1957
Jan. 28,
Feb. 14

REGINA

v.

ANDREAS PHAEDONOS AND OTHERS.

(*Criminal Appeal No.* 2074).

Evidence in criminal cases—Statement by person charged with offence—Formal charge—Caution—Omission of some of the words of the caution—Confessions by accused in custody for some time—Several co-accused—Weight of such evidence—Judges' Rules in England, Rules 5 and 8—Criminal Procedure Law, Cap. 14, *section* 8.

The first two appellants were arrested on the day of the theft of a sten gun from a sergeants' mess, and the third appellant was detained on the following day. All three appellants, who were very young men, had been working at the mess. The appellants remained in custody for some 12 days before they were formally charged. In answer to the formal charge the first appellant said : " I have stolen the gun. I admit "; the second appellant said : " I took the gun from Andreas Phaedonos (the first appellant) and hid it " ; and the third appellant said : " I did not carry a firearm, neither did I touch any. I simply told Andreas Phaedonos to take it and Andreas took it ".

It was common ground that all three appellants, because of their employment, had an opportunity of being parties to the offence ; and the second appellant, apart from his statement in answer to the formal charge, led the police to the spot where they recovered the gun. The case against the other two appellants depended, apart from their employment, upon their answers to the formal charge. Two previous statements that they had made had been ruled as inadmissible.

Before the three appellants were formally charged the police officer administering the caution to them omitted the words " will be taken down in writing", and it was submitted on behalf of the appellants that, since sub-section (7) of section 8 (as amended) of the Criminal Procedure Law, Cap. 14, provides that no statement made under that section shall be received in evidence unless the provisions of the section have been complied with, the answers of the appellants to the formal charge were inadmissible.

Held : (1) that the scope and object of section 8 of the Criminal Procedure Law, Cap. 14, was to enact as a matter of law what in England had long been a matter of practice under the Judges' Rules ; and that the contents of the Judges' Rules were not intended to be reduced to a narrow and rigid verbal formula.

Ezekias Papaioannou and others v. Superintendent of Prisons (1956) 21 C.L.R. 134 referred to.

(2) That the provisions of section 8 of the Criminal Procedure Law, Cap. 14, were directive and not imperative, and failure to comply with them did not invalidate a statement.

(3) That the circumstances in which the first appellant's previous statements were made and other circumstances of his detention prior to the date of his formal charge, greatly reduced the weight of his answer to the formal charge. A conviction based merely on the fact that this appellant had the opportunity to commit the offence and on this kind of confession, could not be regarded as satisfactory; that the second appellant was properly convicted; and that it would be unsafe to convict the third appellant.

Houssein Kizil v. *R.* (1953) 19 C.L.R. 162 referred to.

Convictions of the first and third appellants quashed.

Appeal of the second appellant dismissed.

Cases referred to:

(1) *Ezekias Papaioannou and others* v. *Superintendent of Prisons* (1956) 21 C.L.R. 134.

(2) *Houssein Kizil* v. *R.* (1953) 19 C.L.R. 162.

Appeals against conviction.

The appellants, Andreas Phaedonos, Andreas Evripidou Neocleous and Pericles Solomou Tanou, were convicted by the Special Court sitting in Nicosia (Case No. 1840/56) on the 21st November, 1956, of carrying a firearm and a magazine containing 20 rounds of ammunition without lawful authority, contrary to Regulations 52 (c) and 72 of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 12) 1956, and were sentenced by Shaw J. to 5 years' imprisonment each.

Chrysses Demetriades for the first and second appellants.

A. Anastassiades for the third appellant.

H. Gosling for the Crown.

The judgment of the Court was delivered by:

HALLINAN, C.J.: The three appellants are very young men. The first and second are aged 17 and the third is 16. The first and second appellants were working as kitchen boys in the Sergeants' mess at Episkopi and the third appellant as waiter. On the 5th of August, 1956, Sgt. Stretch left his gun for about half an hour in a store room by the kitchen and it was stolen. The first appellant was taken into custody at the Episkopi Police Station at about 9.30 on the same evening and interrogated by Sgt. Floyd. The second appellant was then arrested and on being interrogated said: "I have no idea". Then a Police Constable called Aziz said to him: "The first accused has told me he gave you the gun". This of course was virtually an invitation to the second accused to reply.

The second accused then took the Police to a football ground and there showed them where he had hidden the gun stolen from Sgt. Stretch and the gun was recovered. Both the first and second appellants were then taken to the Limassol Police Station and there, some time after 1 a.m. on the morning of the 6th of August, a statement from the first accused was taken by P.C. Aziz. The third appellant was detained as from the 6th of August to the evening of the 9th of August; whilst still in custody he was taken to Episkopi Police Station from Limassol and was interrogated for at least three quarters of an hour by Sgt. Floyd. During this interrogation Sgt. Floyd administered what he appeared to think was a caution by saying: "Keep your mouth shut; you have no need to say anything further". The third appellant then made some further statement. He was then taken back to Limassol and on the following morning at 9.30 having been told by Sgt. Floyd that the first and second appellants had implicated him, P.C. Behitch took a statement from the third appellant. The three appellants remained in custody and on the 17th of August they were formally charged. The first appellant had seen his advocate Mr. Vassiliades a few days before he was charged. In answer to the formal charge the first appellant said: "I have stolen the gun. I admit"; the second appellant said: "I took the gun from Andreas Phaedonos (the first appellant) and hid it"; and the third appellant said: "I did not carry a firearm, neither did I touch any. I simply told Andreas Phaedonos to take it and Andreas took it".

The learned trial Judge ruled that all statements by the appellants to the Police were inadmissible except those made in answer to the formal charge. Those made by the first and second appellants and that made by the third appellant when at Episkopi Police Station on the 9th he ruled inadmissible because the provisions of section 8 of the Criminal Procedure Law had not been complied with. The appellants being in custody should not have been questioned except for the purpose of removing an ambiguity. The statement made by the third appellant at Limassol on the 10th of August the trial Judge ruled to be inadmissible because rule 8 of the Judges' Rules had not been complied with. Sgt. Floyd had told the third appellant that the first and second appellants were implicating him. The third appellant should have been furnished by the Police with a copy of the statement made by the first and second appellants and nothing should have been said or done by the Police to invite a reply.

The defence sought to establish that all statements, including those in answer to the formal charge, had been made under duress; the trial Judge rejected this defence and held that the answers made by the appellants to the

formal charge were admissible. He considered that all the appellants, because of their employment, had an opportunity of committing the offence charged and that, as against the second appellant, there was the fact of the gun being recovered in consequence of the statement made by him and there was the admission of the appellants made in answer to the formal charge. On these grounds the Court convicted all three appellants of carrying arms and ammunition contrary to Regulation 52 (*c*) and 72 of the Emergency Powers (Public Safety and Order) Regulations, 1955.

The first ground of appeal argued was a point of law. Section 8 (4) of the Criminal Procedure Law, Cap. 14, provides that before a person is formally charged the following caution shall be administered: "Do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence". The Police Officer administering the caution to the appellants omitted the words "will be taken down in writing" and it is submitted that, since sub-section (7) of section 8 provides that no statement made under this section shall be received in evidence unless the provisions of the section have been complied with, the answers of the appellants to the formal charge were inadmissible. It was urged on behalf of the appellants that any departure from the wording of the caution contained in sub-section (4) was fatal because the provisions of the statute are imperative and not directive.

We are unable to accept this argument. A similar point was argued in a "*habeas corpus*" application to the Supreme Court (Application Nos. 4, 5, 6 and 7/1956). * One of the questions arising on that application was whether certain provisions in Regulation 6 of the Emergency Powers (Public Safety and Order) Regulations, 1955, were imperative or directive. In holding they were directive only, both at first instance and on appeal the Supreme Court cited with approval the passage from Maxwell, 10th Edition, at p. 176, which states that the fundamental rule in determining whether an enactment is imperative or directive is to consider the scope and object of the enactment. Now, the scope and object of section 8 is to enact as a matter of law what in England has long been a matter of practice under the Judges' Rules which are set out in Archbold, 33rd Edition, at p. 414. The caution set out in section 8 (4) reproduces verbatim that contained in Rule 5 of the Judges' Rules. The legislative authority clearly intended to make a matter of law what in England is a matter of practice; we cannot agree that the contents of the Judges' Rules were intended to be reduced to a

* See *Ezekias Papaioannou and others* v. *Superintendent of Prisons* (1956) 21 C.L.R. 134.

narrow and rigid verbal formula. In the present case, although the words "will be taken down in writing" were omitted, the statements of the appellants in answer to the formal charge were in fact taken down in writing, read over to them and signed by them as correct. It would not be in the interest even of accused persons, that the provisions of section 8 should be considered as a complete and rigid code to control the practice of the Courts in admitting statements by accused persons. For example, Rule 8 of the Judges' Rules is not included in section 8 and yet the trial Judge in the present case, quite rightly, relied on this very Rule to exclude the statement of the third appellant made at Limassol on the 10th of August, 1956; for the Police had not, as they should have done, presented the third appellant with a copy of statements made by his co-accused and should have done nothing to invite a reply. The appeals on the point of law, therefore, fail.

During the hearing of the appeal we have thought it proper to amend the notice of appeal by allowing leave to appeal on fact; that is to say, on the ground that the convictions should be set aside because they cannot be supported having regard to the evidence. This Court in the case of *Kizil* v. *The Queen*, 19 C.L.R. 162, has stated that the greatest caution should be exercised in receiving and weighing the statements of accused persons where there are several co-accused and they have been in custody for some time before their statements are made. In the present case the weight of the evidence differs as regards each of the appellants. It is common ground that all three, because of their employment, had an opportunity of being parties to the offence. The strongest case is that against the second accused for not only is there his statement in answer to the formal charge that he took the sten gun from Andreas and hid it, but the fact that he led the Police to the spot where they recovered the gun. The case against the other two appellants depends, apart from their employment, upon their answers to the formal charge. Both accused had been in custody for some 12 days before they had made the statements, and the two previous statements that they had made had been ruled as inadmissible. The statement made by the first appellant is categorical: "I fave stolen the sten gun. I admit". But on the other hand a man should not be convicted on an admission which was unfairly induced. When Sgt. Floyd interrogated the first appellant at Episkopi on the night of the 5th of August he says he told the accused—"If you tell me something I will keep it quiet". Then apparently the first appellant told him that he had given the gun to Andreas. This remark was repeated over and over again throughout the trial, for Aziz had repeated this statement of the first appellant to the second appellant. These early

statements by the first appellant were ruled as inadmissible. Once he has been induced to confess, he may have felt there was no point in denying anything in answer to the formal charge. When ruling that a statement of the second appellant was inadmissible at page 56 of the record the learned trial Judge said : " It may well be that if he had been cautioned in the proper manner before he began to make his voluntary statement he might not have made it at all. When once he began to incriminate himself he may have felt that it was too late to draw back. In the circumstances I find that the statement must all be excluded ". Of course the reason in that ruling does not apply with equal force to the answer of the 1st appellant to the formal charge which we are now considering ; the Judge's ruling referred to a continuous statement, whereas there was a gap of some 11 days between the 1st appellant's statement on the 5th and 6th of August and the formal charge on the 17th. We do not say that answer to the formal charge was inadmissible ; but the circumstances in which his previous statements were made and other circumstances of his detention prior to the 17th, greatly reduce the weight of this piece of evidence. A conviction based merely on the fact that this appellant had the opportunity to commit the offence and on this kind of confession, cannot be regarded as satisfactory.

The statement of the third appellant is far less categorical than that of the first appellant : " I did not carry a firearm, neither did I touch any. I simply told Andreas Phaedonos to take it and Andreas took it " .This appellant is 16 years old and is younger than the other two. He had been told that the other two had implicated him. He may well have thought that he ought to say something which would explain his relationship with the other two appellants without amounting to an admission of guilt. It is unlikely that the younger boy should counsel or procure the elder one to commit the offence. In our view it is unsafe to convict on such evidence.

Convictions and sentences of the first and third appellants are, therefore, set aside. The appeal of the second appellant is dismissed.

Convictions of first and third appellants quashed.
Appeal of second appellant dismissed