ANDREAS KLEANTHOUS HAJI GEORGHIOU, *Appellant*,

v.

THE POLICE, *Respondents.*

(*Criminal Appeal No.* 2082).

Criminal Law—Meaning of "taking upon himself the disposition"—Inciting to steal—Property of Her Majesty (Theft and Possession) Law, Cap. 28, *section* 2 (1) (*b*)—*Criminal Code, Cap.* 13, *sections* 249 *and* 364 (*a*) *and* (*b*).

Criminal Procedure—Powers of Supreme Court on appeal by accused—Power to convict of offence of which accused has been acquitted—Criminal Procedure Law, Cap. 14, *section* 142 (1) (*c*).

The appellant asked a soldier to get him a pistol, and he offered £1 for a pistol which he was allowed to test in the soldier's camp. He then asked the soldier to take the pistol outside the camp.

On this evidence the appellant was convicted of the offence of inciting a soldier to take upon himself the disposition of a pistol belonging to Her Majesty, and he was acquitted of the offence of inciting him to steal the said pistol.

Held: (1) That the appellant was guilty of the offence of inciting a soldier to steal the said pistol and not guilty of the offence of inciting him to take upon himself the disposition of a pistol belonging to Her Majesty;

The Police v. *Economides and others* (1951) 20 C.L.R., Part II, page 11, referred to.

(2) that the Supreme Court had power to convict the appellant of an offence of which he had been acquitted by the trial Court;

Police v. *Savva* (1929) 14 C.L.R. 11; and *Police* v. *Moustafa Hassan Ouzoun Mehmed* (unreported) Criminal Appeal No. 2008, decided on Sept. 30, 1955, followed; *R.* v. *Melvin and another* (1953) 1 All E.R.294 distinguished.

Decision of trial Court varied accordingly.

Cases referred to:

(1) *Police* v. *Economides and others* (1951) 20 C.L.R., Part II, 11.

(2) *Police* v. *Savva* (1929) 14 C.L.R. 11.

(3) *Police* v. *Mustafa Hassan Ouzoun Mehmed* (unreported) Cr. Appeal No. 2008, decided on Sept. 30, 1955.

(4) *R.* v. *Melvin and another* (1953) 1 All E.R. 294.

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March 22, 26

ANDREAS KLEANTHOUS HAJI GEORGHIOU
v.
THE POLICE.

Appeal against conviction.

The appellant was convicted at the Special Court of Nicosia (Case No. 238/57) on the 15th February, 1957, of the offence of inciting a soldier unlawfully to take upon himself the disposition of a pistol belonging to Her Majesty, and was sentenced by Ellison, Special Justice, to eighteen months' imprisonment.

Lefkos Clerides for the appellant.

H. Gosling for the respondents.

The facts of this case sufficiently appear in the judgment of the Court which was delivered by :—

ZEKIA, J. : The accused, a young man of 22, employed as a worker in the Tunisia Military camp, had asked on the 12th December last, a certain soldier, Evans, stationed as a guardsman in the said camp, to get him a pistol. The following day the accused entered the tent within the camp with a view to obtaining a pistol. The prisoner offered £1 for a pistol produced to him which he tested but declined to take delivery of it on the spot. He asked the soldier to take it for him outside the camp. The soldier asked for £3 and insisted on handing the weapon over to him in the tent ; the prisoner did not agree to this and the transaction was dropped there and then. The prisoner on leaving the tent was arrested.

Before the trial Court the accused was charged on three counts :

(1) Inciting Evans unlawfully to take upon himself the disposition of a pistol, property of Her Majesty ;

(2) Inciting him, the said Evans, to steal a pistol ; and

(3) Inciting for the transfer of a pistol contrary to section 9 of the Firearms Law, Cap. 86.

The trial Court found the accused guilty on count 1 and not guilty on the remaining two counts.

The grounds of appeal were three :

(1) The verdict of guilty on count 1 was not supported by evidence. The words used by the accused "get me a pistol" could not amount to an incitement to witness Evans for taking upon himself the disposition of a pistol, property of Her Majesty.

(2) Appellant having never asked Evans to become the unlawful receiver of a pistol he could not be found guilty for inciting him to do so.

(3) Once appellant was acquitted on the second count, that is, inciting Evans to steal a pistol, he ought to have been acquitted also on count 1.

From the judgment of the Court it appears that the evidence of the main witness, Evans, was accepted as true and that it was amply corroborated by other witnesses. The suggestion by the defence that it was a put-up-case by prosecution's main witness was rejected by the trial Court. There was evidence for the facts which we outlined at the beginning of our judgment and which the Court believed.

The point which falls for decision in the first place is whether the evidence accepted by the trial Court can support a conviction for inciting soldier Evans unlawfully to take upon himself the disposition of a pistol belonging to Her Majesty. The phrase " to take upon himself the disposition " has been judicially interpreted by this Court in *Police* v. *Michael Nicolaou Economides and others* (1951) 20 C.L.R., part II, page 11, and in that case it has been decided that this phrase does not create an offence distinct from the offence of receiving stolen property and evidence to support the former should be the same in the latter case. There was no evidence before the trial Court that the appellant incited Evans to receive a pistol unlawfully, because as far as Evans is concerned he being a person in the military service he might come to possess a pistol not necessarily by unlawful means or as receiver. We think, therefore, that the conviction by the trial Court on this count cannot stand.

There remains, however, to see whether on the evidence accepted the prisoner did not commit an offence. In our view on the evidence accepted the appellant committed an offence under count 2, of which he has been acquitted by the trial Court. There was one possible verdict in this case and it was the one of which he has been acquitted. The learned trial Judge appeared to have been misled by the word " disposition " in count 1 by interpreting it to mean " disposal " of a firearm. Indeed if the evidence is to the effect, and there is no doubt that it is, that the prisoner tried to persuade Evans, a soldier, to secure him a pistol from a military camp this could only be carried out in one of the following ways :—

(*a*) Evans might steal a pistol within the camp and pass it to the prisoner.

(*b*) Evans might come to possess a pistol lawfully as a bailee and deliver it to the prisoner.

(*c*) He might secure the possession of a stolen pistol within the camp and give it to the appellant.

It is in evidence that Evans was not carrying a pistol and was not in the habit of doing so. We are not in a position to say whether he was authorised to carry one, if he wished to do so, but it is reasonable to infer that a military serviceman might lawfully become possessor of a pistol. But assuming Evans to have come to possess the

pistol for the purpose of delivering it to the prisoner, not feloniously or unlawfully, his parting with the possession to the prisoner would have amounted to theft. The incitement involves the commission of theft either before the delivery or by the delivery of the pistol to the prisoner. If he was lawfully in possession of this pistol in his capacity as a serviceman he was then a bailee and as such he would be committing theft within the definition of section 249 of the Cyprus Criminal Code.

This leads us to a consideration of a point of law, namely, whether this Court has got the power to convict an appellant for an offence of which he has been acquitted. The relevant section is section 142 (1) (*c*) of the Criminal Procedure Law which reads:

> " The Supreme Court may set aside the conviction and convict the appellant of any offence of which he might have been convicted by the trial Court on the evidence which has been adduced and sentence him accordingly ".

The Supreme Court in *Police* v. *Agathoclis Savva* (1929) 14 C.L.R. 11, at page 12, and in a recent unreported case *Police* v. *Mustafa Hassan Ouzoun Mehmed*, Criminal Appeal No. 2008* decided that this Court had power to convict the appellant of an offence of which he had been acquitted by the trial Court. We considered also the case of *R.* v. *Melvin and another* (1953) 1 All E.R. 294, where it was stated that under section 5 (2) of the Criminal Appeal Act, 1907, the Court of Appeal had no power to substitute a verdict of guilty of breaking and entering and larceny for that of guilty of receiving. In our view the present case is distinguishable from the *Melvin* case. Here, on the accepted facts, there could be only one verdict. In *Melvin's case* the jury by their verdict appeared to have rejected the evidence showing that the appellants in that case were the persons who broke and entered into the premises and committed the theft.

For these reasons we are of opinion that the conviction and sentence on count 1 should be set aside and a conviction on count 2 should be entered with six months' imprisonment from the date of conviction.

Conviction and sentence on count 1 *set aside. Accused convicted on count* 2 *and sentenced to six months' imprisonment.*

* Decided on Sept. 30, 1955.