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

CHRISTOFIS VASSILIOU TOFAS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2302).

Appeal—Powers of the High Court under section 25(3) *of the Courts of Justice Law,* 1960, *to review findings of fact and rehear witnesses.*

The appellant was convicted by the Assize Court of Larnaca in a case of robbery with violence and burglary and sentenced to three years' imprisonment on each count to run concurrently. The Assize Court unanimously accepted the evidence of the complainant, an aged woman, regarding the identification of her assailant. It was argued on behalf of the appellant that this was a proper case for the High Court to use its powers under section 25(3) of the Courts of Justice Law, 1960.

Held: No adequate reason has been shown either for rehearing any witness or for disturbing the findings of the Assize Court which unanimously accepted the evidence of the complainant as to the identification of her assailant.

Nicolas Kkolis v. The Republic, reported in this volume at p. 53 *ante* and *Stelios Simadhiakos v. The Police* reported in this volume at p. 64 *ante, followed.*

Appeal dismissed.

Cases referred to:

Nicolas Kkolis v. The Republic, Criminal Appeal No. 2291 reported in this volume at p. 53 *ante;*

Stelios Simadhiakos v. The Police, Criminal Appeal No. 2298, reported in this volume at p. 64 *ante;*

Philippos Haralambous v. Sotiris Demetriou, Civil Appeal No. 4314, reported in this volume at p. 14 *ante;*

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Appeal against conviction and sentence.

The appellant was convicted on the 24th January, 1961, at the Assize Court of Larnaca (Criminal Case No. 3570/60) on two counts of the offences of

1. Robbery with violence contrary to ss. 282 and 283 of the Criminal Code, Cap. 154;

2. Burglary contrary to s. 292(a) of the Criminal Code, Cap. 154.

and was sentenced by Attalides, Ag. P.D.C., Kacathymis and Malachtos, Ag. D.JJ. to three years imprisonment on each count.

Ach. Frangos for the appellant

E. Munir for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was read by :—

VASSILIADES, J. : This is an appeal against conviction and sentence, in case of robbery with violence and burglary, before the Assize Court of Larnaca, where the appellant was convicted on both counts, and was sentenced to three years imprisonment on each count, to run concurrently.

The appeal against conviction is made mainly on the ground that the trial court should not have acted on the evidence of the victim, an aged woman of about 75, regarding the identification of her assailant. With her weak eyesight, in her poorly lighted room, the victim could well have made a mistake as to her assailant, counsel for the appellant argued; her evidence on this point, he said, could not be free of all reasonable doubt.

Moreover, counsel for the appellant submitted that this Court, not being bound by the findings of the trial court, could draw inferences of fact from the evidence on the record and could proceed to make its own findings, rehearing, if necessary, the complainant or any other witness, under the powers conferred upon this Court by section 25 of the Courts of Justice Law, 1960.

The provisions of section 25, and their application in

proceedings on appeal, have been discussed and considered in several cases since the enactment of the new Courts of Justice Law. In *Nicolas Kkolis v. The Republic* (Criminal Appeal No. 2291 — decided on 29.3.61) the part of the judgment dealing with this section reads :

> "In spite of the wide powers which this Court possesses under section 25 of the Courts of Justice Law (Law 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 rehear the complainant under section 25 of the Courts of Justice Law, 1960. The Court has power to rehear 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 powers 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 rehearing of any witness".

In *Philippos Haralambous v. Sotiris Demetriou* (Civil Appeal No. 4314 — decided on 10.2.61) Zekia, J., after citing the provisions of section 25(3) of the Courts of Justice Law said (at p.5).—

> "A finding of the trial court based on the credibility of a witness, save in exceptional instances according to English authorities which were followed hitherto in this Island, cannot be disturbed by an appellate court".

In *Stelios Simadhiakos v. The Police* (Criminal Appeal No. 2298 — decided on 20.4.61) the verdict of the trial court was attacked on appeal, mainly on the ground that, resting, principally, on the evidence of a witness whose testimony was contradicted by the appellant on oath, should not be considered as binding on this Court ; and that, in the circumstances, the Court might think fit to rehear the witness, or the appellant, or both, on the main issue so as to make its own finding. The majority of this Court took the view that on the evidence on record, the trial judge's finding appeared to be well justified, and that the circumstances of the case did

not seem to require the rehearing of any witness.

The view was expressed in that case that the trial court findings continue to be the valuable conclusions reached by one or more trial judges, subject only to unfettered investigation and criticism on appeal, where only if the circumstances so require, the Court should rehear any witness already heard, or order a retrial.

> "Before such findings are disturbed, it was said in that case, the appellate Court must be satisfied to the extent of reaching a decision (unanimous or by majority) that the reasoning behind a finding is unsatisfactory ; or that the finding is not warranted by the evidence considered as a whole. And the onus must rest on the appellant, both in civil and in criminal appeals, to bring this Court to such a decision ; or else the trial court findings remain undisturbed".

In the present appeal the verdict of the Assize Court on the question of the identification of the culprit, rests on the evidence of the victim and her ability to recognise her assailant. She had the opportunity of seeing him for a space of time which must have been several minutes, standing and moving quite close to her, and of hearing his voice. The accused was a person very well known to her, and she mentioned his name when she spoke to him at the time of the offence, and immediately afterwards when she made her first complaint.

The question of identification was the main defence before the trial court and it was carefully considered. The Court unanimously accepted the evidence of the complainant and convicted the appellant accordingly.

No adequate reason has been shown, in our opinion, either for rehearing any witness or for disturbing that finding; we take the view that the verdict was well justified ; and we dismiss the appeal against conviction. As far as sentence is concerned, the nature of the crime, and the circumstances in which it was committed are such, that we find ourselves unable to accept the submission that it is excessive, notwithstanding appellant's age. We dismiss this part of the appeal as well, with a direction that the sentence be made to run from conviction.

Appeal dismissed.
Conviction and sentence affirmed.