

IOANNIS NESTOROS,

*Appellant,*

v.

THE REPUBLIC,

*Respondent.*

(*Criminal Appeal No. 2381*).

---

*Evidence in criminal trials—Statements made by co-accused to the Police, in the absence of the accused, inadmissible—Opened as evidence against all on a conspiracy charge—Notwithstanding that the trial court regarded those statements as evidence only against the persons who made them—New trial ordered.*

*Evidence—Courts—Duties of courts in criminal trials—Including the High Court—The High Court should not, for some reason or other, have regard to the consequences of an accused's conviction not being upheld although the evidence might not strictly justify such conviction.*

*Advocates—Duties of advocates undertaking defence in criminal cases.*

The appellant was convicted by the Assize Court on three counts: (1) conspiracy to murder, (2) possessing a revolver without a permit, contrary to the Firearms Law, Cap. 57, section 4(1) (2) (b), and (3) possessing explosive substances contrary to the Explosive Substances Law, Cap. 54, section 4(4) (d). He was sentenced to imprisonment for 3 years, 2 years and 1 month, respectively, to run concurrently. Apparently, counsel for the prosecution opened as evidence against the appellant certain statements made in the latter's absence to the Police by the co-accused. The trial court regarded those statements as evidence only against the persons who made them. It was argued on appeal by counsel for the prosecution that the statements in question were evidence against the appellant on the conspiracy charge.

*Held:* (1) The statements cannot be evidence against the appellant.

(2) Although the trial Court regarded the statements as evidence against the persons who made them, it was impossible for their minds not to have been affected by these matters or some of them.

1961  
June 28  
—  
IOANNIS  
NESTOROS  
v.  
THE REPUBLIC

(3) The High Court is not concerned with the consequences of setting aside any conviction.

*Appeal allowed. New trial ordered.*

*Per curiam* : It is the duty of counsel undertaking the defence in a criminal case, to see the case through from beginning to end without absenting himself from the trial, even temporarily, without leave; not even for the purpose of appearing before another Court. Defending counsel should stand by their client throughout the case, unless the client discharges them of that responsibility; or they have sufficient professional reasons which compel them to withdraw from the case; and then by leave of the Court only.

### **Appeal against conviction.**

The appellant was convicted on the 3rd June, 1961, at the Assize Court of Nicosia (Criminal Case No. 5801/61) on three counts of the offences of (1) conspiracy to murder, contrary to sections 217 and 20 of the Criminal Code, Cap. 154; (2) possessing a revolver, without a special permit, contrary to section 4(1)(2)(b) of the Firearms Law, Cap.57; and (3) possessing explosive substances, contrary to section 4(4)(d) of the Explosive Substances Law, Cap.54, and was sentenced by Loizou, Georghiou and Demetriades, D.JJ. to 3 years' imprisonment on count 1; 2 years' imprisonment on count 2; and 1 month's imprisonment on count 3, to run concurrently.

*Appellant* in person.

*K.C. Talarides* for the respondent.

The judgment of the Court was delivered by:—

O' BRIAIN, P.: The Court has given consideration to this rather grave case and considered what is the proper order to make, having regard to what appears on the record of the proceedings before the trial court and to what transpired here to-day on the hearing of this appeal.

It was submitted by the prosecution at the trial that the two statements made by the co-accused of the appellant, accused No. 1 and 3, to police officers, in the absence of the appellant, were evidence against the appellant on the conspiracy charge. That view of the law, in our opinion, is quite erroneous. It was pressed again on this Court to-day, on the hearing of this appeal, and, though the record is silent

on the point, it may well have been put before the trial court in counsel's opening address for the prosecution.

Regarding counts 3 and 4, in connection with what is described by one of the witnesses as "an identification parade of revolvers", the substance of what was stated by the Police to one witness, P.W. 11 Panayiotis Christodoulou, and what the witness said to the police officer, in the absence of the accused, was conveyed to the trial court. This was, in our opinion, a misreception of evidence and it became all the more serious as this witness gave the only evidence, in the opinion of the trial court, on these two counts against the accused. He was, moreover, described by the trial judges as an accomplice.

Finally, and not least, this accused man who has been described as illiterate was left without the services of his counsel at the opening of his trial which included a count for conspiracy to murder, and also, at intervals, at a later stage during the trial.

In the circumstances, this Court has adverted to the fact that the trial judges, in their careful judgment, did refer to this question of the statements and regarded them as evidence only against the persons who made them. Notwithstanding this we think that it was impossible for their minds not to have been affected by these matters or some of them and we take the view that this trial was unsatisfactory in the circumstances.

Having regard to the submissions that Mr. Talarides made as to the existence of a *prima facie* case on all three counts on which the accused was convicted we shall order a retrial on these counts and direct that, in the meantime, the accused be kept in custody.

There is only one other matter I would like to add before I conclude. The suggestion was made that this Court should, for some reason or other, have regard to the consequences of the accused's conviction not being upheld although the evidence might not strictly justify it. I think this matter has been extremely well and eloquently dealt with in a judgment delivered by the Court of Criminal Appeal in England during the last 48 hours in which one of the judges expressed himself in these words: "If this conviction is allowed to stand the appellant may rightly consider that he was deprived of that priceless asset which should be afforded to all accused persons,

1961  
June 28  
—  
IOANNIS  
NESTOROS  
v.  
THE REPUBLIC  
—  
O' Briain, P.

1961  
June 28  
—  
IOANNIS  
NESTOROS  
v.  
THE REPUBLIC  
—  
O' Briain, P.

however guilty, a fair trial". I respectfully agree with and adopt that observation. This Court is not concerned with the consequences of setting aside any conviction not justified by the Law of Cyprus.

VASSILIADES, J.: The President of the Court has delivered the Court's judgment in this appeal, and there is nothing that I have to add to it. But I would like to take this opportunity to make some observations regarding the duties of counsel acting for accused persons in criminal cases which (observations) reflect the views of all the members of this Court as it appeared from the discussion we have just had on the point, in connection with this case.

We have recently noticed with regret, that counsel especially younger members of the profession, do not seem to feel sufficiently their responsibility to stand by their client throughout the case, unless the client discharges them of that responsibility; or, they have sufficient professional reasons which compel them to withdraw from the case; and then by leave of the Court only.

We consider that it is the duty of counsel undertaking the defence in a criminal case, to see the case through from beginning to end without absenting himself from the trial, even temporarily, without leave; not even for the purpose of appearing before another Court. If counsel foresees that he will be unable to attend Court in his criminal case, he should make arrangements in time, to hand over his brief to a colleague, after consultation with the client.

We feel confident that the Bar Council share these views, and are as anxious as we are, to keep high standards in the profession.

O' BRIAIN, P.: In the result, this Court will order a new trial before the Assize Court of Nicosia, but another Coram, of the three counts on which the appellant was convicted, that is, counts 1, 3 and 4.

Accused to remain in custody pending his trial.

*Appeal allowed. New trial ordered.*