[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

1963
June 6
—
MICHAEL DEMETRIOU ZAVOS
v.
THE POLICE

MICHAEL DEMETRIOU ZAVOS,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 2636)

Criminal Law—Antiquities—Unlawful possession of antiquities contrary to section 33 (3) *of the Antiquities Law, Cap.* 31*—Possession of antiquities not contained "in any list furnished under sub-section* (1) *of that section—The possessor is guilty of the offence under sub-section* (3) *even if he is not the person who furnished or ought to have furnished under sub-section* (1) *the aforementioned list—"Forfeiture" of the antiquities subject of the charge under sub-section* (3) *in addition to the penalty of fine provided thereby—"Forfeiture" in this context is a "punishment" in the sense of Article* 12.3 *of the Constitution—Decision of the Supreme Constitutional Court* Gendarmerie and Michael Demetri Zavos, 4 *R.S.C.C.* 63 : reasoning not followed.

Evidence in criminal cases—Onus of proof—Where the onus is cast on the accused it is enough for him to satisfy the Court upon the balance of probabilities.

Constitutional Law — Unconstitutionality of any law or decision raised in any judicial proceeding—Reference of the question to the Supreme Constitutional Court for its decision thereon—Article 144.1 *of the Constitution—Such decision is binding on the Court by which the question has been so reserved and on the parties to the proceedings—Article* 144.3*—Notwithstanding that such reference ought not to have been made in view of Article* 188.4 *of the Constitution—Articles* 144 *and* 188 *of the Constitution.*

Constitutional Law—"Punishment" provided by any law should be proportionate to the gravity of the offence—Article 12.3 *of the Constitution—The "forfeiture" provided by section* 33 (3) *of the Antiquities Law, Cap.* 31 (supra) *cannot be anything but "punishment" in the sense of Article* 12.3 *of the Constitution—And inasmuch as the "forfeiture" in question is mandatory under sub-section* (3) (supra) *the relative provision is repugnant to Article* 12.3 *of the Constitution—The decision of the Supreme Constitutional Court referred to above* (supra) *to the effect that in the context of the*

Antiquities Law (supra) *the "forfeiture" is not a "punishment" and therefore it is outside the purview of Article* 12.3 *of the Constitution is erroneous—However the said decision is binding on the High Court but only in this case and on the parties thereto in view of paragraph* 3 *of Article* 144 *of the Constitution.*

Constitutional Law—Laws in force on the day of the coming into force of the Constitution—Issue of unconstitutionality thereof—The Courts have to deal themselves with the matter and determine the issue of unconstitutionality—Article 188.4 *of the Constitution—And the reference to the Supreme Constitutional Court under Article* 144 *of the Constitution must not be resorted to.*

Sub-sections (1) and (3) of section 33 of the Antiquities Law, Cap. 31, read as follows :

"33 (1) Every person in possession of antiquities at the date of the coming into operation of this Law, shall, within a period of four months from that date, furnish the Director with a list describing such antiquities to the best of his ability.

(3) After the expiration of the period of four months as aforesaid any person having in his possession any antiquity which has not been contained in any list furnished under this section shall, unless he satisfies the Court that he has acquired the same lawfully under the conditions of this Law, be guilty of an offence and shall be liable to a fine not exceeding fifty pounds and any antiquity in respect of which the offence has been committed shall be forfeited."

That Law came into operation on the 31st December, 1935.

Article 12, paragraph 3 of the Constitution provides :

"No law shall provide for a punishment which is disproportionate to the gravity of the offence."

Article 144 of the Constitution reads as follows :

"1. A party to any judicial proceedings, including proceedings on appeal, may, at any stage thereof, raise the question of the unconstitutionality of any law or decision or any provision thereof material for the determination of any matter at issue in such proceedings and thereupon the Court before which such question is raised shall reserve the question for the decision of the Supreme Constitutional Court and stay further proceedings until such question is determined by the Supreme Constitutional Court.

2. The Supreme Constitutional Court, on a question so reserved, shall, after hearing the parties, consider and determine the question so reserved and transmit its decision to the Court by which such question has been reserved.

3. Any decision of the Supreme Constitutional Court under paragraph 2 of this Article shall be binding on the court by which the question has been reserved and on the parties to the proceedings and shall, in case such decision is to the effect that the law or decision or any provision thereof is unconstitutional, operate as to make such law or decision inapplicable to such proceedings only."

Article 188 of the Constitution provides :

" 1. Subject to the provisions of this Constitution and to the following provisions of this Article, all laws in force on the date of the coming into operation of this Constitution shall, until amended, whether by way of variation, addition or repeal, by any law or communal law, as the case may be, made under this Constitution, continue in force on or after that date, and shall, as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution.

4. Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into accord with the provisions of this Constitution including the Transitional Provisions thereof.

5. In this Article—

" law " includes any public instrument made before the date of the coming into operation of this Constitution by virtue of such law ;

" modification " includes amendment, adaptation and repeal".

The Constitution came into operation on the 16th August, 1960.

The appellant was convicted of being in possession of antiquities not contained in a list furnished to the Director of Antiquities contrary to section 33 (3) of the Antiquities Law, Cap. 31 (*supra*). He was sentenced to pay a fine of £40 and costs, and it was further ordered that 460 pieces of antiquities, which formed the subject matter of the charge, be forfeited under the provisions of that sub-section (*supra*).

After a plea of not guilty was entered at the trial and before the evidence was heard, the trial Judge, according to an application by counsel of the accused (appellant) reserved for the decision of the Supreme Constitutional Court, under Article 144 of the Constitution (*supra*) the question " whether the provisions embodied in section 33 sub-section (3) of the Antiquities Law, Cap. 31, making the forfeiture of any antiquity in respect of which a conviction under the above section is made mandatory, contravenes the provisions of Article 12.3 of the Constitution of Cyprus :" Article 12.3 of the Constitution provides : " No law shall provide for a punishment which is disproportionate to the

gravity of the offence ". On the aforesaid reference by the trial Judge in this case the Supreme Constitutional Court on the 5th December, 1962, declared as follows :

" Subsection (3) of section 33 of the Antiquities Law, Cap. 31, is not contrary to, or inconsistent with, paragraph 3 of Article 12 of the Constitution ". In making that declaration the Supreme Constitutional Court based its reasoning on the conclusion that the " forfeiture " provided under subsection (3) of section 33 of the Antiquities Law, Cap. 31 is not " punishment " in the sense of paragraph 3 of Article 12 of the Constitution. (vide *Gendarmerie and Michael Demetri Zavos*, 4 R.S.C.C. 63). That view of the Supreme Constitutional Court is criticised by the High Court in the instant appeal holding that in the context of the Antiquities Law, Cap. 31, section 3 (3) (*supra*) " forfeiture " cannot be anything but " punishment " in the sense of paragraph 3 of Article 12 of the Constitution (*supra*). But apart from this conflict, another interesting feature of the case is that, in view of the clear provisions of paragraph 4 of Article 188 of the Constitution (*supra*) the course of referring the matter to the Supreme Constitutional Court under Article 144 of the Constitution (*supra*) should not have been taken at all—Indeed, the Antiquities Law, Cap. 31 being a law in force on the day of the coming into operation of the Constitution (i.e. 16th August, 1960), there was no room for reference to the Supreme Constitutional Court under Article 144 of the Constitution (*supra*) and the trial Judge ought, under the provisions of paragraphs 4 and 5 of Article 188 of the Constitution (*supra*), to apply the Antiquities Law, Cap. 31, " with such modification " as might " be necessary to bring it into accord with the provisions of the Constitution ", in this case, obviously, into accord with the provisions of para. 3 of Article 12 of the Constitution. However, the High Court, VASSILIADES, J., dissenting on this point, held that as the said decision of the Supreme Constitutional Court is under para. 3 of Article 144 of the Constitution binding on the trial Court and the parties to the proceedings, the order for forfeiture should not be disturbed.

Now, coming back to the trial in the first instance, the trial Judge after the declaration of the Supreme Constitutional Court quoted above, proceeded to hear evidence and eventually convicted and sentenced the accused (appellant) as stated before and, in addition, made an order for the forfeiture of the antiquities subject matter of the charge under sub-section 3 of section 33 of the Antiquities Law, Cap. 31 (*supra*). The accused appealed against his conviction, sentence and forfeiture. It was argued on appeal on his behalf that as he did not furnish himself in 1936 any list of the antiquities involved in this case, required by subsection (1) of section 33 of the Antiquities Law, Cap. 31 (*supra*), he could not be found guilty under sub-section 3 of that section. It was further argued that the trial Judge misdirected himself as to the onus of proof cast upon this person charged

under sub-section (3). With regard to sentence, and especially the " forfeiture " order, it was submitted on behalf of the appellant that the relative provision of sub-section (3) making the order mandatory is repugnant to the provisions of paragraph 3 of Article 12 of the Constitution (*supra*).

Held : As to the conviction :

(1) It is abundantly clear that it is not necessary that the possessor of the antiquity should have himself furnished the Director of Antiquities with a list in 1936 under sub-section (1) of section 33 of the Antiquities Law, Cap. 31 before he is found guilty of the offence under sub-section (3) of that section.

(2) True, the onus cast on the accused under the provisions of sub-section (3) of section 33 of the aforesaid law is not to satisfy the Court that he acquired the antiquities lawfully under the conditions of the law beyond reasonable doubt, but on the balance of probabilities. But on the evidence adduced it was abundantly clear that he had not acquired the antiquities in question lawfully under the conditions of the said law.

(3) Therefore, the appeal against conviction must be dismissed.

Held : As to sentence (and forfeiture) :

(1) The provision as to forfeiture of any antiquity in sub-section (3) of section 33 of the Antiquities Law, Cap. 31 (*supra*) is mandatory. The question which arises for consideration is whether this provision as to forfeiture has been modified by the Constitution. If it has been modified at all it must have been modified by the provisions of Article 12.3 of the Constitution which provides that " no law shall provide for punishment which is disproportionate to the gravity of the offence " : and under the express provisions of Article 188.4 of the Constitution (*supra*) it was the duty of the trial Court to apply the provisions of section 33 (3) of Cap. 31 " with such modification as may be necessary to bring it into accord with the provisions of this Constitution " (see the judgments of this Court in *Ratibe Muti Abdulhamid* v. *The Republic*, 1961 C.L.R. 400 ; *Mahmut Fethi* v. *The Republic*, 1962 C.L.R. 139 ; *and Solomos Stylianou* v. *The Police*, 1962 C.L.R. 152).

(2) With great respect to the views expressed in the judgment of the Supreme Constitutional Court upon reference in this case (*supra*), we are of opinion that the "forfeiture" provided for under subsection (3) of section 33 cannot be anything but "punishment"; and the provisions of that section should be modified under Article 188.4 of the Constitution to be brought into accord with the provisions of Article 12.3 *i.e.* the provision for forfeiture should be treated as discretionary and not mandatory.

(3) (VASSILIADES, J., *dissenting*) :

(*a*) In view however of the provisions of paragraph 3 of Article 144 of the Constitution (*supra*), the decision of

the Supreme Constitutional Court is binding on the trial Court which referred the question and on the parties to the proceedings. And, consequently, the trial Court in this case had no discretion in the matter but to order the forfeiture.

If accused's counsel had not asked for the question to be referred to the Supreme Constitutional Court and the trial Judge was not fettered by the decision of that Court, he would have been in a position to exercise his discretion whether or not to order the forfeiture of the antiquities. But, in view of what has been stated, the trial Judge in this case was bound by the decision of the Supreme Constitutional Court which rendered the forfeiture of the antiquities mandatory.

(*b*) We should make it clear, however, that we decide this point with regard to this particular case only, and not generally. This means that we do not accept the position that criminal courts in future should treat the provisions of section 33 (3) (*supra*) as mandatory and not discretionary, in view of the provisions of Article 12.3 of the Constitution.

(*c*) With regard to the fine and order for costs : Considering the value of the 460 pieces of antiquities forfeited, we are of opinion that the fine of £40 imposed in this case should be reduced to £1 and the order for costs set aside.

(*d*) In the result the appeal against sentence is allowed to the extent indicated in the preceding paragraph, but the forfeiture order is affirmed.

Held : As to sentence (*including forfeiture*) by VASSILIADES, J., in his partly dissenting judgment :

(1) I agree that there was no need for reference in this case to the Supreme Constitutional Court under Article 144 of the Constitution.

(2) Be that as it may, the question was in fact referred in the terms appearing on record (*supra*). Now the question reserved for the decision of the Supreme Constitutional Court by the trial Court was whether the provision in section 33 (3) of Cap. 31 (*supra*) making the forfeiture of the antiquities mandatory contravenes Article 12.3 of the Constitution (*supra*). The question itself as framed, assumes that the provision under consideration is a " punishment ", otherwise the question could not arise at all under paragraph 3 of Article 12. The trial Court considering the forfeiture of antiquities as part of the punishment, obviously reserved the question on that premise. And it was for the Court operating under Part X of the Constitution, and not for the Supreme Constitutional Court operating under Part IX, to determine whether a provision in a statute is or is not a "punish-

ment". The Supreme Constitutional Court, however, instead of dealing with the question reserved by the trial Court, proceeded to consider first the question whether the provision for forfeiture in section 33 (3) of the Antiquities Law (*supra*) is or is not a punishment. A very different question indeed; and a question which, in my opinion, could not be reserved under Article 144 of the Constitution

(3) Therefore I take the view that the aforesaid decision of the Supreme Constitutional Court cannot affect this case, being outside the jurisdiction and beyond the constitutional powers of that Court.

(4) Having already agreed with the view that the mandatory forfeiture in section 33 (3) of the Antiquities Law (*supra*) is repugnant to the provisions of paragraph 3 of Article 12 of the Constitution (*supra*), I proceed now to consider the question whether in this case the order of forfeiture is or is not proportionate to the gravity of the offence. But without any evidence as to the value of the 460 pieces of antiquities forfeited it is impossible for anyone to say whether the punishment imposed is or is not proportionate to the gravity of the offence as required by Article 12 3 of the Constitution; or whether it is or it is not manifestly excessive

(5) For these reasons I would not disturb the fine of £40 imposed by the trial Court But I would set aside and discharge the order for forfeiture, or remit the case to the District Court to take evidence and make a finding on the value of the antiquities in question

Appeal against conviction dismissed. Appeal against sentence allowed to the extent indicated hereabove: i.e. fine of £40 reduced to £1. The order for costs set aside but the order for forfeiture affirmed

Cases referred to

Gendarmerie and Michael Demetri Zavos 4 R S.C C 63, *reasoning not followed*,

Ratibe Muti Abdulhamid v. *The Republic*, 1961 C.L R 400,

Mahmut Fethi v. *The Republic*, 1962 C L R. 139;

Solomos Stylianou v *The Police*, 1962 C L.R. 152,

The District Officer, Nicosia and Georghios Haji Yiannis, 1 R S C C. 79;

The District Officer, Famagusta and Demetra Panayiotou Antoni 1 R.S C C. 84;

Morphou Gendarmerie and Andreas Demetri Englezos, 3 R S.C C. 7,

The District Officer, Nicosia and Michael Ktori Palis, 3 R S C C. 27;

The District Officer, Famagusta and Michael Themistocli and another, 3 R.S.C.C. 47 ;

The District Officer, Kyrenia and Adem Salih, 3 R.S.C.C. 69 ;

The Republic and Nicolas Pantopiou Loftis, 1 R.S.C.C. 30 ;

Nicolas Pantopiou Loftis v. *The Republic*, 1961 C.L.R. 108.

Appeal against conviction and sentence.

The appellant was convicted on the 10th April, 1963, at the District Court of Famagusta (Criminal Case No. 33/62) on one count of the offence of possession of antiquities not contained in a list furnished to the Director of Antiquities contrary to s. 33 (3) of the Antiquities Law Cap. 31 and was sentenced by Kourris D.J. to pay a fine of £40 and the items of the antiquities amounting to 460 were ordered to be forfeited.

L. Clerides for the appellant.

S. A. Georgiades for the respondents.

The facts sufficiently appear in the judgments delivered by JOSEPHIDES, J. and VASSILIADES, J.

WILSON, P. : Mr. Justice Josephides will deliver the judgment of the Court and Mr. Justice Vassiliades, who dissents in part, will deliver his reasons.

JOSEPHIDES, J. : This is an appeal from the conviction and sentence of the District Court of Famagusta whereby the accused was found guilty of being in possession of antiquities not contained in a list furnished to the Director of Antiquities contrary to subsection (3) of section 33 of the Antiquities Law, Cap. 31, and he was sentenced to pay a fine of £40 and £13.140 mils costs. It was further ordered that 460 pieces of antiquities, which formed the subject of the charge, be forfeited under the provisions of the aforesaid section.

Counsel for the Appellant has taken the point that as the accused did not furnish himself any list of those antiquites in 1936 as required by section 33 (1) of the Law, he could not be found guilty under the provisions of section 33 (3), because the furnishing of a list is a necessary ingredient of the offence. He has further argued that the judge misdirected himself as to the onus of proof on the accused.

Subsections (1) and (3) of section 33 of the Antiquities Law, Cap. 31, read as follows :

> " 33 (1) Every person in possession of antiquities at the date of the coming into operation of this Law shall, within a period of four months from that date, furnish the Director with a list describing such antiquities to the best of his ability.
>
> . . . . . .
>
> (3) After the expiration of the period of four months as aforesaid any person having in his possession any antiquity which has not been contained in any list furnished under this section shall, unless he satisfies the Court that he has acquired the same lawfully under the conditions of this Law, be guilty of an offence and shall be liable to a fine not exceeding fifty pounds and any antiquity in respect of which the offence has been committed shall be forfeited."

That Law came into operation on the 31st December, 1935.

It will be seen that if the antiquity is not contained in " any list " furnished to the Director the onus is on the accused to satisfy the Court that he has acquired the same lawfully under the conditions of the law, that is to say, either under a permit from the Director or by purchase from a person duly authorized by the Director.

We shall first deal with the ground of misdirection as to the onus of proof. In support of his argument appellant's counsel referred to the following extract from the judgment.

> " I am not satisfied from his explanations that his explanation is a true one. He has changed his version according to the occasion and in any case none of his explanations exonerate him from guilt, even if accepted as true as he does not appear to have obtained these items lawfully under the conditions of the Antiquities Law, Cap. 31, because his first explanation that he had the items with his children at Varoshia does not show that he acquired them under the conditions of the Law even if he had them with his children. His statement to the police (exhibit 2) does not show that he had possessed them in accordance with the Law and his explanation does not exonerate him under the Law and his testimony in Court has been rebutted and has been shown to be an impossible one."

Mr. Clerides submitted that the onus on the accused was not to satisfy the Court that he acquired the antiquities lawfully under the conditions of the Law beyond reasonable doubt, but on the balance of probabilities. On the evidence adduced it was abundantly clear that he had not acquired the antiquities lawfully under the conditions of the Law. The trial Judge accepted the version of the prosecution witnesses and rejected Appellant's version on this point completely, and we see no misdirection in the judgment of the trial Court.

As to the first point taken, we are of the view that it is clear that it is not necessary for the person who is charged with possessing any antiquity under section 33 (3) to have himself submitted a list to the Director of Antiquities in the first instance within the first four months of 1936, when this Law (Cap. 31) came into operation. We think that the scheme of the Law is clear enough and it follows closely the Antiquities Law enacted originally in 1905. In that Law there was provision again for a list to be submitted to the authorities within 6 months (section 4), and there was also provision under section 6 for the confiscation of antiquities not disclosed ; and under section 9 the onus of proof of lawful origin of the antiquity was on the possessor. When the legislature came to re-enact this Law on the 31st December, 1935, they followed substantially the same scheme of the old Law, and section 33 (3) of Cap. 31 provides that if any antiquity in the possession of any person " has not been contained in any list furnished " under that section the onus is on the possessor to satisfy the Court that he has acquired the same lawfully under the conditions of the Law. It will be observed that the words used are " in any list furnished under this section ", and *not* " furnished *by him* " as in subsection (4) of the same section. It is abundantly clear that it is not necessary that the possessor of the antiquity should have himself furnished the Director of Antiquities with a list in 1936, before he is found guilty of the offence under section 33 (3). For these reasons we are of the view that the appellant was rightly convicted.

Now, as to sentence : The provision as to the forfeiture of any antiquity in subsection (3) of section 33 is mandatory ; and there is no doubt that before Independence Day the Court would, in any event, be bound to order the forfeiture of the antiquities. The question which arises for consideration is this : " Has this provision as to forfeiture been modified by the Constitution ? " If it has been modified at all it must have been modified by the provisions of Article 12.3, of the Constitution which provides that

" no law shall provide for a punishment which is disproportionate to the gravity of the offence " ; and under the express provisions of Article 188.4 of the Constitution it was the duty of the trial Court exercising criminal jurisdiction to apply the provisions of section 33 (3) of Cap. 31 " with such modification as may be necessary to bring it into accord with the provisions of this Constitution " (see the judgments of this Court in. *Ratibe Muti Abdulhamid* v. *The Republic*, 1961 C.L.R. 400 ; *Mahmut H. H. Fethi* v. *The Republic*, 1962 C.L.R. 139, and *Solomos Stylianou* v. *The Police*, 1962 C.L.R. 152.

Counsel for the accused, however, after a plea of not guilty was entered and before the evidence was heard, applied to the trial Judge on the 20th June, 1962, to refer the matter to the Supreme Constitutional Court under the provisions of Article 144 of the Constitution. The trial Judge accordingly referred the following question to that Court :

> " Whether the provision embodied in section 33, subsection (3), of the Antiquities Law, Cap. 31, making the forfeiture of any antiquity in respect of which a conviction under the above section is made mandatory, contravenes the provisions of Article 12.3 of the Constitution of Cyprus."

The Supreme Constitutional Court on the 5th December, 1962, declared as follows (Case No. 141/62) :

> " Subsection (3) of section 33 of the Antiquities Law, Cap. 31, is not contrary to, or inconsistent with, paragraph 3 of Article 12 of the Constitution."

As this question was referred to the Supreme Constitutional Court under the provisions of Article 144, the decision of that Court is binding on the trial Court by which the question has been reserved and on the parties to the proceedings (see paragraph (3) of Article 144).

In declaring that the " forfeiture " provided for under subsection (3) of section 33 was not contrary to or inconsistent with paragraph 3 of Article 12 of the Constitution, the Supreme Constitutional Court based its reasoning on the conclusion that such " forfeiture " was not " punishment " in the sense of paragraph 3 of Article 12.

With great respect to the views expressed in the judgment of the Supreme Constitutional Court, we are of opinion that the " forfeiture " provided for under subsection (3) of section 33 cannot be anything but " punishment " ; and the provisions of that section should be modified under

Article 188.4 of the Constitution to be brought into accord with the provisions of Article 12.3, *i.e.* the provision for forfeiture should be treated as discretionary and not mandatory. In view, however, of the provisions of Article 144, the decision of the Supreme Constitutional Court is binding on the trial Court which referred the question and on the parties to the proceedings. And, consequently, the trial Court in this case had no discretion in the matter but to order the forfeiture.

If accused's counsel had not asked for the question to be referred to the Supreme Constitutional Court and the trial Judge was not fettered by the decision of that Court, he would have been in a position to exercise his discretion whether or not to order the forfeiture of the antiquities. But, in view of what has been stated, the trial Judge in this case was bound by the decision of the Supreme Constitutional Court which rendered the forfeiture of the antiquities mandatory.

We should make it clear, however, that we decide this point with regard to this particular case only, and not generally. This means that we do not accept the position that criminal courts in future should treat the provisions of section 33 (3) as mandatory and not discretionary, in view of the provisions of Article 12.3 of the Constitution.

With regard to the fine and order for costs : Considering the value of the 460 pieces of antiquities forfeited, we are of opinion that the fine of £40 imposed in this case should be reduced to £1 and the order for costs set aside.

In the result the appeal against conviction is dismissed and the appeal against sentence allowed to the extent indicated in the preceding paragraph, but the forfeiture order is affirmed.

VASSILIADES, J. : I agree that the appeal against conviction must fail for the reasons given in the judgment delivered by my brother Mr. Justice Josephides ; and that, therefore, the conviction entered on count 1 must be affirmed. Appellant was acquitted on count 2 (*vide* p.13 of the record).

But as regards sentence, and particularly as regards the order for forfeiture, I find myself unable to agree with the view taken by the majority of the Court.

The appellant in this case, described in the charge-sheet as a "merchant, aged 60" was charged in the District Court of Famagusta on the 31st January, 1962, on two counts for offences under the Antiquities Law (Cap. 31): The first, under section 33 (3) for being in possession on 28.7.61 of 460 pieces of antiquities not contained in any list furnished to the Director of Antiquities; and the second, under section 33 (4), for disposing of 180 pieces of antiquities from those contained in a list of 551 pieces, without informing the Director, of such disposal. To both these counts the appellant pleaded not guilty; and was allowed personal bail of £30 to appear for trial.

After some adjournments (the reasons for which appear on the record) the case came on for trial on the 20th June, 1962, when counsel for the appellant raised what is now known in our courts as "a question of unconstitutionality", the proceeding introduced by Article 144 of the Constitution. According to the record (at page 2) the point was raised in these terms:

> "Whether the provision embodied in section 33 and section 3 of Cap. 31 making the forfeiture of any antiquity in respect of which a conviction under the above section is made mandatory, contravenes the provisions of Article 12.3 of the Constitution of Cyprus. It is material for the determination of the proceedings within the meaning of Article 144 of the Constitution, and I apply that further proceedings be stayed until the determination of this matter by the Supreme Constitutional Court."

The learned District Judge, apparently, not having in mind the provisions of Article 188 of the Constitution and what was said regarding those provisions in all the four judgments delivered in the appeal of *Ratibe Mudi Abdul-hamid* v. *The Republic* (*supra*) took the course of referring the matter to the Constitutional Court, without attempting to deal with the question raised, as expressly required by Article 188.

Article 12.3 occurring in the Part of the Constitution dealing with Fundamental Rights and Liberties (Part II, Articles 6-35 incl.) gave constitutional force in our law, to the widely-accepted principle of justice that the punishment in a criminal case must be proportionate to the gravity of the offence; a principle which was part of our law long before the establishment of the Republic, and which was and still is the rule upon which, subject to express statutory

limitations, our criminal courts have always measured their sentences, under the vigilant supervision of the Court of Appeal. The text of this para. of Article 12 reads :

> " No law shall provide for a punishment which is disproportionate to the gravity of the offence ."

The effect of this prohibition in the Constitution for disproportionate punishment, on mandatory provisions contained in certain statutes for the making of ancillary orders for forfeiture, demolition, disqualification etc. consequent upon a conviction, was considered by the Supreme Constitutional Court in a number of cases, the decisions in which would, no doubt, give to the learned trial Judge all the assistance he might require in dealing directly with the question raised before him.

In the *District Officer, Nicosia* and *Georgios Haji Yiannis*, decided about a year earlier, in May, 1961 (1, R.S.C.C., p. 79) where the effect of Article 12.3 on demolition orders under section 20 (3) (*a*) of the Streets and Buildings Regulation Law (Cap. 96) was considered, the Constitutional Court had this to say (at p. 82C.) :

> " A penal provision of a mandatory nature providing for a serious punishment to be imposed in all cases of a certain class or category, irrespective of the circumstances or merits of each particular case, when in such class or category there are bound to arise cases where the imposition of such punishment would be disproportionate to the gravity of the offence in view of its trivial or technical nature, is a provision contravening paragraph 3 of Article 12. It follows, therefore, that the provisions of subsection (3) of section 20 of Cap. 96, whereby a demolition order is made mandatory in all cases, are inconsistent with the aforesaid paragraph 3 of Article 12 of the Constitution ".

And immediately after this, the decision proceeds :

> " It is now for the trial Court in the case under reference to apply paragraph (*a*) of subsection (3) of section 20 of Cap. 96, modified in the light of this decision, so as to bring it into accord with the provisions of the Constitution, as provided by paragraph 4 of Article 188 ."

In *the District Officer, Famagusta* and *Demetra Panayiotou Antoni*, also decided in May, 1961, (1, R.S.C.C. p. 84) where the Constitutional Court considered the effect

of the said same Article 12.3 on the provisions of section 5 (1) (*a*) of the Public Roads (Protection) Law, Cap. 83, as well as on those of section 20 (3) of the Streets and Buildings Regulation Law, and where the previous case was followed in the same tenor, the concluding paragraph of the Court's decision reads : (at p. 87) :

> " In view of the provisions of paragraph 3 of Article 144 this Decision, of course, only applies to the particular case under reference, but there is nothing to prevent a trial Court in a similar case from being guided by this Decision in circumstances such as those envisaged by principle (3) laid down in this connection in the Decision of this Court in Case No. 8/61 ."

In *Morphou Gendarmerie* and *Andreas Demetri Englezos* decided in Jan., 1962, (3 R.S.C.C. p. 7) where the effect of the Article in question (12 (3)) on the provisions of section 7 (4) of the Firearms Law (Cap. 57) regarding forfeiture orders consequent upon conviction in certain cases under that statute, was again made the subject of a reference under Article 144, the decision of the Constitutional Court reads : (at p. 9A)

> " As previously stated in its Decision in Case No. 89/61 the Court is of the opinion that the making of an order of forfeiture of property, such as that provided for in subsection (4) of section 7 of Cap. 57, amounts substantially to ' punishment ' in the sense of paragraph 3 of Article 12 ."

And the Court, after making reference to the *District Officer* and *Georghios Haji Yiannis* (*supra*) proceeded to decide the question raised, in exactly the same terms as in the previous cases.

It is hardly necessary for me at this stage to go further into the line of cases decided one after another in the Constitutional Court as to the effect of Article 12.3 on statutory provisions for consequential orders of this nature, in order to support the view expressed earlier, that had the attention of the learned trial Judge been drawn to these decisions, no question for reference could arise in this case. I shall merely cite *The District Officer, Nicosia* and *Michael Ktori Palis* (3 R.S.C.C. p. 27) ; *the District Officer, Famagusta* and *Michael Themistocli and another* (3, R.S.C.C., p. 47) *The District Officer, Kyrenia* and *Adem Salih* (3, R.S.C.C., p. 69) ; all decided before June, 1962. What appears to me rather difficult to explain, is the way in which advocates

and trial Judges kept on during this period, interrupting court-proceedings, at the expense of the litigants, in order to make references under Article 144 on an apparently simple question so clearly and repeatedly answered, which they were required to deal with directly as provided in Article 188.

But that is not the only harm done. As this case well demonstrates once again, the proceeding is up to lead to the confusion and difficulties created when decisions in such references are not carefully and strictly kept within the limits set by the Constitution to the respective Courts. There can be no doubt whatsoever that the jurisdictions of the Courts functioning under Parts IX and X of the Constitution are mutually exclusive. As President O'Briain has put it :

> " There is a whole field of law in respect of which the Supreme Constitutional Court has clearly exclusive jurisdiction. There is another field of law in respect of which jurisdiction is clearly vested in the Courts established under Part X."

(*Ratibe Abdulhamid* v. *The Republic*, at p. 415 (*supra*)). In fact the position is more exactly seen by comparing the wording of Article 152 which provides for the exercise of the "judicial power" in the Republic, with that of Article 136 which provides for the " exclusive jurisdiction " of the Supreme Constitutional Court. From the whole field of the administration of justice, the Constitution purports to cut off definite parcels which were put under the exclusive jurisdiction of special Courts such as the Supreme Constitutional Court, the Communal Courts, the different Ecclesiastical or Church Tribunals (under Article 111) and so forth. What is the real effect of this purported parcellation of justice in the Country, and what will be the practical consequences thereof, although already beginning to be felt, only time will show.

But failure to keep strictly and carefully within the limits of the jurisdiction set by Article 144 in the reference in *Loftis case* (Cr. App. 2293 ; case No. 8/61 in the S.C.C.) *Nicolas Pantopiou Loftis* v. *The Republic*, 1961 C.L.R. 108 ; *The Republic* and *Nicolas Pantopiou Loftis*, 1 R.S.C.C. 30, created the confusion in the murder-trial of *Ratibe Abdulhamid* before the Assize Court of Nicosia (No. 9929/61 ; Cr. App. 2420, *supra*) and in the murder-trial of *Mahmut Hafiz Fethi* before Larnaca Assizes (Cr. App. 2442, *supra*) discussed in the considered judgments delivered in both those appeals.

I do not find it necessary for the purposes of this judgment to refer to other cases. But reference to *Solomos Stylianou* v. *The Police* (*supra*) throws very useful light on what happens when the line set by the Constitution to separate the functions of the different Courts, is not strictly and carefully observed.

With these considerations in mind, I can now return to the case in hand. It is clear from what I have already said that I agree with the view expressed in the judgment just delivered by Mr. Justice Josephides that there was no need for reference in this case. But be that as it may, on the application of counsel for the appellant, the question was in fact referred to the Constitutional Court, in the terms appearing in the formal order at p. 3 of the record.

The Supreme Constitutional Court heard the case on the 11th October, 1962, and delivered their decision thereon on the 5th of December, 1962, copy of which appears at pages 4, 5, and 6 of the record. After discussing the relative provisions of the Antiquities Law, the Constitutional Court—

> " reached the conclusion that the ' forfeiture ' provided for under subsection (3) of section 33 is not ' punishment ' in the sense of paragraph 3 of Article 12, and therefore, the provision in question is not contrary to, or inconsistent with, such paragraph."

And the Court proceeded to make an " Order " with a declaration to that effect.

Now the question reserved under Article 144 by the trial Court was whether the provision in section 33 (3) making the forfeiture of the antiquities connected with the conviction, mandatory contravenes the provisions of Article 12.3. The question itself as framed, assumes that the provision under consideration is a " punishment " ; *otherwise the question could not arise at all* under paragraph (3) of Article 12. The trial Court apparently considering the forfeiture of the antiquities as part of the punishment, obviously reserved the question on that premise. And it was for the Courts operating under Part X of the Constitution, and not for the Court operating under Part IX, to determine whether a provision in a statute is or is not a " punishment ". Here in fact we have it in the judgment of this Court just delivered in this particular case, (with which I entirely agree on this point) that :

> " With great respect to the views expressed in the judgment of the Supreme Constitutional Court,

we are of opinion that the forfeiture provided for under section 33 (3) cannot be anything but 'punishment'."

The Constitutional Court, however, instead of dealing with the question reserved by the trial Court, proceeded to consider first the question whether the provision for forfeiture in section 33 (3) of the Antiquities Law is or is not a "punishment". A very different question indeed; and a question which in my opinion, could not be reserved under Article 144. After discussing and considering the origin of the provision in question in the Antiquities Law "as far back, at least, as 1905" the Constitutional Court reached the conclusion stated earlier and determined the question accordingly.

With all respect to the view taken by the majority in this Court as to the effect of the decision of the Constitutional Court in this case, I cannot avoid the conclusion that the latter Court's answer to the question reserved by the trial Court, is in effect quite in accordance with their previous decisions in the numerous cases to which I have already referred earlier in this judgment; that is to say: that in so far as the provision in section 33 (3) of the Antiquities Law *is not* a punishment, it is not contrary to, or inconsistent with the provisions of Article 12.3. But if such provision were a mandatory punishment with no option to the criminal Court to regulate it in proportion to the gravity of the offence, it would be contrary to and inconsistent with Article 12.3. In other words if the provision in question is a punishment, it is in conflict with the Constitution; if it is not a "punishment", Article 12.3 has nothing to do with it.

Now the terms "forfeiture" and "punishment" have no special or defined meaning in the Constitution of Cyprus. And none can be attached to them, different to their ordinary meaning, well known to our law in its every day application by our Courts for years and years prior to the drafting of our present Constitution. It must therefore, be presumed that the draftsmen of the Constitution have used these terms in their known and accepted meaning. Our rules of interpretation of statutes, settled in the course of years of experience, cannot be ignored without serious repercussions on our legal system.

According to the Shorter Oxford English Dictionary, 3rd Ed. p. 736, middle col., "Forfeiture" means "the fact of losing or becoming liable to lose (an estate, goods, life,

an office, right, etc.) in consequence of a crime, offence, or breach of engagement. The penalty of the transgression'. That which is' forfeited, a penalty, a fine. And ' forfeit ' is something to which *the right is lost* by the commission of a crime or fault ; *hence a penal fine, a penalty* ".

In Stroud's Judicial Dictionary of Words and Phrases, 3rd Ed., 1952, Vol. 2, at p. 1140, the first meaning given to " Forfeiture " is : " The proper signification of forfeiture, as appears from Cowel's ' Interpreter and Ducange ' is a mulct or fine, a ' *punishment for an offence* '. " I need go no further. Anyone looking at that authentic book of reference can have no doubt whatsoever in his mind as to the legal meaning of the word " Forfeiture ".

Need I now go into the meaning of the word " punishment " ? In the same edition of the Shorter Oxford English Dictionary (*supra*) at p. 1620, 3rd col., the meaning given is : " The act of punishing or the fact of ' being punished'; also, that which is inflicted as a penalty ; *a penalty imposed to ensure the application and enforcement of a law* ".

But without going into dictionaries at all, the text of section 33 (3) itself leads unavoidably to the conclusion that the forfeiture of the antiquities is part of the punishment. The material part of the section reads :--

> " shall be guilty of an offence and shall be liable to a fine not exceeding £50 and any antiquity in respect of which the offence has been committed shall be forfeited."

There can be no doubt, in my opinion, that the order for the forfeiture of appellant's 460 pieces of antiquities in respect of which he was convicted on count one, was part of the punishment imposed on that count. It has been unanimously so held by this Court in this very case. I have already given the reasons for which I take the view that the decision of the Supreme Constitutional Court to the contrary, cannot affect the case, being a decision outside the jurisdiction and beyond the constitutional powers of that Court. In any event, no decision of the Supreme Constitutional Court can alter either the Constitution or the Law of the Republic. It can only declare a law or a provision thereof " unconstitutional ". And for the reasons given in *Solomos Stylianou* v. *The Police* (*supra*) I still hold the view that the jurisdictions of the Courts established under

Parts IX and X of the Constitution being mutually exclusive, that applies only to laws made by the Republic.

The provision of section 33 (3) of the Antiquities Law being a provision for the punishment of the offence of unlawfully possessing antiquities, must be read and applied in this case as required by Article 188, subject to the provisions of Article 12.3 of the Constitution as repeatedly interpreted by the Supreme Constitutional Court in the cases I have already referred to. And the provision in question must be " construed and applied with such modification as may be necessary " to bring it " into conformity " with provisions in Article 12.3 regarding punishment.

The Order for the forfeiture of appellant's antiquities must be proportionate to the gravity of the offence committed by this " merchant of 60 ". It is his Constitutional right that it should be so. The appellant, an apparently old dealer, with no previous conviction in the Courts ; a man who was the holder of a licence to possess antiquities and who committed his offence in July and was not prosecuted until next January, cannot in my opinion, be punished with a sentence the gravity of which is not known to the Court. Without any evidence as to the value of these 460 pieces of antiquities (which can be very large indeed) it is impossible for anyone to say whether the punishment imposed is, or is not, proportionate to the gravity of the offence ; whether it is, or it is not manifestly excessive.

For these reasons I would not disturb the fine of £40 imposed by the trial Court. But I would set aside and discharge the order for forfeiture ; or remit the case to the District Court to take evidence and make a finding on the value of the antiquities in question.

Before concluding I must add a word regarding the ownership of these antiquities prior to the forfeiture Order. This, in my opinion, could not, and has not been determined in these proceedings otherwise than under the forfeiture Order. It was never in issue ; and it could not be decided in this case. Unlawful possession of antiquities under the Antiquities Law, i.e. possession not in accordance with the provisions of section 33, does not necessarily mean possession of antiquities not belonging to the person in possession. Indeed it may well mean something very different

to possession of antiquities belonging to the Government, which has never been suggested in this case, excepting for the view expressed in the last part of the decision of the Supreme Constitutional Court, at p. 65 of the report (*supra*), clearly obiter the question reserved.

Appeal against conviction dismissed. Appeal against the order for forfeiture dismissed. Appeal against the sentence of fine and the order for costs allowed to the following extent : Fine of £40 reduced to £1. Order for costs set aside.