[O' BRIAIN, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

1961
June 22, 23, 30

ANDREAS CHR. MOUSTAKAS
v.
THE REPUBLIC

ANDREAS CHRISTODOULOU MOUSTAKAS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2368).

Evidence in criminal cases—Evidence tending to show the commission of an offence not charged—Or of an offence of which the accused was acquitted—But relevant to the offence charged—Admissible.

The appellant was jointly tried with one L.R. by the Assize Court of Nicosia. Both accused were charged on four counts of (1) conspiracy; (2) attempting to extort money by threats; (3) demanding money with menaces; and (4) stealing by intimidation. Both accused pleaded not guilty and upon counsel for the Republic stating that he would offer no evidence on the count of conspiracy, the court acquitted both accused on that count. The trial proceeded and eventually the accused were convicted on the remaining three counts. Evidence was received tending to show that the appellant was acting in concert with other people who were engaged in the criminal enterprise and had *mens rea*. It was argued on behalf of the appellant that the latter having been acquitted on the charge of conspiracy, any evidence tending to show that he was a conspirator was totally inadmissible. That was one of the grounds of appeal, the other being that the verdict was unreasonable regard being had to the evidence adduced.

Held: (1) If there had in fact been no count for conspiracy, it could not be suggested that the mere fact that evidence was adduced by the prosecution, relevant to counts 2, 3, or 4, which tended to show the commission of other crimes would have rendered such evidence inadmissible.

(2) Any evidence is relevant that bears on the question whether the acts alleged to constitute the crime charged were designed or accidental or done with guilty knowledge as distinct from an innocent mind.

Makin v. The Attorney-General for New South Wales (1894) A.C. 57, *followed.*

(3) The prosecution may adduce such evidence even without waiting for the prisoner to set up a defence calling for a rebuttal. This principle was laid down recently by the House of Lords in *Harris v. D.P.P.* (1952) A.C. 694.

(4) But in the instant case a defence was foreshadowed which clearly entitled the prosecution to adduce evidence to show that the appellant's mind was far otherwise than suggested by his counsel and that he was acting in concert with people who were engaged in criminal enterprise and had *mens rea*.

(5) There is no support for the proposition that the fact that there was an acquittal as distinct from an omission to charge conspiracy alters the legal position.

(6) (O' BRIAIN, P., dissenting): There was no sufficient evidence to support the conviction on count 4.

Appeal dismissed as regards conviction on counts 2 and 3. Appeal allowed by majority as regards conviction on count 4.

Cases referred to:

Makin v. The Attorney-General for New South Wales (1894) A.C.57.

Harris v. D.P.P. (1952) A.C. 694.

Appeal against conviction.

The appellant was convicted on the 15th May, 1961, at the Assize Court of Nicosia (Criminal Case No. 2219/61) on three counts of the offences of (1) attempt to extort money by threats, contrary to sections 288(a) and 20-21 of the Criminal Code, Cap. 154; (2) demanding money with menaces with intent to steal contrary to sections 290 and 20-21 of the Criminal Code; and (3) stealing contrary to sections 255 and 20-21 of the Criminal Code, Cap. 154, and was sentenced by Stavrinides, P.D.C., Georghiou and Demetriades, D.J.J. to nine months' imprisonment on each count. The sentences to run concurrently.

Sir Panayiotis Cacoyannis with *D. Liveras* for the appellant.

K. C. Talarides for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of:

O' BRIAIN, P.: In this case the appellant Andreas Christodoulou Moustakas appeals against his conviction on three counts -

a) attempting to extort money by threats;

b) demanding money with menaces; and

c) stealing by intimidation.

The accused was jointly tried with one Lefkios Rodosthenous by the Assize Court of Nicosia. No application made for a separate trial by either accused from which, I think, it may be inferred that the accused and their legal advisers were satisfied that it was possible for the trial court to segregate the evidence relating to each which they did in a careful judgment.

Both accused were charged on a further first count of conspiracy to which they pleaded "not guilty" and upon the Counsel for the Republic stating that he would offer no evidence on that count, the court acquitted both accused.

The verdict of the court following a long and careful trial was unanimous on all counts. In this appeal, this court is concerned solely with the conviction of this appellant. The appeal has been put by Sir Panayiotis Cacoyannis on two grounds : (1) That the verdict was unreasonable having regard to the evidence adduced and (2) that the trial court wrongly admitted inadmissible evidence.

I have carefully considered the record of evidence and the submissions of Sir Panayiotis. To me it seems that there was abundant evidence which, if accepted, would have warranted a verdict either of acquittal or conviction on all three counts. The learned trial judges in a careful and reasoned judgment which, in my view, is free from any mis-statement of law or errors of fact, accepted unanimously the evidence for the prosecution and rejected in substance that of the defence.

This Court is not a trial court and its function, as a Court of Appeal, in a case of this kind, is to review the evidence and the record of the trial so as to satisfy itself that the facts found by the trial court are supported by legal evidence, that the law was correctly stated and properly applied by the Court and that no evidence was wrongly admitted against accused. On each of these heads I can find no valid grounds for criticising

the trial. Accordingly, the view I take of this case is the appeal, on the first ground, cannot succeed. In this connection I wish to add that I have given careful consideration to the point, perhaps somewhat academic in the circumstances of this case as to whether or not there was satisfactory evidence to justify the conviction on count 4, i.e. the charge that the accused on the 7th February, 1961, at Limassol did steal by intimidation £4,000 from Efstathios Kyriacou. The appellant at an interview with the son of the complainant at which the latter was not present, made certain threatening statements which have been found by the trial court to have been threats and menaces for money. At a later interview, on or about the 27th January, the appellant did the same thing, charging Efstathios Kyriacou that he offered £3,000 to have Rodosthenous shot. But the stealing charged in count 4, is stated to have occurred on the 7th February and there is no doubt that the appellant was absent when the money was paid over to the accused Rodosthenous on behalf of the complainant i.e. the actual stealing. Nevertheless, if the appellant though absent, procured another to commit the stealing, he would be liable as an accessory before the fact and can be charged and convicted as a principal offender. The "procurement" of course may be direct or it may be indirect by evincing an express liking, approbation or assent to the other's felonious design to steal. The evidence relating to what the appellant did at the two interviews mentioned, its effect upon complainant and the relations between the appellant and Rodosthenous justify a conclusion that there was procurement on the part of the appellant and warrants the conclusion and observations of the trial court, which stated:

> "If any further explanation is required as regards this accused No.2 in connection with count 4 it is that the payment cannot be divorced from the effect of the part played by him down to and including the meetings at Rodosthenous's office".

The second ground of appeal was put by the appellant's counsel on the basis that appellant having been acquitted on a charge of conspiracy any evidence which tended to show that he was a conspirator was totally inadmissible. As he put it, "they (the trial court) considered appellant as a conspirator". If there had in fact been no count for conspiracy I do not think that it can be suggested that the mere fact that

evidence was adduced by the prosecution, relevant to counts 2, 3 or 4, which tended to show the commission of other crimes would have rendered such evidence inadmissible. Any evidence is relevant that bears on the question whether the acts alleged to constitute the crime charged were designed or accidental or done with the guilty knowledge as distinct from an innocent mind. This was laid down by Lord Herschell many years ago in *Makin v. The Attorney-General for New South Wales* (1894) A. C. 57. In a much more recent case (*Harris v. D.P.P.* (1952) A. C. 694) the House of Lords laid down that the prosecution may adduce such evidence without waiting for the prisoner to set up a specific defence calling for a rebuttal. A perusal of the record at pages 67 and 68 showed that the appellant's counsel expressly submitted "that the accused No.2 simply conveyed information with the object of finding out whether the information was true or not". Later on he said, "If the Court finds that the fact that accused 2 went there to find the correctness of the information or not....." and again "in the present case the accused did not make an accusation at all..... he simply went there for the purpose of giving help to a friend of his".

Such a defence thus foreshadowed clearly, in my opinion, entitled the prosecution to adduce evidence to show that the appellant's mind was far otherwise than suggested by his counsel and that he was acting in concert with people who were engaged in criminal enterprise and had *mens rea.* I cannot find any authority for the proposition that the fact that there was an acquittal as distinct from an omission to charge conspiracy alters the legal position. Apart from authority and none was cited in point, I cannot see how in principle it could do so. For this reason, I am of opinion that the second ground of appeal is unsustainable and that this appeal should be dismissed.

ZEKIA, J.: I agree that there is sufficient admissible evidence to support two of the counts for which the accused was found guilty. The trial court having accepted as true the evidence adduced, there appears to be no sufficient reasons for us to interfere with their finding. I disagree, however, that there is sufficient evidence to support a conviction on the 4th count, namely, on the count of theft.

What the appellant did, as far as the evidence against

him goes, ended by the meeting of the 27th January in the house of Rodosthenous. Now, there appears nothing to link him with the incidents and events which took place after that date to the time of theft, that is, the 7th February. There appears that on the 27th January the efforts to extort money were frustrated. The complainant himself at the end of the meeting said that he was not prepared to pay even a piastre. The appellant disappeared from the scene after that date. If he was a conspirator in the whole affair the money obtained by menaces on the 7th February might have been regarded as the result of conspiracy in which the appellant need not have taken part after the 27th January. The appellant, however, was discharged on the count of conspiracy. In order to find him guilty of theft it had to be proved whether he was a party or an accessory before the fact to that offence. I find that there is no evidence to support a finding that he was a party or an accessory before the fact for the theft which took place days after the meeting of the 27th January.

A few days after the frustrated meeting of the 27th January a new man, namely Argyris, came into the picture; he contacted a certain Drakos, one of the managers of the complainant company, and then a message was conveyed to the complainant who got terrified. Further incidents took place. Fresh menaces and threats alarmed the complainant and on the 6th February he collected £4,000 and on the 7th this sum of money was, through Argyris - a prosecution witness -, given to Rodosthenous.

In the circumstances, is it an inescapable conclusion or can it be argued that the appellant has beyond reasonable doubt taken part in this offence as an accessory before the fact? It is very doubtful indeed, in such a case, to assume that after the incidents and events which took place between the 27th January and the 6th-7th February the appellant continued to take part or contributed in any way to the stealing as an accessory before the fact.

Therefore, I am of the opinion that the count for theft, count 4, against the appellant cannot stand and should be quashed.

VASSILIADES, J.: This is an appeal by the appellant against his conviction by the Assize Court of Nicosia on three counts, namely, (a) attempt to extort money by threats, (b) demanding money with menaces and (c) stealing.

I agree with the conclusions of the President of the Court arising from the facts as found by the trial court, excepting on this one point: whether the appellants part in the early stages of the attempt to extort money, can be so connected with the stealing several days later, and after the intervention of decisive new factors, that the appellant could be convicted as an accomplice on the count for stealing.

After discussing this matter with the other members of this Court, I am inclined to agree with the view that the lapse of time and the intervening factors, which Zekia, J. has just stated, are such that the appellant could not be sufficiently connected with what happened on the 7th February, as to make him an accomplice in the stealing; and his conviction on that count must be quashed.

I agree that the appeal must fail as regards convictions (a) and (b) above; and succeed as regards count (c). I am taking the counts from the judgment of the Court.

JOSEPHIDES, J.: I agree with the judgment which has been delivered by the President of the Court with the exception that I consider that the evidence adduced is insufficient to support the conviction of stealing on count 4. In this respect I associate myself with the views expressed by my brother Zekia, J.

O' BRIAIN, P.: In the result the appeal is dismissed as regards the convictions on counts 2 and 3 of the information. As regards the conviction on count 4 it is allowed by majority, and that conviction is quashed.

Sentence to run from the date of conviction.

Appeal dismissed as regards conviction on counts 2 *and* 3. *Appeal allowed by majority as regards conviction on count* 4.