[HALLINAN, C. J. and ZEKIA, J.]
(March 27, 1956)

GEORGHIOS CHRISTOFOROU AND OTHERS of Vouni, *Appellants*,

v.

THE POLICE *Respondents*.

(Criminal Appeal No. 2040)

Criminal Law—Identification—Chain of evidence incomplete —Unsworn statement by accused—Attack on prosecution witnesses—Unsworn statement not "evidence" within Cap. 15 — Failure of accused to give evidence — Prosecution precluded from comment.

Following upon a riot in a village, the villagers were collected in a "cage" by security forces. Members of these forces identified participators in the riot. Each man so identified was asked his name by a sergeant who noted in a book the name given in reply. At the trial of 28 of these villagers for riot the sergeant stated that he had in his book (*inter alios*) the names of three villagers thus elicited as a result of identification by two members of the security forces, H. and E. These 3 names were in fact the names of three of the accused (3rd, 7th and 8th appellants). But at the trial neither the sergeant nor H. and E. were able to identify these 3 accused apart from the correspondence between their name and the names in the sergeant's note book.

Another accused (the 11th appellant) in the course of an unsworn statement alleged that certain unnamed members of the security forces had beaten a woman—the Court stopped him making these allegations but said he might proceed with this statement on other matters. The evidence against this accused was very strong. He was defended by counsel.

During his address at the conclusion of the evidence, counsel for the Crown commented on the fact that the accused had not given evidence on oath. The English Criminal Evidence Act, 1898, section 1 (b), which is in force in Cyprus by virtue of the Evidence Law (Cap. 15), provides that the failure of any accused person to give evidence shall not be made the subject of any comment by the prosecution. For the Crown it was contended that an unsworn statement was evidence and the Crown might comment on the fact that it was unsworn.

All appellants were convicted of riot.

Upon appeal,

Held: (1) As regards the identification of 3rd, 7th and 8th appellants, the chain of evidence was incomplete. H. and E. had identified certain villagers and these villagers had given the names of the three appellants as being their names. These names are not admissions by the appellants but merely hearsay spoken by those villagers.

(2) An accused person when making an unsworn statement must be permitted to say whatever he wishes to say provided it is relevant to his defence. Even if what he says is an attack upon the prosecution witnesses the 11th appellant should not have been stopped.

(3) An unsworn statement is not "evidence" within the meaning of that word in the English Criminal Evidence Act, 1898, section 1 (b) which is in force in Cyprus by virtue of the Evidence Law (Cap. 15). The prosecution should not have commented on the accused's failure to give evidence on oath.

(4) The irregularities (2) and (3) above did not in the circumstances of the case amount to a miscarriage of justice.

Appeal by accused from the judgment of the Special Court of Limassol (Case No. 14/55).

Chr. Demetriades and *A. Mavromatis* for the appellants.

R. Gray, Crown Counsel, for the respondents.

The judgment of the Court was delivered by:

HALLINAN, C. J.: This case arose out of a riot in the village of Vouni on the 4th of November last. A flag had been hoisted on the elementary school building which is Government property and when the security forces moved into the village to take down the flag they were assaulted by a crowd of villagers. Later these villagers were gathered to a certain spot (referred to as a "cage") for screening by the security forces. Each of the villagers attending at the "cage" was brought before a line of Marine Commandos and when one of the commandos identified a villager as a rioter the villager was asked his name by a police sergeant and when the name was given the sergeant wrote it down in a note-book.

Twenty-eight of the villagers were put on trial for riot and out of those who were convicted 11 have appealed. We may say at once that there are only three points on this appeal which it is necessary to discuss. The first point is as to whether there was any or sufficient evidence to identify the 3rd, 7th and 8th appellants as among the rioters; secondly, whether due to an irregularity in the trial the 11th appellant was precluded or prejudiced when making his defence; and, thirdly, whether it was incorrect for the prosecuting counsel to refer in his closing address to the fact that the appellants had made statements from the dock and had not given evidence on oath.

Two of the Commandos, Hayter and Edison, had picked out certain villagers in the "cage" as being among the rioters. Police Sergeant Constantinides gave evidence that among the villagers picked out by Sgt. Hayter one of them on interrogation by the Sergeant had given his name as Nicos Christodoulou; and among the villagers

picked out by Edison one had given his name as Michalakis Ioannou and another as Michalis Christou Sotiri. It is clear from the record that Nicos Christodoulou is the name of the third appellant; Michalakis Ioannou, is the name of the 7th appellant; and Michalakis Christou Sotiri is the name of the 8th appellant. At the trial neither Hayter, Edison or the police sergeant were able to point to the 3rd, 7th and 8th appellants and say that they were the men whom the commandos had identified in the "cage" and whose name had been recorded by the sergeant. The learned trial Judge considered that this was sufficient evidence to identify these three appellants and that they had not rebutted this evidence by a statement made from the dock that they were not identified by security forces while in the "cage".

There are of course numerous methods of identification. The most common are the following: First, direct identification when a witness positively identifies a man in the dock or an object produced to him in Court. Secondly, at a time previous to the trial the witness may identify an object which he connects with the crime and he does this in the presence of a third person, usually a police officer, who marks or labels the object. At the trial the witness may not be able to say that the object he identified to the police officer is identical with the object produced in Court but the chain of evidence is completed by the police officer who marked or labelled the exhibit and the police officer is able to say that the object in Court was the object identified to him by the witness. In our view the mode of identification of the 3rd, 7th and 8th appellants is analogous to the second mode of identification, namely, the identification of an object. Edison and Hayter identified three villagers; but the sergeant instead of taking steps to identify them so that he could swear at the trial that the three villagers picked out by the commandos were the 3rd, 7th and 8th appellants standing in the dock, could only depose at the trial that the three villagers picked out by Hayter and Edison had given names which corresponded with the names of the 3rd, 7th and 8th appellants. The sergeant had no description, mark or other means of identification whereby he could complete the chain of identification; he could only rely on names which came out of the mouths of certain villagers in the "cage". We do not consider that in these circumstances it can be inferred that the names of the 3rd, 7th and 8th appellants, given by certain villagers in the "cage", were given by the 3rd, 7th and 8th appellants. Since then these names are not admissions by the appellants they are technically nothing more than words spoken by three villagers and therefore hearsay.

We think that the ruling of the trial Judge on this point of evidence was wrong. It is probable that this error was made because the mode of identification of the

3rd, 7th and 8th appellants resembled (except in one essential particular) the evidence usually admitted as to identification parades. In the case of other accused at this trial where a commando had picked out a villager in the "cage" who had given his name to the sergeant but the commando was not available at the trial to give evidence, the trial Judge held that the evidence of the sergeant alone was insufficient. This of course is correct for evidence of an identification parade is only relevant to corroborate the evidence at the trial of the witness who identifies the accused at the parade: It serves to rebut suggestions by the defence that the witness had made a mistake as to the identity of the accused owing to the lapse of time between the date of the offence and the date of trial, or the suggestion that the evidence of the witness is an afterthought or fabricated. But in every case the identification of the accused must be established by evidence at the trial and evidence that a witness picked out an accused at an identification parade can never make up for the failure of the Crown witnesses to establish the identity of the offender at the trial.

We are therefore of opinion that the evidence that the 3rd, 7th and 8th appellants were picked out at an identification parade is inadmissible in the absence of evidence at the trial identifying the appellants. But even if it were admissible it would not in the present case be sufficient. Apparently Hayter and Edison at the trial were unable to give any physical description of the appellants from any recollection they had at the time they picked out certain villagers at the "cage". Moreover they were unable to say at what stage of the riot or at what place each of the three appellants was when seen rioting. In the absence of at least some of such particulars it is well nigh impossible for their evidence to be tested by cross-examination. Since the 3rd, 7th and 8th appellants have not been identified as among the rioters at Vouni their appeal must be allowed.

We now turn to the ground of appeal upon which the 11th appellant relies. This appellant in the course of an unsworn statement from the dock said, "On my way home I saw 4-5 commandos beating a woman. I shouted to them but they did not understand my language". At that point he was stopped by the Court who said that the appellant could not be permitted to make an attack on unnamed commandos in a statement from the dock and that he either must withdraw this statement or must take the oath and give evidence upon which he might be cross-examined. Apparently his counsel advised him to withdraw his statement and upon his refusal to do so the Court addressed counsel as follows: "I am much obliged for your efforts. I will ask him to proceed but I will not permit a statement to be made of the kind he is just making concerning the criminal conduct of four to five

persons referring to the commandos". The appellant then said, "Since the Court does not allow me to say what happened I will stop here".

In our view an accused person even when making an unsworn statement must be permitted to say whatever he wishes to say provided it is relevant to his defence, even if what he says is an attack upon the prosecution witnesses or the forces of the Crown (*R. v. Dunn and another*, 17 Cr. App. R. 12). The remarks of the appellant to which the trial Judge objected appear to us to be relevant to his defence although they may well have been untrue, and the Court should not have stopped him when making these remarks. However, the remarks were made and not withdrawn and when the trial Judge invited the appellant to proceed he chose to adopt the attitude that since the Court stopped him in making certain allegations he would say nothing further. Apart from his allegations against the commandos the rest of his statement was excluded as a result of his own decision made after receiving the advice of his counsel. Now the evidence against this appellant was overwhelming. Lieut. Waters saw him throw a stone which hit the lieutenant on the leg. When that officer was arresting him, the appellant struck him with a rod. This evidence was corroborated by Sgt. Hayter and Marines Ellis, Smith, Welsh, Edison and Johnson. Now it is difficult to believe that the appellant by making unsworn statement could have rebutted this overwhelming evidence. When we consider then that the appellant was not stopped from making a statement but only certain allegations in that statement; secondly, that he was merely relying on a statement not on oath to rebut overwhelming evidence given on oath by the prosecution; and, lastly, that he was defended and advised by counsel who had an opportunity of addressing the Court on his client's behalf, we do not consider that the irregularity amounts to a substantial miscarriage of justice.

The last point to be considered on this appeal is whether, when accused persons make unsworn statements, the prosecution may comment on the accused's failure to give evidence on oath. The Criminal Evidence Act 1898 is in force in Cyprus by virtue of our Evidence Law (Cap. 15), and section 1 (b) provides that: "The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution."

Counsel for the respondent has submitted that when an accused person makes an unsworn statement he has given evidence and the prosecuting counsel can comment on the fact that the accused has not given evidence on oath. We consider that the word "evidence" in the section means evidence on oath as distinct from the

statement not on oath mentioned in para. (h) of the same section. In our view the prosecution is entitled to address the Court on such a statement, but should not comment on the failure of the accused to give evidence on oath as was done in this case.

However, it is quite clear from the remarks made by the trial judge when calling on the accused to elect what they would do at the close of the prosecution's case that his attention was directed to the relative weight to be attached to the evidence on oath on the one hand and an unsworn statement on the other. We do not consider that the comment of prosecuting counsel on this point materially influenced the trial Judge or amounted to a substantial miscarriage of justice.

[HALLINAN, C. J. and ZANNETIDES, J.]
(April 7, 1956)

MICHAEL TSIVITANIDES of Nicosia. *Appellant,*

v.

MARY MICHAEL TSIVITANIDES of Nicosia, *Respondent.*

(Matrimonial Petition No. 11/54)

Matrimonial cause—Nullity—Membership of Greek Orthodox Church—Marriage Law (Cap. 116) section 36—Right to secede from Greek Orthodox Church.

The petitioner, born a Roman Catholic, was received into the Greek Orthodox Church the month before her marriage. The marriage was dissolved in 1946 and in 1951 the petitioner was readmitted into the Roman Catholic Church. Later that year the parties were re-married under the Marriage Law (Cap. 116) in 1954. Both the petitioner in her petition and the respondent in his answer sued for divorce. The respondent also in these proceedings alleged that the civil marriage under Cap. 116 was a nullity under section 36 of Cap. 116 as at the date of the marriage the parties were both members of the Greek Orthodox Church.

It was argued for the respondent that the petitioner could only cease to be a member of the Greek Orthodox Church if excommunicated.

The point as to nullity was argued as a preliminary issue. The trial Judge held that once the Court is satisfied that a party genuinely professed to be a member of a particular religion not only in words but in practice by attending a particular church for instance then that person is a member of that church; and held that the petitioner at the date of the civil marriage had left the Greek Orthodox Church.

Upon appeal,

Held: Any individual member of a Church is free to secede from his membership of that Church subject to the