

[O' BRIAIN, P., ZEKIA, J., TRIANTAFYLIDIS and STAVRINIDES  
ACTING JJ.]

NICOLAS GEORGHIOU 'KKOLIS',

*Appellant,*

*v.*

THE REPUBLIC,

*Respondent.*

*(Criminal Appeal No. 2291)*

1961  
Jan. 1  
March 29  
—  
NICOLAS  
GEORGHIOU  
'KKOLIS'  
*v.*  
THE REPUBLIC.

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*Appeal—Rehearing of witnesses—The Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960), section 25 (3) — Powers of the High Court to rehear witnesses—“Where the circumstances of the case so require”—Burden on the appellant to make out a case for the exercise of such powers.*

*Criminal Procedure—Appeal—Quashing conviction—Substitution of a new count by the High Court—Conviction and sentence thereon—Criminal Procedure Law, Cap. 155, section 145 (1)(c).*

The appellant was convicted by the Assize Court at Larnaca on a charge of attempted murder and sentenced to seven years' imprisonment. On appeal, counsel for the appellant asked the High Court under section 25(3) of the Courts of Justice Law, 1960, to rehear the complainant. The verdict of the Assize Court was unanimous.

*Held* :— (1) The High Court, in spite of the wide powers it possesses under section 25(3) of the Courts of Justice Law, (Law of the Republic No. 14 of 1960), will be very reluctant in disturbing the finding of a unanimous Assize Court's finding.

(2) The High Court has power under section 25(3) to rehear a witness already heard by the trial court “where the circumstances of the case so require” and the burden of making out such a case lies on the appellant.

(3) The conviction of the appellant on the charge of attempted murder is not warranted by the evidence adduced. Therefore, the conviction and sentence on that count will be quashed.

(4) In the exercise of the powers under section 145(1)(c) of the Criminal Procedure Law, Cap. 155 a new count will be substituted under section 231 of the Criminal Code, Cap. 154

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and the appellant convicted in that count and sentenced to three years' imprisonment.

*Appeal allowed. Conviction and sentence quashed. New count added. Appellant convicted thereon and sentenced to three years' imprisonment.*

#### **Appeal against conviction.**

The appellant was convicted on the 25.10.60 at the Assize Court of Larnaca (Criminal Case No.2754/60) of the offence of attempt to murder contrary to sections 214(a) of the Criminal Code Cap. 154 and was sentenced by Vassiliades, J., Josephides P.D.C. and Michaelides D.J. to seven years' imprisonment.

*Lefkos Clerides with A. Frangos and  
Lellos Demetriades for the appellant.  
K. C. Talarides for the respondent.*

*Cur. adv. vult.*

The judgment of the Court was delivered by :—

TRIANTAFYLLIDES, Acting J. : On October 25th, 1960, appellant was found guilty by the Larnaca Assize Court of attempted murder committed on July 31st, 1960, at Larnaca and was sentenced to seven years' imprisonment.

The Court has carefully considered the evidence, but it is not prepared to say that it was not open to the Assize Court to base on that evidence its finding regarding the identity of the person who fired.

In spite of the wide powers which this Court possesses under section 25 of the Courts of Justice Law, Law of the Republic No.14 of 1960, the fact remains that three Judges of the Assize Court having heard the whole case including the evidence regarding the movements of the appellant after the incident, unanimously came to the conclusion that the person who fired was the appellant.

We have been invited by the learned counsel for the appellant to re-hear the complainant under section 25 of the Courts of Justice Law, 1960. The Court has power to re-

re-hear a witness already heard by the trial court "where the circumstances of the case so require". Naturally, the burden of making out a case for the exercise of the power was on the appellant and we think that in this case it is enough to point to the fact that the decision appealed from was unanimous on all points and to say that the appellant has failed to show that the circumstances of the case require the re-hearing of any witness.

The Court further is of the opinion that the prerequisite has not arisen which would justify the retrial of the case by another bench.

The Court, however, considers that the Assize Court did not specifically direct its attention to the issue of whether or not it had been proved beyond reasonable doubt that the appellant at the material time had formed the intention to cause the death of the complainant, which is the principal ingredient of the crime of attempted murder. Nowhere in the judgment of the Assize Court is any mention made that this fact has been found as duly proved. It is also a fact that although the appellant must have had with him the revolver from the very beginning of the incident, and though he was hit more than once in the meantime, nevertheless he did not use it either against the victim or anybody else who took part in the fight until after the complainant had actually started to chase him across the street holding a chair.

This Court in a case such as this might have ordered a retrial in view of this issue of the necessary intent. But bearing in mind all the circumstances of this case and in view of the fact that no matter what may have been the outcome on the question of the existence of the intent to murder there is ample evidence that the appellant did cause the complainant grievous bodily harm by shooting at him, the Court has decided in the exercise of its powers under section 145 (1) (c) of the Criminal Procedure Law, Cap. 155, to order the substitution of a new count under section 231 of the Criminal Code, Cap. 154, *i.e.* that at the material time and place the appellant did in fact cause the victim grievous bodily harm and it finds the appellant guilty on that count. The conviction and sentence on the count for attempted murder are hereby quashed. As regards sentence, the Court under section 145 (1) (c) must impose a fresh one and it sentences the ap-

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pellant to three years' imprisonment as from the date of conviction.

*Appeal allowed. Conviction and sentence quashed. New count added. Appellant convicted thereon and sentenced to three years' imprisonment.*