

1986 April 18

(A LOIZOU DEMETRIADES PIKIS JJ)

THE ATTORNEY—GENERAL OF THE REPUBLIC,

Appellant,

v

MARIANNA DEMOSTHENOUS,

Respondent

(Criminal Appeal No 4724)

5 *Stealing—Identifiable object—The Tounst Places of Entertainment Law 91/79—
Part III—Tounst Centre—Obligation of business-man running same to collect
from clients on behalf of the Cyprus Tourism Organisation a fixed percentage
and hand it over to the Organisation—Whether monies so collected are
capable of being stolen*

10 The respondent was charged with 13 counts. The first seven were based on sections 255 and 270(c) of Cap 154 and referred to the stealing of sums of money which he had collected for the account of Cyprus Tourism Organisation, but omitted to pay them over to the said Organisation. The next three counts were based on sections 257 and 262 of Cap 154 and sections 12(2) and 16(4) of The Tounst Places of Entertainment Law 91/79 and are alternative counts to the first three. The last three counts, which were also alternative counts to the first three were based on sections 259 and 261 of the Code and section 12(2) and 16(4) of the said law.

15 Under Part III of Law 91/79 an obligation is cast on business-men running a tourist centre to collect from clients a fixed percentage and pay it over at their responsibility to the said organisation not later than the 15th of the following month. Furthermore, he must keep a record showing the daily receipts of his tourist centre.

20 For the months of August 1983 until and including February 1984 the respondent submitted knowingly to the organisation statements showing lower collections than the real ones and as a result the fixed percentage (3%) was calculated on lower figures, and, consequently, the amounts paid to the organisation were less than those that ought to have been paid.

25 Upon a submission of no case to answer the trial Judge acquitted the respondent on the ground that there was no identifiable object, the subject-matter of stealing.

As a result the Attorney-General filed the present appeal.

Held allowing the appeal (1) The nature of our statutory provisions as regards the various aspects of stealing has been analysed in *Sotenou v The Republic*, 1962 C L R 188 and an extensive analysis of the offences such as of stealing by agent, by bailee and breach of trust is to be found in *Azinas v The Police* (1981) 2 C L R 9 5

(2) In the context of Law 91/79 the amount abstracted is intermingled with other monies received by the caterer or other person liable to account for monies received on behalf of the Cyprus Tourism Organisation. The monies are collected by such a person as agent and trustee who is liable to account to the organisation and hand over what he has received on their behalf on the strength of the relevant statutory provision 10

Appeal allowed
Retnal ordered

Cases referred to

Shistns v C T O (1983) 2 C L R 72, 15

Sotenou v The Republic 1962 C L R 188,

Azinas v The Police (1981) 2 C L R 9

Appeal against acquittal.

Appeal by the Attorney-General of the Republic against the judgment of the District Court of Lamaca (G Nicolaou, D J) given on the 16th December, 1985 (Criminal Case No 4953/85) whereby respondent was acquitted of thirteen counts of the offences of stealing sums of money and which she omitted to pay over to the Cyprus Tourism Organisation contrary to sections 255, 262 and 270 (c) of the Criminal Procedure Law, Cap 155 and on sections 11, 12, 13 and 16(4) of the Tourism Places of Entertainment Law, 1979 (Law No 91 of 1979) 20
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A Frangos, Senior Counsel of the Republic, for the appellant

A Poetis, for the respondent

Cur adv vult 30

A LOIZOU J read the following judgment of the Court. This is an appeal by the Attorney-General of the Republic under Section 137(1)(a)(iii) of the Criminal Procedure Law, Cap 155, from a judgment of acquittal of the respondent by the District Court of Lamaca, on the ground that the law was wrongly applied to the facts of the case 35

The respondent was charged before the District Court of Lamaca with thirteen counts the first seven were based on sections 255 and 270(c) of the Criminal Code Cap 154 They refer to the stealing by the respondent of the sums of money mentioned
 5 in each count that she omitted to pay over to the Cyprus Tourism Organization (C T O) and which she had collected for its account for the months of August 1983 to February 1984, respectively

Counts 8, 9, and 10 were based on sections 257 and 262 of the Code and Sections 12(2) and 16(4) of the Tourist Places of
 10 Entertainment Law, 1979 (Law No 91 of 1979), hereinafter to be referred to as «the Law», are alternative counts to the first three and counts 11, 12 and 13 which are also alternative counts to the first three are based on Sections 259 and 261 of the Code and Sections 12(2) and 16(4) of the Law

15 The respondent, who was duly represented by counsel, entered a plea of guilty to all seven counts that were originally on the charge, - and they were the first seven ones - but after the facts of the case were explained and counsel was heard in mitigation the learned trial Judge expressed reservations as to whether there
 20 existed or not a subject matter which was capable of being stolen and invited argument by both sides

We need not however, go into that aspect of the case Suffice it to say that counsel for the appellant invited the attention of the Court to the case of *Charalambos Soteriou v The Republic* 1962
 25 C L R 188 to which authority I shall be referring in due course It was then submitted by counsel for the respondent that in view of that situation the Court should not have accepted the plea of guilty of the respondent and leave might be granted to him to change his plea

30 The prosecution then asked to have counts 8 to 13 added to the charge which was duly done and the case was adjourned for hearing after a change of plea was recorded

The facts of the case as emanating from the evidence adduced and which do not appear to be in dispute are the following

35 The respondent was at the material time a business-woman running a tourist centre, so classified under the provisions of «the Law» Under Part III thereof an obligation is cast on such business-men to collect from clients the percentage fixed by Order of the

Council of Ministers and pay it over at their own responsibility to the Cyprus Tourism Organization not later than the 15th of the following month in accordance with the Circular Instructions of the Organization. Furthermore each businessman must keep a record showing the daily receipts made by such tourist centre in accordance with Circular Instructions of the Organization. This is the effect of Section 12 of the Law, the acts or omissions performed thereunder being made into offences by virtue of the provisions of Section 16(4) and this is the interpretation given to these sections by this Court in *Shistris v. C.T.O.* (1983) 2 C.L.R. 72, where it was held that the Law makes it an offence for the proprietor of a tourist centre to fail or omit to collect the 3% charge and that such a proprietor not only has a right but a duty to collect it.

For the months of August, September, October, November and December 1983, as well as for the months of January and February 1984, the respondent submitted to C.T.O. statements in which to her knowledge there were recorded collections lower from the real ones which had been recorded in the Register of collections kept by her. The percentage of three percent was calculated on the basis of the false statements and so in every instance there was paid over to C.T.O. the amount mentioned in such count which is less than that which the respondent ought to have paid.

Particulars in respect of these records were adduced at the trial and the learned trial Judge rightly pointed out that there was no need for the purposes of his judgment, which turned on a purely legal issue, to incorporate them therein.

At the close of the case for the prosecution a submission was made on behalf of the respondent, - adopting therein also what was said at the outset of the case, - that no prima facie case had been made out against the accused sufficiently to require her to make her defence.

The submission was accepted by the learned trial Judge and thereupon he acquitted and discharged her on all counts. In his reasoned judgment he formulated the issue of the case as follows:-

«The result of this case depends on whether there was or not an item or anything which could be capable of being stolen under the provisions of section 255(3) of the Code.»

He referred to section 12 of the Law and went on to say that it is noteworthy that the said Section 12 referred to percentages and that it is of course to be understood that the percentage after being calculated on the basis of the height of the bill was converted into a concrete amount, but that the reference in the Law to collection and payment of the sum received by the business-man underlined as it appeared to him that at the time of the collection it was not separated in the hands of the businessman in currency which represented the corresponding values. He then went on and said -

«The currency in its material form (or other consideration) belongs to the businessman whose obligation is to pay over within the prescribed time-limit an amount which represents the value of the percentage. Until the business-man separates from the total currency and allocates part of it as an amount that belongs to C T O C T O cannot be considered as the owner by virtue of Section 1(2) of the Criminal Code of any item under section 255(3) of the same Code. Whether the content of any circular by C T O could differentiate the picture is a matter for which I need not express an opinion in the present case. At some stage of the proceedings learned counsel for the prosecution referred the Court to the case of *Charalambos Soteriou v The Republic* 1962 C L R 188 in accordance with which the offence of stealing in Cyprus extends with the various provisions of the Criminal Code beyond the corresponding English offence, in order to include also instances known in England as embezzlement. This does not change the situation because in every particular offence of stealing as in every instance of the offence of embezzlement in England it is a necessary prerequisite the existence of a concrete object on which a person other than the accused has some right of ownership or possession.»

We need not deal with the various aspects pertaining to the offence of stealing and relating offences as the nature of our statutory provisions to be found in the Criminal Code has already been dealt with in the *Soteriou* case (supra)

Furthermore an extensive analysis of offences such as stealing by agent and by bailee and breach of trust was made and examined by the Supreme Court in the case of *Azinas and Another v The Police* (1981) 2 C L R 9 and we consider it unnecessary to

reiterate the relevant principles here as we fully subscribe to what was decided in the two cases hereinabove mentioned

The sole issue upon which the learned trial Judge found the case for the prosecution unproven and, therefore acquitted and discharged the accused without calling upon her to make her defence was the absence of an identifiable object, the subject matter of theft 5

In the context of the law here under consideration, by its very nature, the amount abstracted is intermingled with other monies received by the caterer or other person liable to account for monies received on behalf of the Cyprus Tourism Organization 10
The money is collected by the caterer as agent and trustee and is liable to account to the tourism organization and hand over what he has received on their behalf on the strength of the relevant statutory provision 15

The appeal is allowed, the case will go back before the trial Judge to deal further with the matter. He must decide whether, in the light of the evidence and this Judgment, the prima facie case was made out against the accused on all or any of the counts

For all the above reasons we set aside the verdict of acquittal and we order a retrial 20

*Appeal allowed
Retrial ordered*