COSTAS HJI COSTA (No. 2),

*Appellant,*

*v.*

THE REPUBLIC,

*Respondent.*

(*Criminal Appeal No.* 2780)

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*Criminal Law—Conviction for stealing in the public Service and omitting to make entries in the cash book, contrary to sections* 255, 259, 267 *and* 313 (c) *of the Criminal Code, Cap.* 154—*Conviction quashed because considerations, which might well have been found to be relevant in deciding the question of guilt or innocence of the accused, do not appear to have been in the mind of the trial Court at the material time.*

*Criminal Law—Offences—Stealing in the Public Service and omitting to make entries in the cash book, contrary to sections* 255, 259, 267 *and* 313 (c) *of the Criminal Code* (supra)—*Existence or not of fraudulent intent which is required as an element of both offences.*

*Criminal Procedure—Practice—Appeal—Findings of fact by trial Courts—Exercise of Courts appellate Jurisdiction on findings of fact made by trial Courts and inferences to be drawn therefrom—Supreme Court entitled on appeal to examine what are the proper inferences to be drawn from proved facts and to examine, further whether the verdict of a trial Court was reached in the light of such inference or without due regard to them or in spite of them, as the case may be—It can, also examine whether the findings made by a trial Court are warranted by the evidence adduced, when looked upon as a whole and consider whether a trial Court has failed to take into account circumstances material to the estimate of such evidence.*

*Criminal Procedure—Practice—Oral application for the recall of a witness before the Supreme Court under section* 25 (3) *of the Courts of Justice Law,* 1960 (*Law No.* 14 *of* 1960)—*Application dismissed as having not been made properly.*

*Criminal Procedure—Appeal—Courts of Justice Law,* 1960, *section* 25 (3)—*Retrial—Order of retrial under section* 25 (3) *of the Courts of Justice Law* (supra) *made in preference to the hearing of further evidence, under the same section.*

1965
Sept. 28,
Oct. 15,
Nov. 18
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COSTAS
HJI COSTA
(No. 2)
v.
THE REPUBLIC

*Criminal Procedure—Practice—Grounds of appeal—Practice of allowing counsel to file notices of appeal with generic grounds, subject to fuller grounds being filed later—Practice intended to enable notice of appeal to be filed in time and not to enable appellant to avoid complying with requirements of filing full and specific grounds of appeal—Court may, in proper cases, decline hearing counsel or an appellant on grounds which are not properly stated in the notice of appeal as originally filed or even as supplemented in due course.*

Section 25 (3) of the Courts of Justice Law, 1960, reads as follows :—

> " Notwithstanding anything contained in the Criminal Procedure Law or any other Law or in any Rules of Court and in addition to any powers conferred thereby the High Court on hearing and determining any appeal either in a civil or a criminal case shall not be bound by any determinations on questions of fact made by the trial Court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial Court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of re-trial by the trial Court or any other Court having jurisdiction, as the High Court may direct."

The appellant, a public officer, holding the post of Antiquities custodian was convicted on 2 counts of the offences of (1) stealing on the 25.10.63 while being a person employed in the Public Service the amount of £27.500 mils which came into his possession from collections of admissions tickets to the Antiquities of Salamis, contrary to sections 255, 259 and 267 of the Criminal Code, Cap. 154, and (2) of omitting, on the same date to make an entry in the relevant cash book in respect of the said amount contrary to section 313 (*c*) of the Criminal Code and he was sentenced to 18 months' imprisonment on the first count and to 9 months' imprisonment on the 2nd count. He appealed against conviction on the ground that his conviction was erroneous in law and was not supported by the evidence adduced.

The trial Court found that the appellant failed to account for an amount of £27.500 mils which he collected from P.W. 3, Ritsa Georghiou, who took a party of 275 foreign visitors to visit the antiquities at Salamis at an admission fee of 100 mils for each tourist.

The trial Court further found that the above said witness definitely stated that she paid £28.500 mils to the appellant.

The appellant never entered into the cash book the proceeds for the sale of the above tickets nor did he lodge into Government account such proceeds ; but he did enter in the said cash book that on the same day, the 25th October, 1963, he received £29 from the sale of other tickets, with different serial number. The trial Court however, in its judgment seems to have treated the entries relating to the receipt for £29 as irrelevant.

The appellant's contention at the Court below and on appeal was that it was he that gave the receipt for the money to P.W. 3 but denied that it was he who received the money or gave to her the tickets and that the money must have been collected by one of the other Antiquities Custodians.

As the amount of £29 admitted to have been collected by the appellant represents admission tickets of 290 foreign visitors and as this would necessitate the presence at Salamis, on that same day, 25.10.63, of 290 more foreign visitors, in addition to the group of 275 tourists accompanied on that day by P.W. 3 the Supreme Court asked counsel for respondent to cause Police Investigations as to the fate of the tickets, or some of them identified in the cash book, as sold on the 25th October, 1963 : such Investigations were in fact carried out but they were unsuccessful.

*Held,* (*1*) *as to the finding of the trial Court regarding the amount of* £29.

(1) It would be rather difficult to assume that the extra 290 foreign visitors were made up of foreign visitors staying in Cyprus for the time being and visiting Salamis, singly or a few of them at a time, all on the same day, but independently of each other. Actually, a perusal of the relevant entries in the cash-book, exhibit 11, for September, October and November, 1963, shows that, apart from on a few occasions, when apparently groups of tourists visited the antiquities— and then again not more than 250 on any such occasion—foreign visitors at Salamis never exceeded 50 on any one day. So the presence of 290 foreign visitors at Salamis on the 25th October, 1963, in addition to the 275 accompanied by witness Ritsa Georghiou, must be an event which can be traced in terms of arrival, transportation, and departure of the foreign visitors involved who must have, in all probability, gone to Salamis together, as one group of tourists.

(2) If such a second group did go to Salamis on the 25th October, 1963, then the trial Court was right in treating the relevant entries in the cash-book as irrelevant. On the other hand, if no such second group of visitors called at Salamis on that day, then the fact remains that the appellant did account for an amount, equal, more or less to that represented by the tickets issued, to witness Ritsa Georghiou, for foreign visitors on that day and attached to exhibit 5, though admittedly on entering such amount in the cash-book he did so by reference to other counterfoil books of tickets ; there must, then, exist an explanation—sinister or innocent—of why he did so, which will have to be gone into.

(3) Considerations, such as the above, might well have been found to be relevant when deciding the issue of the existence or not of the fraudulent intent, required as an element of both offences of which appellant has been found guilty (*vide* ss. 255 and 313 of the Criminal Code, Cap. 154). Yet they do not appear to have been in the mind of the trial Court at the time, because it discarded as irrelevant the entries in respect of the £29 collected on the 25th October, 1963.

(4) This Court has, therefore, considered using its powers under section 25 (3) of the Courts of Justice Law, 1960, for the purpose of calling further evidence on this matter, including such evidence as may become available after a fuller police investigation into the question of the number of tourists visiting Salamis on that particular day. Bearing, however, in mind the fact that such course could possibly involve calling or recalling quite a number of witnesses, including perhaps the appellant, it has been found to be more proper, rather than to turn this Court into a court of first instance for the purpose, to quash the convictions of appellant and, using the powers under the same section 25 (3), to order a new trial of appellant, on the two counts concerned, before another Assize Court.

(*II*) *As to the finding of the Court regarding the evidence of P.W.* 3 *Ritsa Georghiou* referring to the payment by her of the *amount of* £28.500 *mils :*

(1) In our opinion, in the particular circumstances of this case, the fact that the possibility of witness Ritsa Georghiou making a *bona fide* mistake, on account of the lapse of time, as to whether she had paid to appellant personally the amount concerned, was not put to her expressly in cross-examination, is not a sufficient reason for dismissing such a possibility from consideration—as the trial Court appears to have done

in its judgment—once such possibility clearly arises on the very face of her evidence : it was open to the trial Court to recall the witness for the purpose of testing her memory in the light of this possibility and, once it was raised, we think that it ought to have done so.

(2) This Court has considered this point, in conjunction with the other aspects of this case and has found that it is an additional reason for ordering, in the circumstances of this case, a retrial under section 25 (3) of the Courts of Justice Law, 1960, as already stated.

*Appeal allowed. Convictions and sentences of appellant on counts* 1 *and* 6 *of the information quashed. Retrial of appellant ordered, under section* 25 (3) *of the Courts of Justice Law,* 1960, *on the said counts, before a different Assize Court. Appellant to remain in custody pending retrial.*

*Observations by Court regarding practice of allowing Counsel to file notices of appeal with generic grounds of appeal subject to further grounds.*

Cases referred to :

*Afsharian* v. *Patsalides* (1965) 1 C.L.R. 134.

**Appeal against conviction.**

Appeal against conviction by the appellant who was convicted on the 27.6.65, at the Assize Court of Famagusta on two counts of the offences of (1) Stealing by a person in the public service contrary to sections 255, 259 and 267 of the Criminal Code, Cap. 154, and (2) of omitting to make entries in the cash-book contrary to section 313 (*c*) of the Criminal Code, and was sentenced by Evangelides, P.D.C., Kourris & Zihni, D.JJ., to 18 months' imprisonment on count 1 and to 9 months' imprisonment on count 2, the sentences to run concurrently.

*G. Tornaritis*, for the appellant.

*S. Georghiades*, counsel of the Republic for the respondent.

*Cur. adv. vult.*

The facts sufficiently appear in the judgment of the Court.

VASSILIADES, J. : The judgment of the Court will be delivered by Mr. Justice Triantafyllides.

TRIANTAFYLLIDES, J. : The appellant was convicted by the Assize Court of Famagusta on the 7th June, 1965, of the offence of stealing, on the 25th October, 1963 while being a person employed in the public service as an antiquities custodian, the amount of £27.500 mils, which came into his possession from collections of admission tickets to the antiquities of Salamis, and, also, of the offence of omitting, on the same date, to make an entry in the relevant cash-book in respect of the said amount.

Both such offences were charged as counts 1 and 6, respectively, in an information containing four other similar counts on which the appellant was acquitted.

Appellant was sentenced to 18 months' imprisonment on count 1 and to 9 months' imprisonment on count 6, to run concurrently.

The appellant lodged this appeal, against conviction only, on the 16th June, 1965.

The grounds of appeal, as stated in the notice of appeal, read as follows :

> " The conviction of the accused was erroneous in law and was not supported by the evidence adduced. Full grounds will be given when the record of the case will be ready."

When, however, the appeal came up for hearing on the 28th September, 1965, no fuller grounds had been filed, as previously undertaken by the notice of appeal.

The Court cannot but record its surprise and regret for the failure of counsel to file full grounds of appeal, in due time before the hearing of the appeal. The practice of allowing counsel to file notices of appeal with generic grounds, subject to fuller grounds being filed later once the record of proceedings becomes available (*vide* also rule 24 of the Criminal Procedure Rules) is only intended to enable the notice of appeal to be filed within the proper period of time for appealing, without the need of applying for extension of such period, and it is not intended to enable an appellant to avoid complying with the requirement of filing full and specific grounds of appeal.

This Court will not hesitate, in a proper case, to decline hearing counsel or an appellant on grounds which are not properly stated in the notice of appeal as originally filed or, even, as supplemented in due course.

In the present case, having drawn the attention of counsel for appellant to the inadequacy of the presentation of the grounds of appeal and having received due explanations from him, we have decided to proceed with the hearing of the appeal on the notice of appeal as filed, but we have, nevertheless, thought fit to make these remarks so as to ensure that in future such a situation will not be allowed to arise.

No grounds of law have, eventually, been argued before this Court as invalidating the conviction of appellant.

The only ground of appeal which was argued is that on the evidence before the trial Court the appellant ought not to have been convicted.

The salient relevant facts, as found by the trial Court, are as follows :

The appellant, at the material time, in October 1963, was an antiquities custodian at Salamis.

On the 25th October, 1963, prosecution witness No. 3 Ritsa Georghiou, took a party of tourists to visit the antiquities there. She paid the appellant £28.500 mils for the admission of the tourists and she was given 275 admission tickets ; as the admission fee for foreign visitors is 100 mils per person the trial Court found eventually that the amount for which appellant ought to have accounted was only £27.500 mils and convicted him accordingly.

In addition to receiving the tickets, witness Ritsa Georghiou asked for a receipt for the money which she paid to appellant and he gave her one. It is exhibit 6 in these proceedings.

On the same day she handed in the tickets and the receipt to the Louis Tourist Agency by which she was being employed. The tickets are attached to the receipt, exhibit 6.

The appellant never entered into the cash-book, exhibit 11, for the keeping of which he was responsible, the proceeds from the sale of the tickets in question, or their serial numbers, nor did he lodge into Government's

account such proceeds. The appellant entered, however, in the said cash-book that on the 25th October, 1963, he received £29 from the sale of other tickets, with different serial numbers.

The appellant admitted, at his trial, giving the receipts for the money paid by witness Ritsa Georghiou but denied that it was he who received the money or gave her the tickets. He alleged that it must have been one of the other custodians at Salamis. He has taken the same course before this Court.

In dealing with this appeal this Court has borne duly in mind the relevant principles regulating the exercise of its appellate jurisdiction on findings of fact made by trial courts, and inferences to be drawn therefrom (*vide Afsharian* v. *Patsalides*, (1965) 1 C.L.R. 134.

In the light of such principles, this Court is entitled, on appeal, to examine what are the proper inferences to be drawn from proved facts and to examine, further, whether the verdict of a trial Court was reached in the light of such inferences or without due regard to them or in spite of them, as the case may be. It can, also, examine whether the findings made by a trial Court are warranted by the evidence adduced, when looked upon as a whole, and consider whether a trial Court has failed to take into account circumstances material to the estimate of such evidence.

In this connection this Court has had considerable difficulty with the entries, in respect of an amount of £29, made by Appellant in the cash-book, exhibit 11, in relation to the 25th October, 1963.

It is correct that this amount appears to represent the proceeds from the sale of 290 admission tickets the serial numbers of which are different than of those attached to exhibit 6.

Because of this the trial Court in its Judgment seems to have dismissed the entries relating to the receipts of the said £29 as being irrelevant.

This Court, however, has not found this matter to be so simple, for the following reasons :

It appears from a perusal of the said entries in the cash-book that the 290 tickets concerned are all tickets for foreign visitors, (Form 19F), costing 100 mils each, and not for Cypriots for whom there are other tickets (Form 19C) costing 50 mils each.

Receipts of £29 at Salamis on the 25th October, 1963, other than the £27.500 collected on the strength of the tickets attached to exhibit 6, would necessitate the presence at Salamis on that same day of 290 more foreign visitors, in addition to the group of tourists accompanied by witness Ritsa Georghiou.

The Court has, therefore, asked counsel for the Respondent to cause police investigations as to the fate of the tickets, or some of them, identified in the cash-book as sold on the 25th October, 1963.

At the resumed hearing on the 15th October, 1965, counsel for Respondent stated that the said tickets were not traced and, further, that, as no records were kept by Customs Authorities of tourists visiting the Island for a few hours only for the purpose of visiting Salamis, it was not possible to say how many such tourists arrived for the purpose on the 25th October, 1963.

We feel that the investigations in question, due perhaps to the short time available between the first and second days of hearing of this appeal, have not been pressed to their ultimate conclusion. Surely, there must be a way of ascertaining eventually whether nearly 300 foreign visitors, other than those accompanied by witness Ritsa Georghiou, were at Salamis on the 25th October, 1963.

It would be rather difficult to assume that the extra 290 foreign visitors were made up of foreign visitors staying in Cyprus for the time being and visiting Salamis, singly or a few of them at a time, all on the same day, but independently of each other. Actually, a perusal of the relevant entries in the cash-book, exhibit 11, for September, October and November, 1963, shows that, apart from on a few occasions, when apparently groups of tourists visited the antiquities —and then again not more than 250 on any such occasion— foreign visitors at Salamis never exceeded 50 on any one day. So the presence of 290 foreign visitors at Salamis on the 25th October, 1963, in addition to the 275 accompanied by witness Ritsa Georghiou, must be an event which can be traced in terms of arrival, transportation, and departure of the foreign visitors involved who must have, in all probability, gone to Salamis together, as one group of tourists.

If such a second group did go to Salamis on the 25th October, 1963, then the trial Court was right in treating the relevant entries in the cash-book as irrelevant. On the other hand, if no such second group of visitors called at Salamis

on that day, then the fact remains that the Appellant did account for an amount, equal, more or less, to that represented by the tickets issued, to witness Ritsa Georghiou, for foreign visitors on that day and attached to exhibit 6, though admittedly on entering such amount in the cash-book he did so by reference to other counterfoil-books of tickets ; there must, then, exist an explanation—sinister or innocent—of why he did so, which will have to be gone into.

Considerations, such as the above, might well have been found to be relevant when deciding the issue of the existence or not of the fraudulent intent, required as an element of both offences of which appellant has been found guilty, (*vide* ss. 255 and 313 of the Criminal Code, Cap. 154). Yet, they do not appear to have been in the mind of the trial Court at the time, because it discarded as irrelevant the entries in respect of the £29 collected on the 25th October, 1963.

This Court has, therefore, considered using its powers under section 25 (3) of the Courts of Justice Law, 1960, for the purpose of calling further evidence on this matter, including such evidence as may become available after a fuller police investigation into the question of the number of tourists visiting Salamis on that particular day. Bearing however, in mind the fact that such course could possibly involve calling or recalling quite a number of witnesses, including perhaps the appellant, it has been found to be more proper, rather than to turn this Court into a court of first instance for the purpose, to quash the convictions of appellant and, using the powers under the same section 25 (3), to order a new trial of appellant, on the two counts concerned, before another Assize Court.

There is a further ground which has led us to the decision of ordering a retrial in this case :

It has been the case for the appellant before the trial Court, and before this Court too, that, though he did sign the receipt exhibit 6, it was not he who collected the money from, or gave the tickets to, the witness Ritsa Georghiou ; as stated earlier in this Judgment, he has alleged that it must have been one of the other antiquities custodians, there at Salamis at the time, one of whom has since died.

According to the evidence of witness Ritsa Georghiou it was she herself who prepared the said receipt and appellant merely signed it.

She also said the following in examination-in-chief : " From this receipt "—exhibit 6—" I remember that I paid the sum of £28.500 mils to the accused ".

The trial Court in dealing in its Judgment with the evidence of witness Ritsa Georghiou—and such evidence is really the foundation of the case for the prosecution—said that they found her to be a truthful witness and that " there was no reason for Ritsa to have asked the accused to sign the receipt if she had given the money to another officer there ".

The Court then went on to say the following :

" At his final address counsel for the accused suggested that Ritsa might have made a *bona fide* mistake on account of the lapse of time and that now she might think that it was the accused who received the money, because she saw his signature on the receipt, but this suggestion was never put to the witness at the time of her cross-examination and Ritsa in her examination definitely stated that she paid the £28.500 mils to the accused."

As a matter of fact, from a perusal of the whole of her evidence, it appears that the statement which she made in this respect and which might have been taken by the trial Court to convey a definite pronouncement on her part, is the following, in examination-in-chief :

" I paid the sum of £28.500 mils to the accused, and that is why I got that receipt "—exhibit 6.

With respect to the trial Court, this answer again leaves room for the possibility that her recollection of the payment to appellant himself was not independent of the existence of the receipt, but that it was a case of consequential recollection, which would not go as far to exclude appellant's version as would an independent recollection of the payment in question.

Even though witness Ritsa Georghiou was not expressly cross-examined on this point—(and it may be that counsel for appellant, acting quite prudently, did not want to disturb evidence against his client which left it open to him to argue before the trial Court that it was only because of the receipt that the witness remembered the actual payment of the amount concerned to his client, and, therefore, that she could have been making a *bona fide* mistake)—there is no

doubt that the appellant, when giving evidence in his defence, expressly raised this issue, *viz.* that he had not sold her the tickets concerned or received himself the amount in question.

In our opinion, in the particular circumstances of this Case, the fact that the possibility of witness Ritsa Georghiou making a *bona fide* mistake, on account of the lapse of time, as to whether she had paid to appellant personally the amount concerned, was not put to her expressly in cross-examination, is not a sufficient reason for dismissing such a possibility from consideration—as the trial Court appears to have done in its Judgment—once such possibility clearly arises on the very face of her evidence ; it was open to the trial Court to recall the witness for the purpose of testing her memory in the light of this possibility and, once it was raised, we think that it ought to have done so.

In relation to such possibility, counsel for appellant, on the second day of the hearing of this appeal, without filing a written application for the purpose, applied orally for the recall of this witness before this Court for further evidence, under the provisions of section 25 (3) of the Courts of Justice Law, 1960. Such application has been dismissed by the Court as having not been made properly ; the relevant Ruling was given on the 15th October, 1965*, and it is hereby confirmed by this Judgment.

The dismissal of the application to recall witness Ritsa Georghiou, in the manner it has been made by counsel for appellant during the hearing of the appeal, did not, of course, dispose also of the point that, though this witness was found to be a truthful witness by the trial Court—and this Court is not prepared to interfere with such a finding—her evidence as it stands at present is not such as to exclude definitely the possibility of a mistake on her part concerning the actual receipt of the tickets from, or the actual payment of the amount involved to, the appellant.

This Court has considered this point, in conjunction with the other aspects of this Case—which have been dealt with earlier in this Judgment—and has found that it is an additional reason for ordering, in the circumstances of this Case, a retrial under section 25 (3) of the Courts of Justice Law, 1960, as already stated.

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* Ruling reported at p. 93 of this Part ante.

There shall be, therefore, an order quashing the convictions and sentences of appellant on counts 1 and 6 of the information and directing a retrial of appellant on such counts before a different Assize Court.

VASSILIADES J. : Appellant to remain in custody pending retrial, but the responsible authority to render to counsel handling the case for the appellant every reasonable facility for the preparation of his case.

*Appeal allowed. Convictions and sentences of appellant on counts* 1 *and* 6 *of the information quashed. Retrial of appellant ordered, under section* 25 (3) *of the Courts of Justice Law,* 1960, *on the said counts, before a different Assize Court. Appellant to remain in custody pending retrial.*