[BOURKE, C.J. and ZANNETIDES, J.]

1. ANDREAS IOANNOU of Asomatos now of Limassol
2. PANICOS MICHAEL ANTONIADES of Limassol

Appellants

v

THE POLICE

Respondents.

(Criminal Appeals Nos. 2208 and 2209 Consolidated).

1958
Nov. 10, 21,
Dec. 10

ANDREAS IOANNOU AND ANOTHER v. THE POLICE

Stealing and unlawfully possessing property of Her Majesty's—The Property of Her Majesty (Theft and Possession) Law, Cap. 28, Section 3 (1) (a) and (b)—Criminal Procedure: Consent of a Law Officer required under Section 3 (3) for the institution of prosecutions for offences against Section 3—Proof of such consent—Absence of any challenge or objection—Presumption that consent was duly given.

Witness—Accomplice—The question whether a witness is an accomplice, being one of mixed fact and law, cannot appear as a ground in an appeal on points of law only.

Criminal Procedure—Evidence by an accused against a co-accused—Admissible even if the accused incriminates the co-accused in the course of his cross-examination by the prosecution. Criminal Procedure Law, Cap. 14, Sections 72 and 74.

Observations by the Court for the guidance of those responsible for the filing of charges where consent of anybody is required for the institution of proceedings.

The appellants were charged at the Special Court of Limassol, jointly with a certain Eliades, for offences against the Property of Her Majesty (Theft and Possession) Law, Cap. 28, the appellant No. 1 and Eliades for stealing two jerry cans contrary to Section 3 (1) (a), and the appellant No. 2 for possessing the same jerry cans contrary to Section 3 (1) (b) of the said Law. Eliades was acquitted and both appellants were convicted as charged. The appellants appealed against their conviction on points of law only.

Under Section 3 (3) of the said Law proceedings for the aforementioned offences against Sect. 3 shall not be instituted except with the consent of a Law Officer. The trial was allowed to proceed without challenge or objection in that regard until after the prosecution had closed its case

and the judge was about to give his judgment, when prosecuting Counsel asked leave to produce the consent. Counsel for the defence then objected but he was overruled by the trial Judge, and the consent was then produced. It was argued on appeal on behalf of both appellants that in the circumstances the trial was a nullity on the ground that proof of such consent at so late a stage as aforesaid ought not to have been admitted and that, therefore, in the result, there was no proof of the consent of a Law Officer as required by Sect. 3 (3) of the Law. It was further argued on behalf of appellant 1 that the trial Court was wrong : (1) in holding that the main witness for the prosecution was not an accomplice; (2) in admitting in evidence certain answers, incriminating the appellant, given by the accused Eliades in the course of his cross-examination by the prosecution. In support of his last submission Counsel for the appellant relied on the authority of *R.* v. *Pouri and five others,* 14, C.L.R. 121 and on Sect. 74 of the Criminal Procedure Law, Cap. 14, (*post*).

Held : (1) Proof that the consent of a Law Officer was given before the institution of the proceedings should be laid before the Court. In view, however, of the fact that the trial was allowed to proceed without any challenge or objection in that regard until after the prosecution had closed its case, the presumption is that the consent was duly given and the proceedings properly instituted. The matter being one of procedure, any objection or challenge by Counsel for the defence after the close of the case for the prosecution should not be allowed.

Price v. *Humphries* (1958) 2 All E.R. 725. *followed.*

(2) Relying on *Price* v. *Humphries* (*supra*) the trial Judge would have been right, when the prosecution sought to produce the consent of a Law Officer at the stage it did, to intimate that such proof was not at all necessary and that the case for the prosecution having been closed without any objection or challenge as to the consent, the consent was presumed to have been given and the proceedings properly instituted.

(3) The question whether a witness is an accomplice or not, is a matter of mixed fact and law, and therefore, it cannot appear as a ground in an appeal on points of law only. Anyhow in this case, going through the record, we think that the trial Judge was right in holding that the witness was not an accomplice.

(4) The evidence of the accused Eliades incriminating the co-accused (appellant No. 1) is admissible although it was given in his cross-examination by Counsel for the prosecution. It would have been otherwise on the authority of *R.* v. *Pouri and five others,* 14, C.L.R. 121. But this case is no longer good law because its *ratio decidendi* was based on the wording of clause 144 of the Cyprus Courts of Justice Order in Council, 1927, (1) now repealed, together with all its other provisions

(1) The relevant part of Clause 144 reads:
"....After he (the accused) has been so examined the prosecuting officer or the advocate may ask him questions in the same manner as if he were a witness under cross-examination; provided that such questions shall be confined to the matter in issue and matters relevant thereto".

relating to criminal procedure, by the Criminal Procedure Law, Cap. 14. Under Sect. 72 of the Criminal Procedure Law, Cap. 14 there are no restrictions to the cross-examination of an accused in the witness box by the prosecution. (1) Moreover by Sect. 74 of the same Law (2) the right of cross- examination is given to a co-accused when an accused in the witness box incriminates him. It is obvious from that, that an accused person in the witness box can incriminate his co-accused. There is nothing in Sect. 74 of the Criminal Procedure Law, Cap. 14 inconsistent with that view. What Section 74 intended to do was to provide a rule of convenience in the examination of the accused as a witness and the co-accused can always get leave to cross-examine. When an accused person comes to the witness box, he is a witness in the case and in giving evidence he can incriminate his co-accused even in his cross-examination by the prosecution. This brings our Law into line with the English Law on the subject as stated in *R.* v. *Paul* (1920) 2 K.B., 183.

Appeals dismissed.

Cases referred to :

Price v. *Humphries* (1958) 2 All E.R. 725.

R. v. *Pouri and five others,* 14, C.L.R. 121.

R. v. *Paul* (1920) 2 K.B. 183.

Per curiam : It is the duty of the persons who are responsible for the filing of a charge and the issue of summonses or warrants where the consent of anybody is required for the institution of proceedings, to see that the consent is given, otherwise the summons or warrant will be a bad one.

Appeals on points of Law against conviction.

The appellants were convicted on the 18th October 1958 by the Special Court of Limassol (Cohen, Judge) in case No. 842/58 : appellant 1 of the offence of stealing, appellant 2 of unlawfully receiving property belonging to Her Majesty,

(1) The material parts of Sect. 72 are as follows : (1) (a)..... (b).....
(c) at the close of the case of the prosecution, if it appears to the court that a prima facie case is made out against the accused sufficiently to require him to make a defence, the Court shall call upon him for his defence and shall inform him that he may make a statement, without being sworn from the place where he then is, in which case he will not be liable to cross-examination or give evidence in the witness box, after being sworn as a witness, in which case he will be liable to cross-examination as a witness ;
(d) after the accused has made a statement or has given evidence as hereinbefore provided, he may call any witness or other evidence he has to adduce in his defence.

(2) Section 74 reads as follows: "Where, during or upon a joint trial, one of the accused gives evidence under section 72 (c) of this Law and, in so doing, incriminates one of his co-accused, such co-accused shall be entitled to cross-examine him and such cross-examination shall take place before cross-examination by the prosecution.

contrary to the Property of Her Majesty (Theft and Possession) Law, Cap. 28, Section 3 (1) (a) and (b), respectively. Appellant No. 1 was sentenced to six months' imprisonment and £15 fine, and appellant No. 2 to £20 fine. They appeal on points of law against conviction.

Chryssis Demetriades for the appellants.

N. Munir, Q.C., Solicitor-General with
J. Ballard, Crown Counsel for the respondents.

Cur. Adv. Vult.

The judgment of the Court was delivered by:

ZANNETIDES, J.: The two appellants Andreas Ioannou, appellant No. 1, and Panicos Michaelides, appellant No. 2, were charged at the Special Court of Limassol, jointly with a certain Eliades, for offences against the Property of Her Majesty (Theft and Possession) Law, Cap. 28, appellant No. 1 and Eliades for stealing two jerry cans with petrol, contrary to section 3 (1) (a), and appellant No. 2 for possessing the same jerry cans with petrol, contrary to section 3 (1) (b) of the said Law.

The said two jerry cans with petrol were stolen in the course of loading of jerry cans of petrol on to a military vehicle, of which appellant No. 1 was the driver, at No. 5 Military Petrol Supply Depot, Limassol, to be transported from there to the pumping station at Zyghi Military Camp; instead of 20 jerry cans, as was the order, there were loaded on the vehicle 22 and the surplus two were unloaded on the way by appellant No. 1 at the house of appellant No. 2 at Limassol and delivered personally to him.

Appellant No. 1 was found guilty of stealing and sentenced to 6 months' imprisonment and ordered to pay a fine of £15, and appellant No. 2 of possession and sentenced to pay £20 fine; Eliades was given the benefit of doubt and acquitted.

Both appellants gave notice of appeal and the two appeals were heard together.

The point which is common to both appeals, and indeed the only point in the appeal of appellant No. 2, is that the proceedings at the trial were a nullity because there was no proof of the consent of a Law Officer for the institution

of the proceedings as required by section 3 (3) of the above-mentioned Law, Cap. 28.

Section 3 (3) runs as follows:—

"A prosecution for an offence against this section shall not be instituted except with the consent of a Law Officer".

What happened in the case was that the trial was allowed to proceed without any objection until the time the trial judge was about to give his judgment, when the prosecution thought of producing to the Judge the consent. Mr. Demetriades for the defence objected to the production, alleging that it came too late in the day but he was overruled.

When Mr. Demetriades started arguing the point in this Court his attention was drawn to the recent case of *Price* v *Humphries* (1958) 2 All E.R. 725, which is on all fours with the present case and he abandoned and dropped the point; but it is as well if we give our decision on it for the guidance of the legal profession and particularly of those whose duties are to receive and present for filing a charge and to issue summonses or warrants, because under sections 42 and 43 of the Criminal Procedure Law, Cap. 14, it is by the filing of a charge and the issue of a summons or warrant that criminal proceedings are instituted.

Price v. *Humphries* (*supra*) was a case of certain offences against the National Insurance Act, 1946, regarding which the institution of proceedings required the consent or authority of the Minister of Pensions and National Insurance or some other persons specified in the Act under Section 53 (1), which is similar to our section 3 (3) of Cap. 28. The prosecution gave evidence as to the facts of the case and closed its case; the defence then submitted that there was no case to answer because the consent of the Minister had not been proved and, the case having been closed, evidence of the consent or authority could not be given.

The Divisional Court of the Queen's Bench Division held that this submission was wrong. Devlin, J. who gave the first judgment said this in the course of the judgment at page 727:

"The first thing to observe about s. 53 is that the authority or consent for which it provides is authority or consent that has to be given for the institution of the proceedings: 'Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Minister'. Proceedings in summary jurisdiction of this sort are instituted by the laying of an information and the issue of a summons, and, when the summons is issued, that is the institution of the proceedings. The point, therefore, at which the consent or authority must be proved is at that point before the summons is instituted, and it is the duty of the clerk to the Justices if application is made to him, as it generally is, for the laying of the information or the issue of the summons, to see that the requirements of s. 53 are complied with, otherwise the summons will be a bad one".

Further down at the same page, after referring with approval to the case of *R. v. Waller* (1910) 1 K.B. 364 in which Lord Alverstone, C.J. cited a passage from the case of *R. v. Turner* (1910) 1 K.B. 346, Devlin, J. went on as follows:

"I think *mutatis mutandis* that that reasoning applies exactly to this case. It is the duty of the clerk to the Justices, or whoever issues the summons, to see that it is not issued unless the consent or the authority is produced, and there is a presumption which, indeed, is merely a facet of the wider maxim *omnia praesumuntur rite et solenniter esse acta* that the clerk has discharged his duty in that respect. Accordingly, *prima facie*, the position was that the summons had been properly issued and there was no need for the prosecution to take any further step unless objection was taken".

Further down at page 728 —

"if the prosecution is allowed without objection to close its case, then the prosecution has done all that is necessary and the summons is presumed to be a good one and properly authorised. If the defence wants to challenge that and take objection, they should take their objection before the prosecution case is closed, and, having taken their objection, the burden will pass to the prosecution

to produce what evidence they have which shows that the proceedings were duly authorised".

Lord Goddard who gave a short judgment said this at p. 728:

"If it is only a matter which goes to procedure, as this does, and as it does in a large number of cases where the Director of Public Prosecution's consent or anybody else's consent is required to the prosecution, then I do not think that they ought to allow an objection which has been, so to speak, kept up the sleeve till the last minute, as where the prosecution are induced to say that they have closed their case, and it is objected that they have not proved consent to the proceedings having been instituted. If the difference between an objection which goes to the merits and one which only goes to procedure is borne in mind, many of the difficulties will be cleared up".

As we said before, the present case is on all fours with *Price* v. *Humphries* (*supra*) and following that case we may as well say that the trial Judge would have been right if, when the prosecution sought to produce the consent, at the stage it did, had intimated that such proof was not at all necessary and that the case for the prosecution having been closed without any objection and challenge as to the consent, the consent was presumed to have been given and the proceedings properly instituted.

To sum up we hold that:

(a) It is the duty of the persons who are responsible for the filing of a charge and the issue of summonses or warrants, where the consent of anybody is required for the institution of proceedings, to see that the consent is given, otherwise the summons or warrant will be a bad one.

(b) Any challenge by the defence as to the consent, being a challenge on a matter of procedure, must be made before the case for the prosecution is closed.

(c) If the case for the prosecution is closed without any objection as to the consent, the presumption is that the proceedings have been properly instituted; in other

words, after the case for the prosecution is closed the defence will not be heard to say the proceedings are bad because there is no proof of the consent required.

This disposes of the appeal of appellant No. 2 because this was the only point raised in the notice of appeal; his appeal is therefore dismissed.

The second point in the notice of appeal of appellant No. 1 was that the trial Judge was wrong in holding that Ahmed Ali, the main witness for the prosecution, was not an accomplice. The question whether a witness is an accomplice or not is a question of mixed law and fact and cannot appear as a ground in a notice of appeal which is for points of law only. Anyhow, going through the record we find that the trial Judge was right in holding that Ahmed Ali was not an accomplice.

The third and last point is that the trial Judge admitted in evidence answers given by accused Eliades when cross-examined by the prosecution, relating to the appellant. When accused Eliades was called upon to make his defence he went into the witness box and gave evidence on oath, as he was entitled to do under section 72 of the Criminal Procedure Law, Cap. 14. In his examination in chief he said nothing incriminating appellant No. 1: when cross-examined by the prosecution he gave the following answers concerning appellant No. 1:

"When loading took place No. 1 accused (appellant No. 1) was on truck. When checking took place No. 1 was present. I counted. Don't know if No. 1 accused counted as well".

After the cross-examination by the prosecution was ended Mr. Demetriades for appellant cross-examined Eliades and this is the answer he gave:

"Accused No. 1 was not all time on vehicle during loading. He was on top to begin with but later got down to help with loading".

Mr. Demetriades argued that the answers to the prosecution which were incriminating his client were wrongly admitted in evidence and in support of his submission he

referred us to the decision of this Court in *R. v. Pouri and five others*, 14 C.L.R. 121, which was decided in 1932, when the position of an accused person called upon by the Court for his defence was regulated by Clause 144 of the Courts of Justice Order in Council, 1927, which provided that the prosecuting officer might, after the accused had given evidence on oath, ask him questions which should be confined to the matter in issue and matters relevant thereto.

Stronge, C.J. delivering the judgment of the Court said at page 124:

> "The present Law in Cyprus as to the evidence of accused persons is to be found in Clause 144 of the Courts of Justice Order, 1927, and it provides that the prosecution officer may after the accused has given evidence on oath ask him questions which shall be confined to the matter in issue and matters relevant thereto. So far as an accused person is concerned the sole matter in issue in his case is his guilt or innocence and cross-examination of an accused in order to incriminate another fellow prisoner charged jointly with him cannot in our judgment be said to be cross-examination as to the matter in issue or matters relevant thereto. In our view, therefore, this evidence by an accused person incriminating a fellow prisoner jointly charged with him was inadmissible".

It is clear that the decision was based on the wording of Clause 144, then in force which confined the cross-examination by the prosecution within certain limits.

The *ratio decidendi* in *Pouri's* case turned upon the presence of the words "provided that such questions shall be confined to the matter in issue and matters relevant thereto" in Clause 144 and the Court held that, so far as an accused person is concerned, the sole matter in issue in his case is his guilt or innocence, as it is clear from the passage cited. Clause 144 of the Courts of Justice Order in Council 1927, and indeed all provisions relating to Criminal Procedure in that order were repealed in 1948 by the Criminal Procedure Law, Cap. 14, and new provisions made; the provisions in the new Law corresponding to Clause 144 are to be found in Section 72 of the new Law. The wording of this section is completely different from that of clause 144 and there

are no restrictions to the cross-examination by the prosecution. Moreover by Section 74 the right of cross-examination is given to a co-accused when an accused in the witness box incriminates him. It is obvious from that, that an accused person in the witness box can incriminate his co-accused. Mr. Demetriades tried to make a point from the wording of Section 74 which is as follows:

> "Where, during or upon a joint trial, one of the accused gives evidence under section 72 (c) of this Law and, in so doing, incriminates one of his co-accused, such co-accused shall be entitled to cross-examine him and such cross-examination shall take place before cross-examination by the prosecution".

The point he ventured to make was that since the cross-examination by the co-accused must take place before cross-examination by the prosecution, the accused in the witness box must incriminate the co-accused in his examination-in-chief and not in his cross-examination by the prosecution. We think that there is no substance in this point at all: what Section 74 intended to do was to provide a rule of convenience in the examination of the accused as a witness and the co-accused can always get leave to cross-examine. In our opinion, when an accused person comes to the witness box he is a witness in the case and in giving evidence he can incriminate his co-accused even in his cross-examination by the prosecution. This brings our Law into line with the English Law on the subject, as stated in the decision in the case *R.* v. *Paul* (1920) 2 K.B. 183. Reverting to the decision in *Pouri's* case (*supra*) on this point we say that it was good Law until Clause 144 of the Courts of Justice Order in Council, 1927, was repealed and that it has no application to Section 72 of the Criminal Procedure Law. Its place now together with Clause 144 is in the history of Criminal Law and Procedure of Cyprus.

In conclusion, the appeal of appellant No. 1 also fails and is hereby dismissed.

Appeals dismissed.