[VASSILIADES, TRIANTAFYLLIDES, MUNIR, JJ.]

IOANNIS SAVVA HJI SOLOMOU,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 2726)

Criminal Law—Criminal Procedure—Insanity—The Criminal Code, Cap. 154, *section* 12—*Insanity—Affliction of the mind—Peremptory delusion—Direction for detention under section* 70 (2) *of the Criminal Procedure Law, Cap.* 155—*Premeditated murder—Homicide—The Criminal Code, Cap.* 154, *sections* 203, 204 *and* 205 *as amended by the Criminal Code (Amendment) Law,* 1962 (*Law No.* 3 *of* 1962).

Evidence in Criminal cases—Insanity—Standard of proof similar to that in civil cases.

Criminal Procedure—Substitution by the trial Court for the charge of premeditated murder of a count charging homicide, pursuant to section 83 (1) *of the Criminal Procedure Law, Cap.* 155, *whereas, it would seem, the trial Court should have acted under section* 85 (1) *of the said Law—Criminal Procedure and Evidence in Criminal Cases—Appeal—Witness—Recalling witness—Powers and circumstances for recalling witness by the Appellate Court under section* 25 (3) *of the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960).

The original charge upon which the appellant was committed for trial was one of premeditated murder. And that was the only charge on the information upon which he was arraigned before the Assizes on the 25th June, 1964. He pleaded not guilty ; and the trial was proceeded with upon that issue.

The crime was committed early in the morning of the 26th December, 1963, in circumstances which led to the arrest of the appellant soon after the crime on that same morning ; and which, coupled with his behaviour after arrest, caused the Medical Officer to whom the appellant was taken by the police, to send him for examination by a Government Mental Specialist.

Appellant was kept at the Mental Hospital for examination between the 28th December, and the 2nd January, 1964, when he was returned to police-custody. He was again under medical observation and was subjected to examination by a Mental Specialist at the Psychiatric Wing of Nicosia General Hospital, on seven occasions between the 20th March, and the 12th May, 1964.

At the close of the case of the prosecution on the 5th day of trial upon the charge of premeditated murder counsel for the defence submitted that no case had been made out sufficiently to justify calling upon the accused for his defence. And counsel for the prosecution was heard in reply.

The Assize Court gave its ruling and ordered the substitution for the charge of premeditated murder, of a count charging homicide under section 205 of the Criminal Code.

The information was amended accordingly ; the accused was charged on the new count ; he pleaded not guilty ; accused, made an unsworn statement from the dock.

Eventually the Assize Court convicted appellant of the offence of causing death by an unlawful act, contrary to section 205 of the Criminal Code, Cap. 154, and sentenced him to 14 years imprisonment.

Section 83 (1) of the Criminal Procedure Law, Cap. 155, provides :

"(1) Where, at any stage of a trial, it appears to the Court that the charge or information is defective, either in substance or in form, the Court may make such order for the alteration of the charge or information either by way of amendment of the charge or information or by the substitution or addition of a new count thereon as the Court thinks necessary to meet the circumstances of the case".

Section 84 deals with the procedure to be followed when a charge or information had been altered as in section 83 (*supra*) provided.

Section 85 (1) of the same Law provides :

"If part only of the charge or information is proved and the part so proved constitutes an offence, the accused may, without altering the charge or information, be convicted of the offence which he is proved to have committed."

The accused appealed both against conviction and sentence. The main ground against conviction rests on appellant's mental condition at the time of the offence. The complaint against sentence is that it is manifestly excessive, in the circumstances of this case.

Held, (1) the condition of appellant's mind at the material time is of vital importance. The evidence before the trial Court strongly pointed in the direction of mental affliction, in a manner quite sufficient to discharge the onus resting on " the plaintiff in a civil action ".

(2) The medical witness satisfied this Court that at the material time the appellant was insane.

(3) Acting as he was in a state of insanity, the appellant was incapable of understanding that he was in no danger from his good neighbour and friend who had not betrayed him and who was actually sharing with him whatever danger there may have been. Labouring under the affliction of his mind, the appellant was incapable of understanding that he was not killing a dangerous enemy, but his own companion and friend.

(4) The appellant is, therefore, entitled to be acquitted of the charge, on the ground of insanity.

(5) Appeal allowed ; conviction and sentence of the appellant set aside ; directions made for his detention under section 70 (2) of the Criminal Procedure Law (Cap. 155) adding the finding required by the section that the appellant committed the act constituting the offence of which he was convicted, but he is now acquitted on the ground of insanity.

Appeal allowed. Conviction and sentence of appellant set aside. Directions for his detention under section 70 (2) of the Criminal Procedure Law, Cap. 155.

Cases referred to :

King v. *Shaban* 8, C.L.R. 82 ;

Halil v. *The Republic*, (1961) C.L.R. 432 ;

Simadhiakos v. *The Police* (1961) C.L.R. 64 ;

Kolias v. *The Police* (1963) 1 C.L.R. 52.

Appeal.

The appellant was convicted on the 6th July, 1964, at the Assize Court of Nicosia (Cr. Case No. 230/64) on one count of the offence of homicide contrary to section 205 of the Criminal Code, Cap. 154, (as amended by section 5 of Law 3/62) and was sentenced by Stavrinides, P.D.C., Ioannides and Demetriou D.JJ. to fourteen years' imprisonment.

Cur. adv. vult.

L. N. Clerides, for the appellant.

S. A. Georghiades, Counsel of the Republic, for the respondent.

The judgment of the Court was delivered by :

VASSILIADES, J. : The appellant was convicted on the 6th July, last, in the Assize Court of Nicosia, for causing the death of another person by an unlawful act, contrary to section 205 of the Criminal Code ; and was sentenced to 14 years imprisonment. From this conviction and sentence the appellant now appeals on the grounds set out in the notices filed by counsel on his behalf.

The main ground against conviction rests on appellant's mental condition at the time of the offence ; in other words, on his defence of insanity. The complaint against sentence is that it is manifestly excessive, in the circumstances of this case.

The original charge upon which the appellant was committed for trial on the 26th March, 1964, was one of premeditated murder. And that was the only charge on the information upon which he was arraigned before the Assizes on the 25th June. He pleaded not guilty ; and the trial was proceeded with upon that issue.

The crime was committed early in the morning of the 26th December, 1963, in circumstances which led to the arrest of the appellant soon after the crime on that same morning ; and which, coupled with his behaviour after arrest, caused the Medical Officer to whom the appellant was taken by the police, to send him for examination by a Government Mental Specialist.

In fact the appellant was kept at the Mental Hospital for examination between the 28th December, and the 2nd January, 1964, when he was returned to police-custody. He was again under medical observation, and was subjected

to examination by a Mental Specialist at the Psychiatric Wing of Nicosia General Hospital, on seven occasions between the 20th March, and the 12th May, 1964.

The first witness called at the trial on the 25th June, was the Medical Officer who examined the appellant on the day of the crime. He was questioned by appellant's counsel regarding his client's mental condition in a manner which clearly indicated that appellant's case mainly rested on the defence of insanity.

The doctor, in this connection, stated :

> " He (the appellant) was very excited. His speech was confused as if his mind did not function properly (P.W.1 at p. 2 H of the record) . . . . His conduct was abnormal (at p. 3 C) . . . . Altogether his behaviour was such that next day I sent him for examination by Dr. Andreas Mikellides, Mental Specialist (p. 3 D) . . . . "

At the close of the case for the prosecution on the 5th day of trial upon the charge of premeditated murder—(in support of which the prosecution called seventeen witnesses)—counsel for the defence submitted that no case had been made out sufficiently to justify calling upon the accused for his defence. And counsel for the prosecution was heard in reply.

Upon the submissions before them, the Assize Court ruled as follows :—(P. 29 B).

> " On the strength of the case of *King* v. *Shaban* 8, C.L.R. p. 82, and *Halil* v. *The Republic* Cr. Appeal 2438, of December 19, 1961 (1961, C.L.R. p. 432) we consider that the evidence is more consistent with lack of premeditation—as distinct from intention—rather than the reverse, and we, therefore, think it right to order the substitution for the charge of premeditated murder, of a count charging homicide under section 205 of the Criminal Code."

The information was amended accordingly ; the accused was charged on the new count ; he pleaded not guilty ; his advocate stated to the Court that he was ready to proceed ; and accused, called upon for his defence, elected to make an unsworn statement from the dock. After this, his advocate called as witness for the defence the Mental Specialist who had examined and treated the appellant both at the Mental Hospital, soon after the crime, and

at the Psychiatric Wing of Nicosia General Hospital between March 20th and May 12th, 1964, to establish the mental condition of the appellant at the material time.

There can be no doubt that the defence of insanity was in issue throughout the trial ; the defence under section 12 of the Criminal Code (Cap. 154). It is also equally certain that what took place at the close of the case for the prosecution, was done under the provisions of section 74 (1) (*b*) of the Criminal Procedure Law (Cap. 155).

It is, therefore, somewhat difficult to understand the ruling of the Assize Court, in the circumstances. It is clear that the Court sustained the submission " that a prima facie case had not been made out against the accused, sufficiently to require him to make a defence " to the charge of premeditated murder. On the other hand, it would appear that the only ingredient of the offence on which the trial Court found that the evidence fell short of a *prima facie* case, was that of premeditation.

Apart of other considerations arising in the circumstances of this particular case, it would seem that at that stage of the proceedings, the elements of the crime charged, could hardly be treated severally. If at the conclusion of the trial, the court were to take the view that " part only of the charge .... was proved and that " the part so proved constitutes an offence ", the accused could be convicted of the offence which he was proved to have committed " without altering the charge or information ", as provided in section 85 (1) of the Criminal Procedure Law. With the whole evidence in their hands, the court would then be in a position to decide the case before them, on its merits ; and not merely determine the *prima facie* aspect of part of the count charged.

Be that as it may, however, the Assize Court, at that stage of the trial, apparently took the view that the information—to use the words of the statute—was defective " either in substance or in form "; and making use of their powers under section 83 (1) of the Criminal Procedure Law, ordered the substitution of a new count, thinking, it would seem, that that was " necessary to meet the circumstances of the case ". The requirements of the following section (s. 84 (1)) were then duly complied with, and the case reached in due course the stage of judgment.

After stating the material parts of the evidence and its effect, the trial Court say at p. 5 of the judgment (p. 38F of the record) : " Accordingly at the close of the case for

the Republic, we saw no reason to think that when he left the cafe with the deceased, the accused had formed an intention to kill him ; and that is why we substituted the count under section 205 of the Criminal Code for that of premeditated murder ". We would observe here, that in our opinion, an intention to kill, formed even after the appellant left the cafe with the deceased, and while they were proceeding across country together, could well make the crime a premeditated murder. We think it unnecessary to give here hypothetical examples to substantiate this statement. One could find several.

After dealing with the evidence upon which they ruled out accident, the trial Court state their finding regarding appellant's intention at the time of the fatal shooting. " We are fully satisfied, (the judgment reads at p. 42A), that the accused intentionally shot the deceased. " And further down in the same paragraph the Court add : " However, in view of the position of the wound, there is no reason to think that the intention was other than to kill ". The time when this intention was formed would be a question most material to answer, under the original charge for premeditated murder. Now it became immaterial, under the substituted count ; and the matter was left at that.

The next point considered in the judgment of the trial Court was the defence of insanity; the main issue raised on behalf of the accused, right from the beginning. After quoting the provisions of section 12 of the Criminal Code, governing this matter, the trial Court correctly say at p. 42F that " the onus of proof of insanity is on the accused, although of course it is not higher than that which rests on the plaintiff in a civil action ". And the judgment proceeds :

> " Now accepting as correct the views given by Dr. Mikellides (D.W.1) on the basis of what he was asked to assume, what is the position ? The witness's statement that he had no reason to think that the accused did not know what he was doing if he intentionally shot the deceased, or that he did not know that he was doing wrong, is sufficient to dispose against the accused of any question depending on section 12."

The judgment, however, discussing the evidence of the mental specialist in this connection, proceeds at p. 42H, as follows :

> " With regard specifically to the delusion point, it will be recalled that the witness spoke only of *a possibility* that, the accused, ' assuming he fired

at the deceased ' did so while possessed by (persecutory) ideas and thinking that the deceased had betrayed him and was a person who might do him harm."

" There are two points here, (the judgment proceeds). In the first place, *a possibility* of a delusion as distinct from *a probability*, is not enough to go by. Secondly, according to the judges ' answers to the fourth question in the case referred to, ... a delusion connected with danger from the deceased could only exempt the accused from responsibility if it was one of immediate physical danger. However, the delusion referred to by Dr. Mikellides might have been one of some sort of harm other than physical harm, to be done in the future."

It is true that the medical evidence on this point was rather scanty. And as the trial Court were apparently influenced in their decision, by the doctor's use of the words " it is possible " and " possibility " in connection with accused's state of mind at the time of the shooting (p. 32F and 33A) without his (the doctor's) attention having been drawn to the importance of the distinction between " possibility " or " probability " of accused's abnormality, we had the doctor recalled before us under s. 25 (3) of the Courts of Justice Law, to clear these points.

The mental specialist was definite in his opinion. In all probability, according to him, the accused was labouring under a persecutory illusion at the time of the crime ; the illusion that he was in danger from the victim ; probably an imminent danger. As he had stated in his evidence to the trial Court, (p. 32 GH) the doctor was confident that when he saw the accused at the Mental Hospital, the latter was not feigning. And that his (accused's) psychic affliction had " started before or at least on the morning of the 26th December " (p. 32F). Apparently under the strain of events in those days, and fatigue, the appellant lost his mental balance ; and was acting under the influence of a mental affliction.

The condition of appellant's mind at the material time *i.e.* at the time of the shooting and the period between the moment the appellant left the cafe together with the victim until the fatal firing, is of vital importance. The evidence before the trial Court strongly pointed in the direction of mental affliction, in a manner quite sufficient to discharge the onus resting on " the plaintiff in a civil action ", as put by the Assize Court in their judgment. The medical

witness satisfied this Court that at the material time the appellant was insane. We accept the doctor's opinion that this could be well due to the strain and fatigue he had been subjected to by the events of those days.

Acting as he was in a state of insanity, the appellant was incapable of understanding that he was in no danger from his good neighbour and friend who had not betrayed him and who was actually sharing with him whatever danger there may have been. Labouring under the affliction of his mind, described to us by the medical witness, the appellant was incapable of understanding that he was not killing a dangerous enemy, but his own companion and friend.

The appellant is, therefore, entitled in our opinion, to be acquitted of the charge, on the ground of insanity.

Before closing the case, however, we think that we must refer to the application made on behalf of the appellant for " re-hearing the evidence of Dr. A. Mikellides, pursuant to the provisions of section 25 (3) of Law 14 of 1960, and the decision of the Supreme Court in 1961 Vol. of the C.L.R. p. 64."

Apparently counsel wished to refer to *Stelios Simadhiakos* v. *The Police* (1961, C.L.R. p. 64). But instead of referring to the case, in such an unusual, to say the least, manner, learned counsel should have acted according to the directions made in that case. And, furthermore, apparently counsel did not have in mind what was said in this connection, in *Periclis Ioannou Kolias* v. *The Police* (1963) 1 C. L. R. 52

Dealing with a similar application to hear further evidence under section 25 (3) of the Courts of Justice Law, the Court of Appeal had this to say in that case :

> " . . . .notice of an application to adduce further evidence before us should be served on the Attorney-General and material in support should also be served upon him. Included in that material, ...there should be an affidavit, or affidavits, containing a statement of facts which it was desired to put before the Court, and equally important, the reasons why they were not put before the trial Court . . . .there must be a full disclosure of the circumstances which would justify hearing further evidence on the appeal."

In that same judgment, Wilson P. said : " As has been said in other cases, this is an appellate Court and all the proper evidence must be put before the trial Court. This is the intention of our system ".

Upon the material put before the Court in that case, the application for further evidence was refused, the Court taking the view that it "did not show proper grounds upon which the Court could receive the further evidence tendered". And, but for the very special circumstances of the present case, this might well be the fate of the application in this appeal. In view of the grave responsibility of counsel in such matters, we thought that we should take the opportunity of repeating the warning.

Returning now to the substance of the case in hand, we allow the appeal ; and setting aside the conviction and sentence of the appellant, we make directions for his detention under section 70 (2) of the Criminal Procedure Law (Cap. 155) adding the finding required by the section, that the appellant committed the act constituting the offence of which he was convicted, but he is now acquitted on the ground of insanity.

Appeal allowed. Order and directions accordingly.