[VASSILIADES, P. TRIANTAFYLLIDES AND JOSEPHIDES, JJ.]

NICOS ANTONI POLYCARPOU AND ANOTHER,

Appellants,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal Nos.* 2874-2875)
(*Consolidated*)

Criminal Procedure—Appeal—Appeal against conviction—Conviction by the trial Court based on four grounds—As to the one of them the Court of Appeal found the evidence was unreliable and that the trial Court ought not to have acted thereon—Still the remaining evidence is such that the trial Court, as well as any other Court trying the appellants, would without doubt have convicted them—Therefore, no substantial miscarriage of justice in the sense of the proviso to section 145 (1) (b) of the Criminal Procedure Law, Cap. 155 has actually occurred—And the appeals against conviction have to be dismissed—Cfr. The proviso to section 4 (1) of the English Criminal Appeal Act, 1907, before and after its amendment by the Criminal Appeal Act, 1966—See, also, below.

Miscarriage of justice—Substantial miscarriage of justice—Proviso to section 145 (1) (b) of the Criminal Procedure Law, Cap. 155—Meaning and effect of the phrase—Proper interpretation of the expression "substantial miscarriage of justice" in the said proviso.

Evidence in Criminal cases—Circumstantial evidence—Conclusive evidence in this case, although part thereof was discarded by the Court of Appeal.

Criminal Law—Arson and attempted arson contrary to sections 319 and 320, respectively, of the Criminal Code, Cap. 154—If a person is about to set fire unlawfully and such fire starts earlier than as planned by him, or in a manner different than as intended by him, through mishandling of his preparations for the purpose—Such person should still, in law, be found guilty of the completed offence of arson—And not merely of an attempted arson.

The two appellants in these consolidated appeals were convicted by the Assize Court of Limassol of the offence of attempting, on the 28th May, 1966, to set fire to furniture

stored in a store No. 6 Zalongou Street, Limassol, contrary to section 320 of the Criminal Code, Cap. 154 ; and they were sentenced to five years' imprisonment each.

The trial Court based the said convictions on four main grounds, namely, (1) the finding in the store of a fuel tanker R. 408, connected with the appellants, (2) the extensive burns suffered by them, (3) their false *alibi* and (4) the sighting of car BU 888, belonging to appellant 1, being driven away from the fire.

The Supreme Court, on these appeals against conviction, took the view that the trial Court's conclusions as to (1) (2) and (3) hereabove were properly warranted by the evidence before it, but that it was not safe for the trial Court to accept as reliable the evidence regarding the identification of the car BU 888 referred in (4) hereabove. The Supreme Court, therefore, decided to approach these appeals on the assumption that the trial Court should not have been satisfied beyond reasonable doubt that the car seen by P. Constable J. being driven away from the scene of the crime was in fact the appellant's i said car BU 888. Proceeding on that assumption the Court took the view that the convictions could stand on the three first grounds and that, consequently, the fact that the trial Court wrongly relied in convicting the appellants on the identification of the car in question, did not lead to a substantial miscarriage of justice within the proviso to section 145 (1) (*b*) of the Criminal Procedure Law, Cap. 155. The Supreme Court found, also, that the offence committed by the appellants was not attempted arson but the completed offence. The said proviso to section 145 (1) (*b*) of Cap. 155 reads as follows :

> " Provided that the Supreme Court, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

The Court in dismissing the appeals :—

Held, (1) we are of the view that the trial Court —as well as any other Court trying the appellants—on being faced with the inescapable inference to be drawn from the matter of the tanker R.408 found in the circumstances of this case in the store, from the extensive burns on appellants' bodies and from their false *alibi*, would, without doubt have convicted them, even without crediting as reliable the evidence relating

to the identification of the said car BU 888 ; therefore, no substantial miscarriage of justice in the sense of the proviso to section 145 (1) (*b*) of the Criminal Procedure Law, Cap. 155 has actually occurred.

(2)—(*a*) The trial Court has added a new count for attempt to set fire to the furniture in the store and has convicted the appellants thereon, instead of on the Count charging the completed offence of arson. It has taken such a course because in its opinion the explosion in the store and the ensuing fire occurred prematurely. With respect, we disagree. If a person is about to set fire unlawfully and such fire starts earlier than as planned by him, or in a manner different than as intended by him, through a mishandling of his preparations for the purpose, he should still, in law, be found guilty of the completed offence of arson, and not merely of an attempt at arson.

(*b*) We, therefore, direct that the conviction of the appellants on the count of attempted arson be set aside, and that they should be convicted of the arson of the furniture in question, contrary to section 319 of the Criminal Code, and we impose a sentence of five years' imprisonment on each of the appellants as from the date of their original conviction by the trial Court.

Appeal dismissed.

Cases referred to :

R. v. *Hardy* [1944] 1 All E.R. 319, at p. 321, per Humphreys J., *adopted* ;

Stirland v. *Director of Public Prosecutions* [1944] 2 All E.R. 13, *at pp.* 14–15, per Viscount Simon, *adopted* ;

Pilavakis v. *The Queen* 19 C.L.R. 163 ;

Demetriou v. *The Republic* 1961 C.L.R. 309 ;

Makris v. *The Police* 1961 C.L.R. 330 ;

Zacharia v. *The Republic* 1962 C.L.R. 52 ;

Commissioners of Customs and Excise v. *Harz* [1967] 1 All E.R. 177, at p. 186, per Lord Morris, *adopted.*

Appeal against conviction.

Appeal against conviction by appellants who were convicted on the 30th November, 1966 at the Assize Court of Limassol (Criminal Case No. 7973/66) on one count of the offence of attempting to set fire to goods in a building, contrary

to sections 320 and 20 of the Criminal Code, Cap. 154 and were sentenced by Malachtos Ag. P.D.C., Vassiliades and Loris, D.JJ., to five years' imprisonment each.

G. Cacoyiannis with *Fr. Kolotas*, for the appellant.

L. Loucaides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

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

TRIANTAFYLLIDES, J.: The two appellants in these appeals—which have been consolidated—were convicted by the Assize Court of Limassol, in case 7973/66, of the offence of attempting, on the 28th May, 1966, to set fire to furniture stored in a store at 6, Zalongou street, Limassol, contrary to section 320 of the Criminal Code (Cap. 154), and they were sentenced to five years' imprisonment each.

The two appellants were tried together with three other persons on an information containing originally three counts : one charging all accused with a conspiracy to commit arson of the furniture in the store in question, another charging them with setting fire to such furniture, and yet another charging them with having in their possession, at the time, explosive substances, namely, a roll of safety fuse.

At the close of the case for the prosecution the three co-accused of the appellants were not called upon to make their defence and they were, consequently, discharged. The appellants were, likewise, discharged on the count relating to the explosive substances, but they were called upon to make their defence on the remaining two counts.

At the end of the proceedings both appellants were acquitted on the conspiracy and arson counts, but the trial Court directed the addition of new count for attempted arson and convicted them thereon. The appellants appeal now against such convictions.

The convictions of the appellants have been based entirely on circumstantial evidence, there being no eye witnesses' evidence of the complicity of the appellants.

Such circumstantial evidence has consisted mainly of matters which will be referred to in the immediately ensuing brief account of the salient facts.

On the 28th May, 1966, at about 8.50 p.m., a violent explosion took place in a furniture store situated at 6, Zalongou street, in Limassol. It was followed by an outbreak of fire which raged until about midnight. The store, and almost all the furniture therein, were destroyed.

In the store, and just inside its only door, there was discovered, after the fire had been put out, a converted into a tanker pick-up truck, R 408, with lights still on and facing outwards towards Zalongou street. Its tank consisted of two compartments between which there existed controlled communication ; and in both such compartments there was found a quantity of petrol mixed with diesel oil.

The extent and development of the fire strongly indicate that, shortly before the fire was started, the furniture in the store had been sprayed with a large quantity of petrol mixed with diesel oil.

The owner of the tanker was traced to be one Panicos Prastitis, the proprietor of the FINA petrol-filling station on the corner of Makarios III Avenue and Ayia Phyla street, in Limassol.

Prastitis, who was called as a witness by the prosecution, has testified that in the afternoon of the day of the fire appellant No. 2—being in the employment of appellant 1—bought a hundred gallons of petrol and two hundred gallons of diesel oil for the account of appellant No. 1, to be taken to Pareklissia village, where a traxcavator belonging to appellant 1 was being operated in relation to some Public Works Department project. The said quantities of petrol and diesel oil were put into the tanker and as Prastitis had no available driver it was agreed that appellant No. 2 would drive the tanker to Pareklissia. He did not do so at once, however ; the tanker was left standing there, at the filling station, with the ignition keys on, for some time and it was still there when the station closed up at 8 p.m. In the meantime Appellant No. 1 had called at the station during the afternoon and paid for the quantities of petrol and diesel oil which had been purchased by appellant No. 2 as aforesaid.

Appellant No. 1 is the owner of car BU 888. A police constable, P.C.342 Andreas Josephides, has stated in evidence that, shortly after the explosion and fire in the store concerned, he saw this car being driven away from the direction of such store.

On the 30th May, 1966—two days later—the two appellants were traced, and arrested, in Famagusta, in a private clinic, where they were undergoing treatment for extensive burns. They both volunteered statements to the police putting forward an alibi in relation to the times material to the arson in question and explaining how they came to suffer the burns, in Famagusta, in a manner totally unconnected with the fire in Limassol ; they admitted, however, that the accident which caused to them these burns took place on the same evening as the said fire.

In their statements the appellants admitted that they had called at the filling station of Prastitis on the afternoon of the 28th May, 1966 ; but they said that they had done so for the purpose of making a part payment in respect of appellant's No. 1 current account there ; and nothing was mentioned by either of the appellants about the transaction involving the tanker R 408.

Neither of the appellants chose to give evidence on oath in support of his alibi. They made unsworn statements from the dock adopting their previous statements to the police.

The trial Court disbelieved the alibi of the appellants, as well as the explanation as to how they came to suffer the burns on their bodies, and it accepted the evidence of Prastitis and P.C. Josephides.

The trial Court has based the convictions of the appellants on four main grounds, namely, (1) the finding of tanker R 408 in the store, (2) the extensive burns suffered by the appellants, (3) their false alibi, and (4) the sighting of car BU 888 being driven away from the fire.

Having gone very carefully through everything which learned counsel for the appellants have submitted in relation to the issues of the finding of tanker R 408 in the store and of the burns suffered by the appellants and regarding the conclusion of the trial Court that the appellants' *alibi* was a false one, we find that we have not been convinced that the trial Court has erred in relation to any of these matters. On the contrary we are of the view that the trial Court's conclusions, regarding the linking of the appellants with tanker R 408, the causation of their burns and the rejection of their alibi, were properly warranted by the evidence before it.

Regarding, however, the trial Court's finding that car BU 888, belonging to appellant No. 1, was seen being driven away from the store immediately after the explosion and fire therein, the arguments of counsel for the appellants

have indeed succeeded in persuading us that it was not safe for the trial Court to accept as reliable the identification of this car by P.C. Josephides. We have decided, thus, to approach these appeals on the assumption that the trial Court should not have been satisfied beyond doubt that the car which P.C. Josephides saw driven away from the scene of the crime was in fact car BU 888.

We now have to consider whether the convictions of the appellants can stand without the identification of car BU 888. In other words whether or not reliance by the trial Court in convicting the appellants, on the identification of the said car, has led to a substantial miscarriage of justice in the sense of the proviso to section 145 (1) (*b*) of the Criminal Procedure Law (Cap. 155).

The said proviso to section 145 (1) (*b*) corresponds closely to the proviso to section 4 (1) of the Criminal Appeal Act, 1907, in England ; but the English proviso was recently amended by the Criminal Appeal Act, 1966, so that the term " substantial " has ceased to qualify the words " miscarriage of justice " as it used to previously and as it still does in the proviso to our section 145 (1) (*b*).

In England the proper approach to the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, was laid down by the Court of Criminal Appeal in, *inter alia*, *R.* v. *Haddy* [1944] 1 All E.R. p. 319 and by the House of Lords in *Stirland* v. *Director of Public Prosecutions* [1944] 2 All E.R. p. 13.

In *R.* v. *Haddy*, Humphreys, J., had this to say (at p. 321 *et seq.*) :—

" The proviso runs as follows :

> ' Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.'

The two key words, if I may use the expression, in that sentence seem to be the word ' substantial ' as a description of the miscarriage of justice, and the word ' actually '. They may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

Counsel for the appellant argued that we could not give effect to the proviso in this case unless the court was prepared to hold that no jury properly directed could have acquitted the appellant. He based that

argument upon a passage in the opinion of Lord Sankey, L.C., in giving his opinion in the House of Lords in *Woolmington's* case* ; it is the last effective sentence of his judgment. He observed as follows, after reading the proviso to section 4 which I have just read, at p. 482 :

> ' The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion '.

It was the word ' inevitably ' in that sentence upon which counsel for the appellant relied.

In our opinion, it would be wrong to give effect to that argument. To accept it would be to render the proviso practically otiose, for it can never be said with certainty in any criminal case, however strong the evidence for the prosecution, that no jury could be found to acquit. We are satisfied that Lord Sankey, L.C., was not referring to a jury who might return a perverse verdict but to a jury of sensible persons anxious to do their duty which is, in the language of the juror's oath, to return a true verdict according to the evidence. If that be the correct view, the word ' inevitably ' becomes merely an adverb of emphasis designed to express the necessity for the absence of any doubt on the part of the Court that a reasonable jury properly directed would have returned the same verdict. In the very early days of this Court, Lord Alverstone, L.C.J., used the phrase in delivering the judgment of the Court :

> ' We cannot in this case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction.'

In a later case in the same year, 1909, his Lordship in dealing with Stoddart's case** observed as follows, at p. 245 :

> ' We think it is open to consideration whether the word ' must ' is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict.'

It seems to us to matter very little what precise words are used so long as the language of the proviso

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* [1935] A.C. 462.

** R. v. Stoddart (1909) 2 Cr. App. Rep. 217.

is satisfied and the Court is sure that there has been no substantial miscarriage of justice.

The proper interpretation of the expression 'substantial miscarriage of justice' occurring in the proviso was the subject of a considered judgment of this Court in *R.* v. *Cohen and Bateman**. Reading from p. 207, I find these words used by Channell, J., in delivering the judgment of the Court, the other members of the Court being Jelf and Bray, JJ.:

> 'We have had an opportunity of carefully discussing this case, and we have arrived at our conclusion. Under the statute only one judgment is delivered, and we have, therefore, put into writing our judgment upon the construction of the Criminal Appeal Act, s.4 (1).'

Then he reads the section itself and discusses it, and deals first with the ground of appeal that the conviction should be set aside on the ground of a wrong decision of any question of law. He then proceeds as follows, at p. 207 :

> 'A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground', so that the appeal should be allowed according as there is or is not a 'miscarriage of justice'. There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events

* [1909] 2 Cr. App. Rep. 197.

no substantial miscarriage of justice within the meaning of the proviso . . .'

That statement of the law has stood for 35 years and, so far as we are aware, has never been the subject of adverse comment, though judges in giving the decisions of the Court of Criminal Appeal have used varying language and many different expressions, including the word ' inevitably ', which does not occur for the first time in the opinion of Lord Sankey, L.C. in *Woolmington's* case *.

We are convinced that it was not the intention of Lord Sankey, L.C., in that case, or of the other members of their Lordship's House, who concurred in his opinion, to lay down any different interpretation of the expression ' miscarriage of justice ' ."

In the Stirland case** Viscount Simon had this to say in his judgment (at p. 14–15) :—

" Apart altogether from the impeached questions (which the Common Serjeant in his summing up advised the jury entirely to disregard), there was an overwhelming case proved against the accused. The trial had lasted two full days, but the jury took only a few minutes to consider its verdict and the judge stated that he considered the verdict ' perfectly right '. When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to the Criminal Appeal Act, 1907, s.4 (1) should be applied. The passage in *Woolmington* v. *Director of Public Prosecutions**, at p. 483, where Viscount Sankey, L.C., observed that in that case, if a jury had been properly directed, it could not be affirmed that they would have ' inevitably ' come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence ; but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption,

* [1935] A.C. 462.

** [1944] 2 All E.R. 13.

as the Court of Criminal Appeal intimated, may be safely made in the present case. The Court of Criminal Appeal has recently in *R.* v. *Haddy** correctly interpreted section 4 (1) of the Criminal Appeal Act and the observation above quoted from *Woolmington's* case** in exactly this sense."

The cases of *Haddy* and *Stirland* were followed by the Supreme Court of Cyprus, in applying the corresponding proviso in Cyprus, in, *Pilavakis* v. *The Queen* (XIX C.L.R. p. 163).

Also, the proviso to our section 145 (1) (*b*) was applied, on the above footing, in, *inter alia*, the following cases : *Demetriou* v. *The Republic* (1961 C.L.R. p. 309) ; *Makris* v. *The Police* (1961 C.L.R. p. 330) ; and *Zacharia* v. *The Republic* (1962 C.L.R. p. 52).

It appears that apart from the absence nowadays of the term " substantial " from the amended English proviso—which has rendered the English proviso less available for application against an appellant than our own proviso—the approach to the matter by appellate Courts in England has not changed from what it has been in the past.

In a recent case decided by the House of Lords, *Commissioners of Customs and Excise* v. *Harz* [1967] 1 All E.R. p. 177 Lord Morris had this to say (at p. 186) :—

> " Though the circumstance that on a first trial a jury has disagreed will be noted by the Court of Criminal Appeal if considering the proviso after a conviction in a second trial there should, in my view, be no replacement or abandonment of the principle of the approach indicated in *Stirland* v. *Director of Public Prosecutions****. In his speech in that case Viscount Simon, L.C., in referring to the proviso, said that it assumed a situation where ' a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict '.
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> It is to be observed that the test to be followed is not that of seeking to assess what the particular jury that heard the case would or must have done if it had only heard a revised version of the evidence. For the purpose of the test the appellate Court must assume

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* [1944] 1 All E.R. 319.

** [1935] A.C. 462.

*** [1944] 2 All E.R. 13.

a reasonable jury, and must then ask whether such a reasonable jury, hearing only the admissible evidence, could if properly directed have failed to convict.

If in the present case the impugned evidence is to be excluded, the process in invoking the proviso becomes that of considering whether a reasonable jury who had heard only the admissible evidence would, after a proper direction in a summing-up, without doubt have convicted."

Bearing all the foregoing in mind, we are of the view that the trial Court—as well as any other Court trying the appellants—on being faced with the inescapable inferences to be drawn from the matter of the tanker R 408, from the extensive burns on appellants' bodies (which covered 25%–30% of the surface of their bodies) and from their false alibi would without doubt have convicted them, even without crediting as reliable the evidence relating to the sighting of car BU 888 ; therefore, no substantial miscarriage of justice in the sense of the proviso to section 145 (1) (*b*) of Cap. 155 has actually occurred.

In the circumstances these appeals fail and have to be dismissed accordingly.

As stated earlier the trial Court has added a new count for attempt to set fire to the furniture in the store and has convicted the appellants thereon, instead of on the count charging the completed offence of arson. It has taken such a course because in its opinion the explosion in the store and the ensuing fire occurred prematurely. With respect to the trial Court, we cannot agree with the view it has taken. If a person is about to set fire unlawfully and such fire starts earlier than as planned by him, or in a manner different than as intended by him, through a mishandling of his preparations for the purpose, he should still, in law, be found guilty of the completed offence of arson, and not merely of an attempt at arson. We, therefore, have decided to direct that the conviction of the appellants on the count of attempted arson should be set aside, and that they should be convicted instead of the arson of the furniture in question, contrary to section 319 of Cap. 154. As regards sentence we have decided that they should be sentenced each to five years' imprisonment, as from the date of their original convictions by the trial Court ; though the offence of arson carries a greater sentence than the attempt to commit arson we have decided not to pass on the appellants any heavier sentence, as the sentence of five years' imprisonment is in our opinion a sufficiently severe one.

Appeals dismissed.