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[CREAN, C.J., AND GRIFFITH WILLIAMS, J.]

IN THE MATTER OF THE COURTS OF JUSTICE LAWS, 1935 AND 1938, SECTION 24, AND OF CERTAIN QUESTIONS OF LAW RESERVED FOR THE OPINION OF THE SUPREME COURT BY THE ASSIZE COURT OF NICOSIA IN THE CASE

REX

v.

MUSTAFA KARA MEHMED.

INTERPRETATION OF CLAUSES 143 AND 144 OF THE CYPRUS COURTS OF JUSTICE ORDER, 1927.

The above-named defendant was charged before the Assize Court of Nicosia in February, 1939, with the murder of one Sureyia Salih of Nicosia. At the close of the case for the Prosecution doubts arose as to the correct interpretation of Clauses 143 *and* 144 *of the Cyprus Courts of Justice Order,* 1927, *and the Assize Court, acting under section* 24 *of the Courts of Justice Laws,* 1935 *and* 1938, *reserved two questions for the opinion of the Supreme Court, the text of which is as follows :—*

" 1. *Does the phrase in Clause* 143 *of the Cyprus Courts of Justice Order,* 1927, " ' *Insufficient to support the conviction of the accused of an offence,' mean* " *insufficient in law, if believed, to satisfy the requirements of the law as to* " quantum *of evidence ; or does it mean, insufficient, taking into consideration* " *the demeanour and credibility of the witnesses, etc., to satisfy the Court, beyond* " *reasonable doubt, that the accused committed an offence, so as to enable the* " *Court, if nothing more be heard, to convict ; or should some other interpretation* " *be placed upon the phrase ?*

" 2. *Does the phrase in Clause* 144 *of the Cyprus Courts of Justice Order,* 1927, " ' *Not sufficient to justify a conviction ' bear a meaning in any way substantially* " *different from the phrase in Clause* 143 *quoted in question* 1 *above ?* "

The answers of the Supreme Court are given in the judgments.

Vedad and Pietroni for the Defendant.

The question for the Court is the interpretation of Clauses 143 and 144. The Legislature could easily have stated " legal evidence " instead of " insufficient evidence " if they had intended that " legal evidence " was to be the test. Clause 143 is intended to cover those cases, where the Court, after considering all the circumstances, including the demeanour and general credibility of the witnesses, is unsatisfied with the case and comes to the conclusion, without hearing the advocate on either side, that it is unsafe to convict; and Clause 144 deals with cases, where the Court not having acted on its own motion, yet might be convinced after argument, that it would not be justified on the evidence before it, assuming that nothing further was adduced, in convicting the accused. In either of such cases it is the duty of the Court to acquit the accused.

S. Pavlides, Crown Counsel, for the Crown:

The expression in Clause 143: " If the evidence given in support of " the charge shall, in the opinion of the Court, be insufficient to support " the conviction of the accused of an offence . . . " means in effect, " If the evidence were insufficient in law." This portion of Clause 143 refers only to cases where there is no advocate for the prosecution. If the Crown is represented the appropriate Clause to be applied is Clause 144, and even under this Clause it is not open to the advocate for the defence to discuss the credibility or otherwise of the witnesses but his submission must be confined strictly to the fact that the evidence for the prosecution, if believed, is not sufficient in law to support a conviction. The credibility of the witnesses and the value and weight to be attached to their evidence must not be considered at this stage.

Judgment: CREAN, C.J.: The questions of law reserved by the Assize Court for the opinion of this Court arise out of the wording of Clauses 143 and 144 of the Cyprus Courts of Justice Order, 1927.

These Clauses read as follows:—

143. After the accused has pleaded not guilty, the advocate for the prosecution, if there is one, may open the case against the accused, and call evidence in support of the charge. If there is no advocate for the prosecution the witnesses shall be called and examined as the Court may direct. If the evidence given in support of the charge shall, in the opinion of the Court, be insufficient to support the conviction of the accused of an offence the accused shall be acquitted. If no evidence for the prosecution is offered the accused shall be acquitted.

144. When the case for the prosecution is closed the accused or his advocate may submit to the Court that the evidence given in support of the charge is not sufficient to justify a conviction, and the Court, after hearing the prosecuting officer or advocate in reply, shall, if it be satisfied that such submission be right, acquit the accused. If the Court be satisfied the case should proceed then the Court shall inform the accused, whether he is defended by an advocate or not, that he may make any statement he pleases as to the charge against him, or that he may give evidence upon oath and that if he does so he may be cross-examined by the prosecuting officer or advocate.

If the accused is defended his advocate may open the defence, the accused may then either make a statement, or may give evidence upon oath in which case he may be examined by his advocate as a witness in examination in chief.

After he has been so examined the prosecuting officer or advocate may ask him questions in the same manner as if he were a witness under

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cross-examination; provided that such questions shall be confined to the matter in issue and matters relevant thereto.

After the cross-examination of the accused is ended, his advocate, if he is defended by an advocate, may ask him any questions by way of re-examination. If he is not defended by an advocate he shall be allowed to make any explanation he pleases of the statement made or answers given by him, and the Court, but not the advocate for the prosecution, may ask him questions thereon.

And the questions are:—

1. Does the phrase in Clause 143 of the Cyprus Courts of Justice Order, 1927, "Insufficient to support the conviction of the accused "of an offence," mean insufficient in law, if believed, to satisfy the requirements of the law as to *quantum* of evidence; or does it mean, insufficient, taking into consideration the demeanour and credibility of the witnesses, etc., to satisfy the Court, beyond reasonable doubt, that the accused committed an offence, so as to enable the Court, if nothing more be heard, to convict; or should some other interpretation be placed upon the phrase?

2. Does the phrase in Clause 144 of the Cyprus Courts of Justice Order, 1927, "Not sufficient to justify a conviction" bear a meaning in any way substantially different from the phrase in Clause 143 quoted in question 1 above?

The first question reserved is in regard to the following words in Clause 143: "If the evidence given in support of the charge shall, "in the opinion of the Court, be insufficient to support the conviction "of the accused of an offence the accused shall be acquitted." The Assize Court asks what is the proper interpretation to be put on those words.

For the Crown, it was suggested that they meant and contemplated only cases where the evidence was insufficient in law, and that the Assize Court was precluded from considering at the close of the case for the prosecution the credibility of the witnesses and the value and weight to be attached to their evidence. In other words, if the evidence of the witnesses for the prosecution discloses an offence by the accused, then the accused must be put upon his defence even though the Judges of the Assize Court do not believe the evidence of such witnesses.

This Clause, in effect, says that if there is not sufficient evidence given as to the charge to support the conviction of the accused of an offence the accused shall be acquitted.

In considering this question one must ask oneself if the words " sufficient evidence " connote or imply, a consideration of the evidence, as to its weight, and the credibility of it. To answer that question the legal definition of the words must be looked at and followed; for, it may be taken that a definition is not attempted until the point has received the most careful consideration by the Courts.

There are certain Acts of Parliament which set out what will be sufficient evidence to prove a certain fact. For instance in 20–21 Victoria the production of a sealed probate of a will is to be considered as sufficient proof of the validity of a will, but it has been held that the production does not debar the other side from shewing that it is invalid or that the testator was incompetent.

Following the decision in *Barraclough v. Greenhough* on the interpretation of section 64 of that Act, Stroud's dictionary defines sufficient evidence as " anything which is duly prescribed as ' sufficient evidence ' " of a fact, is enough evidence thereon to go to a jury, but the other " side is not precluded from proving other facts to controvert it."

It was argued in the above case that " sufficient evidence " means " *prima facie* evidence " and very likely as a result of that argument, it is said in Stroud's dictionary that *prima facie* evidence is probably synonymous with " sufficient evidence."

In Wharton's Law Lexicon *prima facie* evidence seems to be defined as " that which not being inconsistent with the falsity of the hypothesis, " nevertheless raises such a degree of probability in its favour that it " must prevail, if it be credited by the jury, unless it be rebutted or the " contrary proved."

I must say I have met with clearer definitions than this, but from it I should be inclined to think that unless the evidence is credited by the jury it cannot be considered as *prima facie* evidence. And as " sufficient evidence " is synonymous with " *prima facie* evidence " it, therefore, cannot be taken as " sufficient evidence."

These definitions appear to me to demonstrate that " sufficient evidence " must be evidence which is credited by the jury. And if it is not credited by the jury then it is not evidence at all.

If the Judges of the Assize Court put no reliance on the credibility of the witnesses for the prosecution, and there is no other evidence but this before them, then, I think, they must direct themselves as jurors to the position of the case at the close of the prosecution. That position being, that there is no evidence before them which raises a presumption and calls for an answer from the accused. If the law does not permit them to do this, then they must perform a sort of mental miracle and obliterate from their minds the impression of

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incredibility and the worthlessness of the testimony given by the witnesses.

I do not think that Clause 143 asks them to do this once they have formed a definite and considered opinion, and I would say that the case of *Rex v. Stoddart*, Vol. II C.A.R. is an authority for this opinion; where it is said by the Lord Chief Justice: " The facts or circumstances " may be of so little weight, that the jury ought to be told that they " raise no presumption which calls for an answer from the defendant."

From what Mr. Pavlides, Crown Counsel, says, I gather there is no reported case on this point in Cyprus, and that is not to be wondered at really, as it could only arise on an appeal from an acquittal, and appeals from acquittal are rare. But although there is no reported decision it is within Crown Counsel's memory that the same point was raised before Sir Charles Belcher, formerly Chief Justice of Cyprus, and a submission made that there was no credible evidence to go to the jury and so accused should be acquitted. The learned Chief Justice, however, refused to act on the submission and gave it as his opinion that the Court could not at that stage consider the question of the credibility of the witnesses.

Now, I have the greatest respect for any opinion given by Sir Charles Belcher, as, in my opinion, he was a Judge of quite outstanding ability. But, I think, it has to be borne in mind that the point was probably not fully argued before him, and was not raised in the form of a case stated as here. It may well be, that the learned Chief Justice in that case had not definitely made up his mind at the close of the prosecution that the witnesses were not to be believed, and I would say that in nearly every criminal case the Court has not definitely decided on the credibility of the witnesses for the Crown at the close of the case for the prosecution, therefore, the accused must be put on his defence.

It is a different position, however, when the Judges of the Court have definitely come to the conclusion at the close of the case for the prosecution that the evidence of the witnesses for the prosecution cannot be relied upon. If they are positive in their own minds that the evidence of the prosecution witnesses could not support a conviction then, if the accused is called upon for his defence, the Judges must fully realize that in truth he is not being called on to defend himself, but, to supply defects in the evidence for the prosecution.

I imagine it does not often happen that the Assize Court definitely decides as to the incredibility of the witnesses for the Crown at the close of the prosecution case. But when it does so happen, and the Judges are absolutely convinced, it seems to me it would be unfair to put the accused on his defence in such circumstances.

It is unfortunate that we have not a decision in a criminal case on this point before us; and though Mr. Pavlides has cited some decisions on the civil side and asked us to apply them by analogy to this case, I think, it is impossible to do so, as they are so very different. One reason often given by the Court of Appeal in England, why an application by defendant to dismiss the case after plaintiff's evidence is heard, should be deprecated and discouraged, is that, it is liable to involve the defendant in heavy costs in case of appeal, in the event of the defence being ordered to be heard. And I think the most of the Judges take the view that it is better to go on with the hearing of the whole case except in a very plain and unarguable one. And if there should be an appeal then it will be from the final decision of the Court. The answer then to the first question is that when a decision is being come to as whether or not the evidence is insufficient or not, the credibility and demeanour of the witnesses may be considered.

And as to the second question, Clause 144, the wording thereof is not substantially different from the words in Clause 143.

In the course of his argument it is asked by Mr. Pavlides if it is open to the trial Court when the accused is defended, and the Crown prosecutor present, to acquit the accused at the close of the case for the prosecution, without a submission by defence and without giving the prosecution an opportunity of being heard.

I would say that the reply to that is contained in the answer already given to the first question. But so far as my experience goes, the usual practice in circumstances such as these, is for the Court to intimate to the defence that a submission on the evidence would not be inopportune, and then to hear the Crown in reply.

GRIFFITH WILLIAMS, J.: Certain questions of law arising out of the trial of the above case have been referred to this Court by the Assize Court of Nicosia under the provisions of section 24 of the Courts of Justice Law, 1935. These questions arise out of the interpretation to be given to clauses 143 and 144 of the Cyprus Courts of Justice Order in Council, 1927; and it is the meaning of certain terms in those Clauses that we are asked to interpret.

Counsel for the Crown has suggested before us that these Clauses are badly drafted and seem to say more than they mean; that Clause 143 when it says: " If the evidence given in support of the charge shall, " in the opinion of the Court, be insufficient to support a conviction of " the accused for an offence the accused shall be acquitted " means no more than that if the evidence, assuming that it is believed, would not be sufficient to establish a *prima facie* case against him, then only can

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the Court act under this Clause. Indeed he went further and suggested that this Clause could only be acted upon in the absence of any counsel for the prosecution; but this question has not been referred to us for decision.

Counsel for the Crown therefore wishes to limit the power of the Assize Court under this clause—though consisting as it does, of three Judges, who are Judges of fact as well as law—to the power possessed by a Judge of Assize in England, who cannot, because he disbelieves the prosecution witnesses, withdraw the case from the jury because it is the function of jury and not judge to decide as to the credibility of witnesses. All the judge can do is to help them, as far as he is able, to come to a correct appreciation of the evidence.

The Judge when he considers that the evidence for the prosecution is insufficient, if believed, to support a conviction may withdraw the case from the jury—*R. v. Leach*, 1909, 2. C.A.R., 72 C.C.A. He may do this whether or not a previous submission that there is no case to answer is made by the accused or his counsel—*R. v. George*, 1908, 25 T.L.R., C.A.R., 168 C.C.A. He is not, however, bound to do so if no submission is made, and if the case goes on and the accused is convicted on evidence adduced on his behalf, the conviction will not be set aside on the grounds that such evidence should never have been heard—*R. v. Pearson* (No. 1) 1908, 1 C.A.R., 77 C.C.A.—*R. v. Fraser* (1911), 7 C.A. Cas. 99 C.C.A., *R. v. Power* (1919), 1 K.B. 572.

Now where the Judge does not withdraw the case from the jury but puts the accused on his defence, the jury, who are the sole arbiters of fact may at any time after the case for the prosecution is closed, decide that they wish to hear no further evidence, stop the case and acquit the accused.

In this Colony, where there are no juries, the Court has to perform the functions of both judge and jury; and it is necessary to keep this fact in mind when considering the meaning to be given to the wording of Clauses 143 and 144 of the Courts of Justice Order that have been referred to us. That is to say, in the absence of any clearly limiting words the powers conferred by those two Clauses must be given their widest meaning, so as to be applicable to a Court exercising the double functions of judge and jury.

Now to consider Clause 143 and firstly the point raised by Counsel for the Crown, but not specifically referred to us. It is clear that no distinction is made between the powers given the Court under this Clause whether there is an advocate for the prosecution or not. The fact that provision is made for the Court in the absence of an advocate

for the prosecution to call the prosecution witnesses, does not, to my mind, affect the powers given to the Court later in the Clause to acquit the accused, if the evidence is insufficient to support his conviction. If there were no full stop after the word " direct " in line 5, and if it were followed by a small instead of a capital letter, then there might be some substance in the argument.

Now to consider the first point submitted to us, namely, that the words " If the evidence given in support of the charge shall in the " opinion of the Court be insufficient to support the conviction of the " accused for an offence, etc." meant " If the evidence were insufficient " in law," and that it did not permit the Court to consider at that stage such factors as the credibility of the witnesses and the value and weight to be attached to their evidence.

I cannot see any sound reason for reading into this Clause words limiting the power of the Court, which were omitted by those who drafted it. It would have been so easy, if this interpretation had been intended, to have inserted some words such as " if believed " between the words " insufficient " and " to support " in that Clause. Nor since the Court performs the functions of a jury in deciding what evidence is to be believed, is there any reason for it to draw a distinction between the quality of sufficiency of that evidence—*i.e.*, decide whether it is evidence sufficient in law even though it may be quite unbelievable in fact—and should not allow itself to act on its conception of the case as it stands at any period after the close of the case for the prosecution.

If the Court is to have the powers that a jury has in England—and I consider that the legislature must have intended to incorporate into the Clause this power—then it can, nay must, on being satisfied that there is insufficient evidence to support a conviction—even because *qua* jury it has disbelieved witnesses—stop the case at the close of the prosecution and acquit the accused. In England where the Judge may only withdraw the case from the jury on the grounds that the evidence adduced for the prosecution even if believed is insufficient to ground a conviction, this power is limited; as it is for the jury and not the Judge to decide as to the truthfulness of witnesses. In this country where there is no jury, there could be no object in so limiting the Court's powers.

Clause 144 clearly is intended to provide the procedure whereby the accused or his advocate, where he considers that the Court should have stopped the case under Clause 143, but may not have done so on account of not having fully considered the bearing or significance of certain parts of the evidence, may submit to the Court that there is

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no case for the accused to answer. At this time the advocate for the accused may not only address himself to the question of the insufficiency of the evidence if believed, but may address himself to the Court *qua* jury. There is nothing in the Clauses to limit the accused and his advocate in this respect; and clearly if the Court has the power to stop the case after considering the evidence *qua* jury under Clause 143, the advocate for the defence need not confine himself in his submissions to the insufficiency of the evidence if believed.

With regard to the second question submitted to us, namely, whether the phrase " Not sufficient to justify a conviction " in Clause 144 bears a meaning in any way substantially different from the phrase " Insuf- " ficient to support the conviction " in clause 143; the only difference seems to be that the word " justify " is substituted in Clause 144 for the word " support " which occurs in Clause 143. The two words are generally used interchangeably. It would seem that the word " justify " is made use of in Clause 144 as an alternative to " support " which word actually occurs in the same line and sentence.

From the definitions of " justify " and " support " given in Webster's Dictionary it would seem that they frequently mean the same thing.

Under " justify," after giving other meanings which do not concern us, under head 2 he defines the word as follows: " To prove or show " to be just, to vindicate, to maintain or defend as conformable to " law, right, justice, propriety or duty; to afford a justification of, or " adequate grounds for, to warrant; as, the benefit justifies the cost."

As synonyms of the word are given—vindicate, defend, maintain, sanction, authorize, support. Then later: " To justify is to vindicate " or show sufficient grounds for."

" Support " is given the following besides other meanings. Under head 7: To verify, substantiate, as to support one's charge. And under head 8: To vindicate, maintain, defend successfully; as to be able to support one's cause.

As will be seen both words can mean to vindicate and to maintain, and under synonyms for " justify " is given " support."

It is clear that the two words may mean the same thing; and I am of opinion that in Clauses 143 and 144 these words are used synonymously.

The second question submitted to us must, therefore, be answered in the negative.