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

OURANIA MODESTOU PITSILLOU,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3119).

Wireless apparatus—Maintaining wireless apparatus without licence (from 1.12.62 *to* 30.11.64)*—Contrary to sections* 3(1) *and and* 11 (*a*)(*i*) *and* (*ii*) *of the Wireless Telegraphy Law, Cap.* 307 *and regulation* 5 *of the Wireless Telegraphy Regulations,* 1955 *to* 1956*—Owner failing to produce licences but alleging that they have been duly renewed—Burden cast on the owner to show that the said set was maintained under licence—A matter turning on the balance of probabilities and not on proof beyond reasonable doubt—Owner discharged the burden cast on him—Finding made by the trial Judge set aside—Conviction quashed.*

Onus and standard of proof—When cast on the accused the standard is that of the balance of probabilities.

Appeal—Findings of fact made by trial Courts—Approach of the Court of Appeal—Principles upon which the Appellate Court will interfere with such findings restated.

Per curiam : It would be oppressive if a citizen had a duty cast on him of keeping all the annual licences of his radio for an indefinite period to prove his innocence if charged at any time.

On June 23, 1969 the appellant, owner of a wireless set, was charged, *inter alia*, that she maintained the said wireless set from December 1, 1962 to November 30, 1964 (*i.e.* for a period of two years) without a licence granted by the appropriate Authority contrary to the enactments referred to in the rubric. The evidence on her behalf was that of her husband to the effect that he checked his papers and found the licences for the years 1958, 1959, 1965, 1966, 1967, 1968 and 1969 but he could not trace the licences for the years 1960, 1961, 1962, 1963 and 1964.

Allowing the appeal the Court :—

Held, (1). The evidence for the defence was not effectively contradicted by the evidence for the prosecution.

(2) On the other hand the evidence established that appellant's husband could not trace not only the licences for the two years in the charge, but also the licences for earlier years (*i.e.* 1960 and 1961) for which licences had been duly obtained as it may be seen from the official card.

(3) The approach of this Court to findings of fact upon which a conviction is based was stated in a number of cases. It is sufficient to refer to a few of them. (See *Antoniou and Others* v. *The Republic*, 1964 C.L.R. 116 ; *Meitanis* v. *The Republic* (1967) 2 C.L.R. 31 ; *Tambouras* v. *The Police* (1968) 2 C.L.R. 100 ; *Ioannides* v. *The Republic* (1968) 2 C.L.R. 169).

(4) The findings made by the trial Judge in this case are usatisfactory and therefore they have to be set aside and the conviction must be quashed.

Appeal allowed

Cases referred to :

Antoniou and Others v. *The Republic*, 1964 C.L.R. 116 ;

Meitanis v. *The Republic* (1967) 2 C.L.R. 31 ;

Tambouras v. *The Police* (1968) 2 C.L.R. 100 ;

Ioannides v. *The Republic* (1968) 2 C.L.R. 169.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Ourania Modestou Pitsillou who was convicted on the 31st July, 1969, at the District Court of Nicosia (Criminal Case No. 11150/69) on one count of the offence of maintaining an apparatus for wireless telegraphy without a permit contrary to sections 3(1) and 11(*a*)(i)(ii) of the Wireless Telegraphy Law, Cap. 307 and regulation 5 of the Wireless Telegraphy Regulations 1955–1966, and was sentenced by Stylianides, D.J. to pay fine of £1 and £3 licence fees and she was further ordered to pay £1 costs.

Appellant in person.

A. Frangos, Senior Counsel for the Republic, for the respondents.

The judgment of the Court was delivered by :

VASSILIADES, P. : The appellant, a housewife and a mother of three children, owned and possessed for home use a wireless set of the make of " Tonfung " for a number

of years. According to the record-card kept by the Post Office (who are the appropriate Authority in this connection) she was the registered owner of this set since 1956.

On June 2, 1969, the appellant was prosecuted, by the Nicosia Police, for maintaining the wireless apparatus in question contrary to sections 3(1) and 11(*a*)(i)(ii) of the Wireless Telegraphy Law, Cap. 307, and regulation 5 of the Wireless Telegraphy Regulations 1955 to 1956 ; and on June 23, 1969, she was charged before the District Court of Nicosia (where she resides) on two counts in that connection :

(1) That she maintained the wireless set in question from December 1, 1962 to November 30, 1964 (*i.e.* for a period of two years) without a licence granted by the appropriate Authority ; and

(2) that she maintained the same set without a licence from December 1, 1968.

To both these counts the appellant pleaded ' not guilty '; and the case went to summary trial on July 18, 1969.

The prosecution called two witnesses in support of their case ; a Post Office employee (P.W.1) and a Policeman (P.W.2). On the closing of the case for the prosecution the appellant was called upon for her defence, when she made a statement from the dock to the effect that the renewal of the licences (for the home wireless) was entirely in her husband's hands who, as far as she knew, regularly renewed the annual licence. The husband, who is a hawker and seems to take a keen interest in litigation, was called as a witness for the defence. His evidence was that he regularly renewed the licences of the wireless set in question, soon after their expiry on the 30th November, each year ; and that having checked his papers he found the licences for the years 1958, 1959, 1965, 1966, 1967, 1968 and 1969, but he could not trace the licences for 1960, 1961, 1962, 1963 and 1964. The licence for 1969 was renewed on December 21, 1968, expiring as usual on November 30, 1969.

He produced the licences in his possession ; and they were admitted in a bundle as *exhibit No.* 3. The witness stated positively that he remembered renewing the set's licence for the years 1962, 1963 and 1964, on two occasions of which he remembers to have done so at the Central Post Office in Attaturk Square, the records of which were

not accessible to the Government Postal authority between January 1964 and early in 1967.

The learned trial Judge, accepting the evidence of the Post Office employee, found that the appellant had not renewed her licence for the years 1963 and 1964 (*i.e.* for the period December 1, 1962 to November 30, 1964) the period in count 1. But as the licence for 1969 (December 1, 1968 to November 30, 1969) had been renewed on December 21, 1968, and was in force at the time when the appellant was charged, the Judge discharged her absolutely on the second count, taking the view that albeit the appellant was in default for the first 21 days in December and had thus committed an offence under the law, she should, in the circumstances, be discharged on that count. For the conviction on the first count the Judge imposed a fine of £1 together with an order against the appellant for the payment of £1 costs and £3 licence fees for the two years in the first count.

From that conviction and sentence the appellant took the present appeal upon a notice containing more argumentation than grounds of appeal (apparently prepared by appellant's husband), including the contention that the finding of the trial Judge that the licences for the two years in question had not been renewed, was against the weight of evidence and should be set aside.

At the hearing of the appeal today, the husband attempted to appear for the appellant ; but he was informed that he could not do so. The appellant was personally present and she was told that her husband could stay with her, to assist her if necessary. The appellant stated that all she wished to say was that she would leave the matter to the Court.

Learned counsel for the Police submitted that on the material before the Court, the trial Judge's finding was fully justified. That the appellant " maintained " the set in question, counsel argued, for the period in the first count, was not in dispute. Indeed this was positively established both by the Police evidence and that of appellant's husband. The only fact in dispute was whether the appellant had obtained the required licences for the period in question; and there was ample evidence, counsel submitted, upon which the trial Judge could make the finding upon which he based the conviction.

Section 3(1) of the Wireless Telegraphy Law, Cap. 307, under which the appellant was convicted, provides, as far as material to this case, that—

> " No person shall use or maintain any apparatus for wireless telegraphy except under the authority of a licence granted by (the appropriate authority), and any person who maintains any apparatus except under and in accordance with such licence shall be guilty of an offence under this law ".

As provided in the interpretation section 2(1) " maintain " includes possession of an apparatus, whether in working condition or not.

As pointed out by the trial Judge, this being a criminal case, the burden is on the prosecution to establish the charge beyond reasonable doubt. In the instant case, the appellant does not dispute that she " maintained " the wireless set in question, during the period in the first count ; and the prosecution might contend that there was sufficient evidence upon which the Court could convict. But the contention of the appellant that she maintained the apparatus under licences, supported by the evidence of her husband that the required licences had been duly obtained, raised the issue of fact whether this was so or not ; and here, as rightly observed by the trial Judge, all that was required was for the appellant to show on the balance of probabilities that it was probable that the annual licence of the set in question was renewed during the period in the charge, same as it was regularly renewed for a number of years both prior and after such period.

The evidence for the defence to that effect was not effectively contradicted by the evidence of the Post Office employee (a prosecution witness) who fairly said in evidence that he could not be expected to bring to Court or to check the counterfoils for licences issued for the two years in question, amounting to some 600,000 in number. He only checked the books, he said. He could not be sure, he agreed, that the official card showing the default was correct ; adding that sometimes mistakes do take place.

On the other hand the evidence established that appellant's husband could not trace (and therefore did not produce) not only the licences for the two years in the charge, but also the licences for earlier years, for which licences had been duly obtained as it may be seen from the official card.

The learned trial Judge seems to us to have attached great importance to the failure of the appellant to produce the licences for the years in question, when her husband was apparently in the habit of regularly keeping the licenses. This, however, is not entirely correct, as pointed out a little earlier. At least two of the old licences are missing which, apparently, had been duly issued (1960 and 1961). The burden cast on the appellant in this connection, (to show that she " maintained " the set in question under a licence) is a matter which turns on the balance of probabilities ; and not one of proof beyond reasonable doubt. It is sufficient for the appellant to show that such a probability cannot be excluded ; and that on the balance of probabilities, the scale with the probability of renewal of the licence, is heavier than that with the probability of non-renewal. In other words to show that it is more probable that appellant's husband renewed the set's licence for 1963 and 1964 (the two years in the charge) same as he had done for the earlier years, rather than that he had failed to do so ; and that he was assisted to jump those two years when he went to the Appropriate Authority to renew the licence for 1965 and again for 1966 and for 1967 ; this jumping being discovered only in 1969, when the appellant had already been issued a licence for that year. All that it was necessary for the appellant to do for her defence was to create a doubt in the mind of the Court whether she had in fact " maintained " her set for those two years *without a licence*, as alleged in the charge. After all it would be very oppressive if a citizen had a duty cast on him of keeping all the annual licences of his radio for an indefinite period to prove his innocence if charged at any time.

Reading the judgment of the trial Court, we are inclined to think that on the evidence before the Court, the finding that the appellant had not renewed her licence for the period in the charge, (which was some six or seven years before she was prosecuted and at period when abnormal conditions in the island kept the official records connected with the matter beyond the control of the responsible authorities for considerable time), was unsatisfactory; and should be set aside. The approach of this Court to findings of trial Courts upon which a conviction is based, was stated in a number of cases. It is sufficient to refer to a few of them. See *Antoniou and Others* v. *The Republic*, 1964 C.L.R. 116 ; *Meitanis* v. *The Republic* (1967) 2 C.L.R. 31 ; *Tambouras* v. *The Police* (1968) 2 C.L.R. 100 ; *Ioannides* v. *The Republic* (1968) 2 C.L.R. 169.

Having come to the conclusion that the finding in question upon which the conviction rests, should be set aside, we unanimously think that this appeal must be allowed and the conviction be quashed.

Appeal allowed. Conviction set aside ; and all moneys paid upon consequential orders or warrants, to be refunded.

Appeal allowed.