objection was raised before the Court whose decision is appealed from, nor for any variance between such charge, information, summons or warrant and the evidence adduced in support thereof unless such objection was similarly raised and the trial Court, notwithstanding that it was shown that by such variance the appellant had been deceived or misled, refused to adjourn the hearing of the case:
>
> Provided that, if the appellant was not represented by an advocate at the hearing before the trial Court, the Supreme Court may allow any such objection to be raised."

As already stated no relevant objection was taken at the trial, at any stage; and the appellant was represented at his trial by counsel; moreover, he ought to have known that the letters to which these two counts relate were found at his home and, therefore, no possible prejudice could have been suffered by him in conducting his defence.

In any case, even if we were to find that the framing of counts 5 and 6 was really defective, we would still have to exercise our

powers under section 145 (1) (c) of Cap. 155 and, in the light of the evidence about the discovery of the two letters concerned at the home of the appellant, find him guilty of the offences of stealing the said two letters on the basis of new counts formulated in the same form as counts 15, 16 and 17, which relate to the other three letters which were found at his home.

In relation to all these five counts, 5, 6, 15, 16 and 17, our attention has been drawn by counsel for the appellant to the fact that the convictions thereon were based both on the appellant's confession—which, in our opinion, ought not to have been treated as evidence—and the other evidence about the finding of the five letters concerned at the home of the appellant; and we have been invited to hold that once his confession ought to have been excluded it is not right to uphold his convictions on these counts on the basis of the remainder of the evidence. We do not share this view. We think that this is a proper case in which to apply the proviso to section 145 (1) (b) of Cap. 155; the principles governing the application of such proviso have been expounded, not very long ago, in *Voumiotis* v. *The Republic*, (1975) 5 J.S.C. 524*, and we need not repeat them again in this judgment; it suffices to say that there can be no doubt at all that the appellant would have been inevitably convicted by any court on the five counts in question on the basis of the evidence about the finding at his home of the five letters to which such counts relate, even if his confession had never been admitted in evidence; we are, therefore, satisfied that no miscarriage of justice of any kind has occurred in this respect.

For all the foregoing reasons his appeal against conviction is dismissed in so far as counts 5, 6, 15, 16 and 17 are concerned and it is allowed in relation to counts 1, 3, 4 and 9.

It has been submitted by counsel for the appellant that since the appellant was found guilty by the trial Court on nine counts we should reduce his sentence in case his convictions in respect of some of those counts are set aside on appeal; and we have, indeed, just set aside his convictions on four out of the nine counts. It must be borne in mind, however, that the sentences of imprisonment which were passed upon the appellant in

* To be reported in (1975) 2 C.L.R.

respect of each particular count were concurrent; and the appellant still stands convicted of having stolen, on five occasions, postal matter, and of having, thus, betrayed the trust that was placed in him by virtue of his office in the public service. We do not think that a sentence of six months' imprisonment for this kind of offence is a manifestly excessive sentence; on the contrary, we regard it as being on the lenient side, and, therefore, we see no reason to interfere with the sentences imposed on him in respect of the five counts in relation to which his appeal has been dismissed.

Appeal partly allowed.