1957
April 15, 25

REGINA
v.
FRIXOS
LAMBROU.

[BOURKE, C.J., ZEKIA AND ZANNETIDES JJ.]

REGINA,

*v.*

FRIXOS LAMBROU.

(*Criminal Appeal No.* 2085).

*Evidence in criminal cases—Statement by accused—Confession—Dispute as to admissibility—Right of accused to give evidence on preliminary issue—Right to call evidence on circumstances of confession.*

At the trial of the appellant the defence objected to the admissibility of a statement amounting to a confession made by the accused, on the ground that it was not voluntary.

After the prosecution had led evidence with the object of discharging the onus cast on it of proving affirmatively that the statement was voluntary, the trial Judge declined to allow the appellant and his witnesses to give evidence on the circumstances of the confession at that stage, and he ruled that there was *prima facie* evidence for the admission of the confession.

*Held :* (1) Where a dispute arises as to the admissibility of a statement by the accused, it is proper to allow the accused himself (and other witnesses) to be called as a witness on the issue of admissibility if the justice of the case makes it desirable that this should be done ;

(2) view expressed that where counsel for the defence wishes to call the accused on the issue as to admissibility it would very rarely occur that the justice of the case would render such course undesirable so as to justify a refusal of permission ; and

(3) the weight and value to be attached to the statement, if admitted, are matters for the judge or judges as the tribunal of fact ; such question arises for determination at the conclusion of the case on the evidence as a whole and is not to be approached on the footing that the statement had been properly obtained according to the rules of evidence.

*R.* v. *Cowell* (1940) 27 Cr. App. R. 191 ; *R.* v. *Murray* (1950) 34 Cr. App. R. 203 ; and Archbold 33rd edn., pp. 418—9, referred to.

*Demetriades* v. *R.* (1956) 21 C.L.R. 180 considered and disapproved.

*Conviction quashed.*

*Retrial ordered.*

**(Editor's Note :** The judicial Committee of the Privy Council dismissed the petition of the accused for special leave to appeal from that part of the judgment of the Supreme Court of Cyprus which ordered his retrial : *Lambrou* v. *The Queen* (1957), *Times*, 19th July).

Cases referred to:

(1) *Demetriades* v. *R.* (1956) 21 C.L.R. 180.
(2) *R.* v. *Cowell* (1940) 27 Cr. App. R. 191.
(3) *Karegwa* v. *R.*, 21 Law Reports, 1954, Court of Appeal for Eastern Africa.
(4) *R.* v. *Murray* (1950) 34 Cr. App. R., 203.

**Appeal against conviction.**

The appellant was convicted at the Special Court in Nicosia (Case No. 620/57) on the 22nd February, 1957, of the offence of discharging a firearm at a person, contrary to Regulation 52 (*a*) of the Emergency Powers (Public Safety and Order) Regulations, 1955 to (No. 16) 1956, and was sentenced by John J. to death.

*Chrysses Demetriades* for the appellant.

*P. R. Grey* for the Crown.

The facts of the case are fully set out in the judgment of the Court which was delivered by:

BOURKE, C.J.: The appellant, Frixos Lambrou, a youth of apparently 17 years of age, was convicted by the Special Court on the 22nd February, 1957, of the offence of discharging a firearm at a person and was sentenced to death.

The case for the prosecution rested in the main upon evidence of a statement amounting to a confession given by the appellant to the witness Sub-Inspector Ismael Hassan at 4.30 p.m. on the day of his arrest, namely, the 28th November, 1956. Objection was taken to the admissibility of the statement in evidence during the examination-in-chief of Sub-Inspector Hassan on the ground that it was not voluntary but had been induced through the application of force and threats. Mr. Demetriades for the appellant sought a full investigation at that stage and made it evident that he wished the appellant to give evidence on the issue as to whether the statement was admissible or not. He submitted that such a course would be in accordance with the usual procedure. This application was supported by learned Counsel for the Crown, who pointed out that otherwise the appellant might suffer prejudice through being forced at the close of the case for the prosecution to give evidence in his defence when he would lay himself open to cross-examination also on the general issue. The learned Judge expressed the intention of " following the English principles first and also following the rules laid down by the Supreme Court." He was there no doubt referring to the decision of this Court in *Andreas Demetriades* v. *R.* (Cr. App. No. 2067)* given by a Bench of two Judges in October, 1956. The appellant's advocate pressed for what has conveniently been called a " trial within a trial " of the particular issue

* (1956) 21 C.L.R. 180.

of admissibility at that stage and pointed out that there was a discretion and that the decision of this Court, to which we will come in a moment, was only advisory. It is clear that the learned Judge felt obliged, having regard to *Andreas Demetriades* v. *R.*,* to refuse to accede to the course desired. Mr. Grey for the prosecution then proceeded to lead evidence with the object of discharging the onus upon the prosecution of proving that the statement was voluntary and the witnesses were cross-examined with a view to sustaining the objection. Mr. Grey then intimated that he had no further evidence to put forward on this issue. Mr. Demetriades thereupon stated that at any time the Court would allow he proposed to call both the appellant and two witnesses on the question as to the admissibility of the statement. The learned Judge, however, proceeded to rule that there was *prima facie* evidence in favour of admissibility and added—" But it only stays at that until after the accused has given evidence or whatever he wishes to do in the matter and then I can decide finally ". It is quite apparent, and there is no dispute about it, that the Judge was maintaining the view that it would not be proper to allow the appellant and his witnesses to give evidence going to the particular issue at that stage. The statement was then put in and passages deemed relevant were read.

At the close of the case for the prosecution the appellant was put upon his defence in accordance with the provisions of section 72 (1) (*c*) of the Criminal Procedure Law, Cap. 14. He elected to testify on oath as a witness. He gave evidence generally in denial of guilt and also as to circumstances which, if true, or if there was any reasonable doubt as to their truth, would render the statement inadmissible. The appellant was cross-examined at length not only to test his story in general but also his account of the circumstances in which the statement came to be made and as to matter contained in the statement. Having heard the evidence of further witnesses called by the defence on the question of admissibility and without hearing defence counsel's submissions on the issue, which it appears from the record he expected to be allowed to make, the learned Judge ruled that on the view he took of the evidence the statement was admissible. He went on to say : " This statement is therefore admitted in evidence, but the weight to be attached to the evidence is a matter for the Court to decide when it has been perused. That being so, it is up to the accused to take the opportunity, if he so desires, to be asked questions on those portions of the statement which have been admitted. I, therefore, administer the same caution to him that I did when he was called upon to make his defence ". Although the evidence for the defence had closed and only the addresses of counsel remained to be

* (1956) 21 C.L.R. 180

made, section 72 (1) (*c*) was then applied for the second time. The appellant elected to speak unsworn from where he stood and said : " What I had to say I said it yesterday in Court in evidence on oath ".

We have no doubt at all that in adopting the irregular procedure he did the learned Judge was acting, as he considered, in fairness to the appellant, but unfortunately he was under a misapprehension because in fact, as the record discloses and Mr. Grey fully concedes, the appellant had already been cross-examined on matters going to the weight of the statement including matter contained in the statement itself. This misapprehension apparently continued to exist in the mind of the learned Judge when he came to judgment. It is evident from the judgment that, very rightly, he attached considerable importance to the weight that could be attached to the statement and he carefully tested it in relation to other evidence regarded as corroborative and going to establish its truth. But it is also apparent that in considering the value of the statement as a confession to the truth, the mind of the learned Judge was affected by the misunderstanding, which amounted to a misdirection, as to the extent of the cross-examination of the appellant, and he appears to some degree to have held it against the appellant that he declined to submit himself again to cross-examination when he was irregularly for the second time put upon his defence under section 72 (1) (*c*) of Cap. 14. The relevant passage from the judgment is as follows :

> "Before a ruling was given on the admissibility of the statement, exhibit 11, counsel for the defence indicated that he wished to address the Court on the admissibility of the statement and learned C.C. replied to the effect that the case was closed until a ruling was given by the Court as to its admissibility or otherwise. The Court then retired to consider the matter and later returned and ruled that those portions of the accused's statement affecting this case contained in Exhibit 11 were voluntary and therefore admissible. The weight, however, to be attached to them could only be decided after a careful consideration of the document and other evidence. The accused was again given the statutory warning and he elected to say nothing further than the evidence he had already given. Learned C.C. had refrained, quite rightly, from cross-examining the accused in the first instance on matters contained in the statement under objection and therefore was deprived from doing so now ".

It is submitted as a ground of appeal that the irregularity occasioned real prejudice and led the Court to form a view adverse to the appellant, who had submitted himself to full cross-examination on all features of the

case and who in fact was cross-examined on matters contained in the statement. It has been contended for the Crown that there was no substantial miscarriage of justice within the proviso to section 142 (1) (*b*) of Cap. 14. It was suggested that there was an error of form rather than substance, though it was conceded that this view could not be urged very forcibly. In the opinion of this Court there is substance in this ground of appeal and it is impossible to say that no substantial miscarriage of justice was occasioned.

The unsatisfactory nature of the trial was due, we think, to some confusion existing in the mind of the learned Judge as to the effect of *Andreas Demetriades* v. *R.*, * to which reference has been made. If that case is to be taken as laying it down that in all circumstances it is an improper procedure to allow an accused person to be called as a witness on the issue whether a statement was admissible or not, then it is the opinion of this Court, composed of a full Bench of three Judges, that it was wrongly decided. But we do not think that such was the result of that case, for it was recognised that there was a discretion and expressly stated that it was not desired to preclude a trial Court absolutely from hearing the evidence of the accused or his witnesses when an objection is taken to the admissibility of a confession. It is true, however, that the view was expressed that it was advisable that a trial Court on the hearing of the objection should confine itself to the issue as to whether the Crown has established a *prima facie* case for its admission. For the purpose of resolving doubts we think it desirable to reaffirm the true position. In *R.* v. *Cowell*, 27 Cr. App. Rs., 191, it was held that:—

> " Whatever the case of Baldwin (1931, 23 Cr. App. Rs.) may have decided, this Court is of opinion that in such circumstances (that is, where a dispute arises as to the admissibility of a statement by an accused) it is proper to allow the prisoner himself to be called as a witness if the justice of the case makes it desirable that this should be done ".

It has, we believe, become almost an invariable practice in England that where counsel for the defence seeks to call an accused (and other witnesses) as a witness on this issue, such course has been permitted and that submissions of both sides going to the issue are then heard. Such a " trial within a trial " has also for long been the usual practice in Cyprus, where a judge or judges constitute the tribunal of fact, and it has worked satisfactorily. It is also within the knowledge of at least one member of this Court that the same procedure has been approved and followed elsewhere in the Colonies where a judge is the ultimate

* (1956) 21 C.L.R. 180.

arbiter of fact (see, for instance, *Karegwa* v. *R.*, 21 Law Reports, 1954, Court of Appeal for Eastern Africa).

The admissibility of a statement, upon a dispute arising and being resolved as envisaged, is a question of law, though dependent on a preliminary finding of fact as to its voluntary character. The weight and value to be attached to the statement, if admitted, is also a matter in Cyprus for the judge or judges as the tribunal of fact; such question arises for determination at the conclusion of the case on the evidence as a whole and is not to be approached on the footing that the statement has been properly obtained according to the rules of evidence—*R.* v. *Murray*, 34 Cr. App. Rs., 208 : Archbold, 33rd Edition, 418—9. In profferring the advice referred to in Andreas Demetriades' case it would seem that sufficient allowance has not been made for this distinction. At any rate it is now considered that the principles to be acted upon are covered by the cases of *R.* v. *Cowell* and *R.* v. *Murray*; and it is thought that where counsel for the defence wishes to call the accused on the particular issue as to admissibility, it would very rarely occur that the justice of the case would render such course undesirable so as to justify a refusal of permission.

In the result the appeal is allowed and the conviction quashed and sentence set aside. We order a retrial of the appellant before the Special Court composed of another judge.

*Conviction quashed.*
*Retrial ordered.*