1982 November 11

[TRIANTAFYLLIDES P., L. LOIZOU, DEMETRIADES, JJ.]

AKINITA ANTHOUPOLIS LIMITED,

Appellants.

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 4139).

Exchange Control Law, Cap.199 (as amended by Law 53/1972)—Evasion of restrictions or requirements imposed by the Law—Power of Central Bank to require information to be furnished for detecting evasion of the Law—Not exercisable after person had 5 *been, on the basis of the same circumstances, formally charged and prosecuted and later a nolle prosequi had been entered—Part I. paragraphs* 1(1) *and* (2) *of the Fifth Schedule to the Law.*

The appellants were convicted by the District Court of Nicosia on 22nd April 1980 of the offence of having failed to supply in- 10 formation to the Central Bank of Cyprus, as required by a letter of the Bank dated 6th April 1978. The said information was requested from the appellants, under the provisions of Part I, paragraphs 1(1) and (2)* of the Fifth Schedule to the Exchange Control Law, Cap.199, as amended by the Exchange Control 15 (Amendment) Law, 1972 (Law 53/72).

It was common ground - and it was, also, so found by the trial Judge - that the appellants had been prosecuted before an Assize Court in Nicosia in criminal case No.18879/77 and that the first count in the information which was then filed charged the appel- 20 lants with an offence arising from the same circumstances in relation to which the charge on which they were convicted in the present instance was preferred. There, also, emerged as common ground, during the hearing of this appeal, that previously to the Assize Court proceedings in question the appellants had been

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* Paragraphs 1 and 2 are quoted at pp. 283–284 post.

formally charged in respect of the offence to which the first count of the aforesaid information related.

The hearing of the case before the Nicosia Assize Court commenced on 15th February 1978 but it was never finally concluded in so far as was concerned the first count in the information (which was based on the same circumstances as the charge in the present case) because a nolle prosequi* was entered by the Attorney-General of the Republic in respect of it on 3rd March 1978. 5

Upon appeal against conviction: 10

Held, that the Central Bank was not properly entitled, under sub-paragraphs (1) and (2) of paragraph 1 of Part I of the Fifth Schedule to Cap.199, to request the appellants, by means of the letter of the Bank dated 6th April 1978, to furnish the information (with documents) specified therein, after the appellants, on the basis of the same circumstances, had been initially formally charged and then prosecuted in respect of count 1 in the aforesaid criminal case No. 18879/77 before the Assize Court of Nicosia and later a nolle prosequi had been entered in connection with such count, for, otherwise the right of a person charged and cautioned to remain silent would be removed; that as, therefore, the appellants could not have been required by the Central Bank to furnish the information (with documents) concerned, they could not have been convicted of having failed to comply with the directive contained in the letter in question of the Central Bank and, consequently, their conviction has to be set aside and the sentence passed upon them, as well as the order made by the trial Court regarding the directors and secretary of the appellants as part of the sentence, have to be set aside, too. 15 20 25

Appeal allowed. 30

Cases referred to:

Goddard v. Smith, 87 E.R. 1008 at p.1009;

Queen v. Ridpath, 88 E.R. 670 at p.671;

Queen v. Allen, 121 E.R.929 at p.931;

A. v. HM Treasury, B. v. HM Treasury [1979] 2 All E.R. 586. 35

* The nolle prosequi was entered by virtue of the provisions of section 154 of Cap. 155 which is quoted at pp. 284-285 post.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Akinita Anthoupolis Limited who were convicted on the 22nd April, 1980 at the District Court of Nicosia (Criminal Case No. 599/79) on one 5 count of the offence of failing to supply information to the Central Bank of Cyprus contrary to the provisions of Part I, paras.1(1) and (2) of the Fifth Schedule to the Exchange Control Law, Cap. 199 (as amended by Law 53/72) and were sentenced by Artemides, D.J. to pay £500.- fine and were further ordered 10 to supply the information requested to the Central Bank.

K. Michaelides, for the appellants.

R. Gavrielides, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

15 TRIANTAFYLLIDES P. read the following judgment of the Court. The appellants were convicted by the District Court of Nicosia on 22nd April 1980 of the offence of having failed to supply information to the Central Bank of Cyprus, as required by a letter of the Bank dated 6th April 1978.

20 The said information was requested from the appellants, under the provisions of Part I, paragraphs 1(1) and (2) of the Fifth Schedule to the Exchange Control Law, Cap. 199, as amended by the Exchange Control (Amendment) Law, 1972 (Law 53/72).

25 The said legislative provisions, modified under Article 188 of the Constitution, read as follows:

"1.(1) Without prejudice to any other provisions of this Law, the Central Bank may give to any person in or resident in the Republic directions requiring him, within such 30 time and in such manner as may be specified in the directions, to furnish to him or to any person designated in the directions as a person authorized to require it, any information in his possession or control which the Central Bank or the person so authorized, as the case may be, may require 35 for the purpose of securing compliance with or detecting evasion of this Law.

(2) A person required by any such directions as aforesaid to furnish information shall also produce such books,

accounts or other documents (hereafter in this Part of this Schedule referred to as 'documents') in his possession or control as may be required for the said purpose by the Central Bank or by the person authorized to require the information, as the case may be." 5

The appellants were sentenced to pay a fine of C£500 and an order was made directing the directors and secretary of the appellants to supply the information (with documents) requested by the aforementioned letter of the Central Bank.

The appellants have appealed on several grounds both against 10 their conviction and against the sentence passed upon them; and, also, against the said order regarding their directors and secretary.

It is common ground - and it was, also, so found by the trial judge - that the appellants had been prosecuted before an Assize 15 Court in Nicosia in criminal case No. 18879/77 and that the first count in the information which was then filed charged the appellants with an offence arising from the same circumstances in relation to which the charge on which they were convicted in the present instance was preferred. 20

There, also, emerged as common ground, during the hearing of his appeal, that previously to the Assize Court proceedings in question the appellants had been formally charged in respect of the offence to which the first count of the aforesaid information related. 25

The hearing of the case before the Nicosia Assize Court commenced on 15th February 1978 but it was never finally concluded in so far as was concerned the first count in the information (which was based on the same circumstances as the charge in the present case) because a nolle prosequi was entered 30 by the Attorney-General of the Republic in respect of it on 3rd March 1978.

Section 154 of the Criminal Procedure Law, Cap. 155, modified under Article 188 of the Constitution, provides as follows about entering a nolle prosequi in criminal proceedings: 35

"154.(1) In any criminal proceedings and at any stage thereof before judgment the Attorney-General may enter a nolle prosequi, either by stating in Court or informing

the Court in writing that the Republic intends that the proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the nolle prosequi is entered.

5 (2) When a nolle prosequi is entered, if the accused has been committed to prison, he shall be released, or if on bail the bail bond shall be discharged, and, where the accused is not before the Court when such nolle presequi is entered, the Registrar or other proper officer of the Court shall, if 10 the accused is in custody, cause notice in writing of the entry of such nolle prosequi to be given forthwith to the person having custody of the accused and such notice shall be sufficient authority to discharge the accused in respect of the charge or information for which the nolle prosequi is 15 entered or, if the accused is not in custody, shall cause such notice in writing to be given forthwith to the accused and his sureties, if any, and shall, in every case, cause a similar notice in writing to be given to any witness bound over to appear.

20 (3) Where a nolle prosequi is entered in accordance with the provisions of this section, the discharge of an accused person shall not operate as a bar to any subsequent proceedings against him for the same offence or on account of the same facts."

25 The notion of nolle prosequi has found its way into our legal system from the English law and though it puts an end to a prosecution the accused remains liable to be reindicted (see Archbold on Pleading, Evidence and Practice in Criminal Cases, 40th ed., p. 84, para. 143).

30 In *Goddard v. Smith*, 87 E.R. 1008, Holt CJ stated (at p.1009) that "entering a nolle prosequi was only putting the defendant sine die".

In *The Queen v. Ridpath*, 88 E.R. 670, it was held (at p.671) that a nolle prosequi is not a discharge.

35 In *The Queen v. Allen*, 121 E.R. 929, Cockburn CJ observed (at p. 931) that in criminal cases the entering of a nolle prosequi stays proceedings on an indictment.

Before the trial Court and before us reference was made, and reliance was placed on, by counsel for the appellants to the case of *A v HM Treasury, B v HM Treasury,* [1979] 2 All E.R. 586. The headnote of the report of that case reads as follows:

"For the purpose of investigating into alleged offences against the Exchange Control Act 1947 Customs and Excise officers, in March 1978, seized documents belonging to several companies. A and B were directors of some of those companies. B declined to answer a questionnaire served on him and was arrested on 13th December. He was charged and cautioned, the charges against him alleging contravention with others of s 23 of the 1947 Act and conspiracy at common law with others to defraud the public revenue. On 19th December the Treasury, purporting to act under Sch 5, Part I, para 1(1) to the 1947 Act, served B with a letter of direction requiring him to answer another questionnaire and to produce certain documents. The letter stated, in accordance with the 1947 Act, that failure to comply with the letter of direction was an offence. The questionnaires were directed towards obtaining information relevant to the conspiracy charge against B, and it was conceded that B might incriminate himself in respect of all the charges against him if he answered the questionnaire. On 29th December A, who had not been arrested or charged, was served with a similar letter of direction, questionnaire and request to produce documents. A and B took out originating summonses seeking the court's determination whether they were bound in law to comply with the letters of direction

Held - On the true construction of Sch 5, Part I, to the 1947 Act the power in para 1(1) to direct a person to furnish information could not be invoked once that person had been charged and cautioned, and was limited to an earlier stage when matters were being investigated, for otherwise the right of a person charged and cautioned to remain silent would be removed. It followed that the Treasury did not have power under para 1(1) to direct B to furnish information, since he had already been charged and cautioned, and accordingly, he was not bound to comply with the letter of direction served on him. However there was

power to direct A to furnish information since he had not been arrested or charged, and was therefore to be treated like any other potential witness from whom information was sought for the purpose of detecting evasion of the 1947 Act. Accordingly, A was bound to comply with the letter of direction served on him."

It should be pointed out that sub-paragraphs (1) and (2) of paragraph 1 of Part I of the Fifth Schedule to the Exchange Control Act, 1947, in England, are practically the same as sub-paragraphs (1) and (2) of paragraph 1 of Part I of the Fifth Schedule to Cap. 199.

In the *A and B* case, supra, Russell QC sitting as Deputy Judge of the High Court in England, stated, inter alia, the following (at pp. 589-590):

"Reading this part of the schedule as a whole, and contrasting it with, for example, Part II, which goes on to deal with the prosecution of and penalties for offences under the Act, I have come to the conclusion that Parliament must have contemplated in Part I a stage before arrest, charging and the institution of proceedings against the person whom it is sought to question. In my judgment, Part I is concerned with the stage when matters are being investigated and where, to use the words of para 1(1), the authority is seeking to secure 'compliance with or detecting evasion of this Act'. I cannot believe that the legislature ever intended that the powers contained in para 1, with the sanction of criminal penalties, should or could be invoked to obtain information or documents of a potentially incriminating nature from one who had already been cautioned and charged with offences under the Act, whether those charges are substantive under the Act or are to be found as ingredients of a common law conspiracy. If this were to be so, it would make a mockery of the caution and the concept of the right to silence after a charge has been preferred.

I am not persuaded that a proper construction of the 1947 Act requires me to hold that the rights of a person charged and cautioned, rights which were enshrined in the common law and emphasised by the judges' rules, are removed by the provision contained in para 1 of Sch 5 to the Exchange Control Act 1947."

Counsel for the respondents has very fairly conceded during the hearing of the present appeal that the ratio decidendi of the *A and B* case, supra, in so far as it related to B was applicable regarding the appellants in the present case and that, therefore, the Central Bank was not properly entitled, under sub-paragraphs (1) and (2) of paragraph 1 of Part I of the Fifth Schedule to Cap. 199, to request the appellants, by means of the letter of the Bank dated 6th April 1978, to furnish the information (with documents) specified therein, after the appellants, on the basis of the same circumstances, had been initially formally charged and then prosecuted in respect of count 1 in the aforesaid criminal case No. 18879/77 before the Assize Court of Nicosia and later a nolle prosequi had been entered in connection with such count.

As, therefore, the appellants could not have been required by the Central Bank to furnish the information (with documents) concerned, they could not, in our opinion, have been convicted of having failed to comply with the directive contained in the letter in question of the Central Bank and, consequently, their conviction has to be set aside and the sentence passed upon them, as well as the order made by the trial Court regarding the directors and secretary of the appellants as part of the sentence, have to be set aside, too.

Before concluding this judgment we would like to observe that it was, also, conceded by counsel for the respondents that, in passing sentence in the present case, the trial Court could not in the context of the present case have made the aforesaid order against the directors and secretary of the appellants, but we need not pronounce on this issue as we have already held that the conviction of the appellants has to be set aside and, consequently, such order is nullified.

This appeal is, therefore, allowed accordingly.

Appeal allowed. Conviction set aside.