[ZEKIA, J. and ZANNETIDES, J.]

PANAYIOTIS CHRYSOSTOMOU,

Appellant,

v.

THE POLICE, *Respondents*.

(*Criminal Appeal No.* 2264).

Trial in Criminal Cases—Criminal Procedure—Charge—Amendment of charge at the conclusion of the trial by adding new count—Requisites for such course—Criminal Procedure Law, Cap. 155 (1959 *Edn.*), *Section* 85 (4).

Sentence—Excessive sentence.

Firearm—Discharging loaded firearm with intent to alarm—Criminal Code, Cap. 154 (1959 *Edn.*), *section* 91 (*b*)—*Failing to keep a firearm in safety—The Firearms Law, Cap.* 57 (1959 *Edn.*), *section* 24.

The appellant was originally charged with the offence of discharging a loaded firearm with intent to alarm a certain S.M., contrary to section 91 (b) of the Criminal Code, Cap. 154. (1959 edn.) At the conclusion of the case the trial Judge, acting under section 85 (4) of the Criminal Procedure Law Cap. 155 (1959 edn.), directed a new count to be added, charging the appellant with failing to keep his firearm in safety, contrary to section 22 A of the Firearms Law, Cap. 86 as amended by sect. 13 of Law No. 30/55, (now section 24 of the Firearms Law, Cap. 57 (1959 edn.), acquitted the appellant on the original count but found him guilty on the added count and sentenced him to fifteen pounds fine.

On appeal against conviction and sentence:

Held: (1) The Judge was right in directing the new count to be added and convicting the appellant on that count. All the requisites of section 85 (4) of the Criminal Procedure Law, Cap. 155 (1959 edn.) were present in this case. (*Note:* The full text of section 85 (4) is set out in the judgment of the Court, *post*).

(2) The sentence, however, of £15 fine is in the circumstances excessive and will be reduced to one of £5 fine.

Appeal against conviction dismissed.

Appeal against sentence allowed.

Appeals against conviction and sentence.

The appellant was convicted on February, 6, 1960 at the District Court of Paphos (Attalides, D.J., in Criminal Case No. 155/60) on one count of the offence of failing to keep his firearm in safety contrary to section 22 A of the Firearms

Law, Cap. 86 (as amended by section 13 of Law No. 30 of 1955), now section 24 of the Firearms Law, Cap.57 (1959 edn.) and sentenced to a fine in the sum of fifteen pounds, (in default to three months imprisonment). The count on which the appellant was convicted was added at the conclusion of the trial at the direction of the learned Judge acting under section 85(4) of the Criminal Procedure Law, Cap.155 (1959 edn.). The appellant was acquitted on the original count.

E. Ieropoulos for the appellant.

J. Samuels for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was read by:

ZANNETIDES, J. : The original charge against the appellant, Panayiotis Chrysostomou of Polemi, contained only one count charging him with discharging a loaded firearm with intent to alarm a certain Socrates Yianni Matsangou of Polemi in his dwelling, contrary to section 91 (b) of the Criminal Code, Cap. 154, 1959 Edition.

At the conclusion of the case the District Judge of Paphos who tried the case, acting under section 85(4) of the Criminal Procedure Law, Cap. 155, (1959 Edition), (the old section is section 83 sub-section 4) directed a count to be added in the charge, charging the appellant with failing to keep his firearm in safety, contrary to section 22A of the Firearms Law, Cap. 86, as amended by section 13 of Law 30 of 1955, and acquitted the appellant on the original count but found him guilty on the added count and sentenced him to £15 fine.

The short facts of the case were that at about 11 o'clock on the night of the 28th December last 3 gunshots were fired from outside in the street at the complainant's dwelling house two of which shots hit the door of complainant's room which opens straight into the street, breaking the celotex apperture above the door and that as a result the complainant and his family in the house were alarmed. Next morning the police found in the street at some distance from the complainant's house two spent sporting gun cartridges which they collected and also seized appellant's sporting gun from his house. Expert evidence was adduced to the effect that the two spent cartridges found in the street had been fired from appellant's gun.

The trial Judge accepted the expert evidence that the two spent cartridges had been fired from appellant's gun but found that there was no further evidence connecting the appellant with the actual discharging of the firearm. There is

no doubt that he was influenced in this finding from the fact that according to the evidence other people lived and had access to the house where the gun was and, as we said above, he directed a new count to be added to the charge and he acquitted the appellant on the original count and convicted him on the new one.

The question raised in the appeal (both by the notice of appeal and by the application for leave to appeal) is whether the trial Judge acted rightly in directing the addition of the new count and in convicting the appellant on it.

Section 85 sub-section 4 on which the Judge acted is as follows:

> " If at the conclusion of the trial the Court is of opinion that it has been established by evidence that the accused has committed an offence or offences not contained in the charge or information and of which he cannot be convicted without amending the charge or information, and upon his conviction for which he would not be liable to a greater punishment than he would be liable to if he were convicted on the charge or information, and that the accused would not be prejudiced thereby in his defence, the Court may direct a count or counts to be added to the charge or information charging the accused with such offence or offences, and the Court shall give their judgment thereon as if such count or counts had formed a part of the original charge or information ".

For a Court to act under the above section 85 sub-section 4 the following requisites must be present:

(*a*) It must be established by evidence that the accused has committed an offence not contained in the charge or information.

(*b*) That the accused cannot be convicted without amending the charge or information.

(*c*) That the accused must not upon his conviction on the new offence be liable to a greater punishment than if he were convicted on the charge or information as it stood, in other words that the punishment provided by law for the added offence must not exceed that of the original offence.

(*d*) That the accused would not be prejudiced by the amendment in his defence.

Let us now see if the above four requirements are present in this appeal.

As to requirement (*a*) whether it was established by the

evidence that the accused has committed the offence of failing to keep his firearm in safety we think that there is ample evidence. It is the evidence of P.W.3 Police Sgt. Panayis Haji Costi who said in his evidence, we quote his own words: ".....from the house of Iason Loizides we seized a D.B.B.L. sporting gun and another D.B.B.L. gun from the house of the accused....." further down, " When we seized the cartridge belt and the gun from the house of the accused the accused himself was not in the house. The gun and the cartridge belt were in a room where there were two beds. I do not know whether in the room where these were found the sister and the father of the accused are staying. It was the sister of the accused who delivered to us the gun and the cartridge belt ". Then there is the evidence of P.W.6 Police Sgt. Kypros Mourouzides who said: (We quote his own words) "Later we went to the house of the accused. He was not present. Sgt. Panayi seized a D.B.B.L. sporting gun, manufacturer's No. 222, St. Etienne make ;" and further down "..... I do not know personally if the house in which the gun was found belongs to the accused or to his father. I did not find out during the investigations to whom the house belongs nor who resided in it. I saw there a young woman of about 17 years. I went into the room and saw there two beds. In this same room we found the gun. I did inquire who stayed in that room. The gun was near one of the beds and the cartridge belt was hanging on a hanger.. ....." The evidence of those two P.Ws. as to the place of the gun was confirmed by the appellant himself when he gave evidence on oath. He said, ".....when I returned —meaning from shooting— to the house I cleaned it and put it in the room of my father. When I return from shooting I leave the gun sometimes in the room of my father and sometimes in my room. As a matter of fact on the 27th December I left it in the room of my father ". And further down in cross-examination, "On the 27th December after my return from shooting I cleaned my gun and left it in the room of my father. I left also the cartridge belt with the cartridges there. I put it on top of the valises, it was visible and the cartridge belt I hang on a peg on the wall....." All this evidence was, we think, more than enough to establish that the appellant had committed the offence charged in the added count.

As to requisite (*b*) it is obvious that the appellant could not be convicted for the offence of failing to keep his firearm in safety without amending the charge by the addition of the new count. The cases in which a Court can convict without amending the charge or information are enumerated in section 85 sub-sections (1), (2) and (3) and appellant's case did not come under any of those sub-sections.

With regard to requisite (*c*) *i.e.* that the punishment pro-

vided for the added offence should not exceed the punishment provided for the original offence it is sufficient to refer to the relative sections of the Criminal Code and the Firearms Law to see that the punishment for the added offence is six months imprisonment and £50 fine which of course is much less than the three years imprisonment provided for the original offence.

As to the last requirement that there must not be any possibility that the accused might be prejudiced in his defence by the addition of the new count, although Mr. Ieropoullos made it a ground of the appeal he failed however to point to us how and in what respect could the appellant be prejudiced and we are, indeed, at a loss to see how in such a clear case with such simple and clear facts could the accused possibly be prejudiced in his defence.

For all the above reasons we are of the opinion that the trial Judge did not go wrong in acting as he did and the appeal is dismissed and the conviction affirmed.

With regard to the sentence we think that, having regard to the fact that the accused is a first offender and that the offence is not in its nature a serious one and discharging from our mind the facts of the offence originally charged, the sentence of £15 is an excessive sentence and we reduce it to one of £5 fine.

Appeal against conviction dismissed. Appeal against sentence allowed.