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

FATMA MEHMET,

Appellant,

v

THE POLICE,

Respondents

(*Criminal Appeal No* 3153)

Criminal Law—Obtaining money by false pretences and pretending to exercise witchcraft and tell "fortunes"—Sections 298 *and* 304 *of the Criminal Code, Cap* 154*—Findings of fact—Identification of the accused (appellant) by complainants who had ample opportunity to know appellant well enough to be able to identify her—No sufficient reasons shown why the Court of Appeal should interfere with the conviction—Appeal against conviction*

Witchcraft—Telling "fortunes"—See supra

Criminal Procedure—Charge—Amendment of the charge by the trial Judge by confining the particulars of the different counts to those established to his satisfaction, and excluding those which he did not find sufficiently proved—Sections 83, 84 *and* 85 *of the Criminal Procedure Law, Cap* 155*—The trial Judge could have convicted on the counts as were originally framed, without any amendment thereof stating merely that certain of the allegations set out in the particulars had not been proved—Since what has been proved was obviously sufficient to support the conviction on the counts or count upon which the accused was charged—And the trial Judge could have convicted as aforesaid under section* 85 (1) *of the Criminal Procedure Law, Cap* 155 *without making any amendment*

Appeal—Findings of fact made by trial Courts—Approach of the Court of Appeal—Principles applicable

Charge—Amendment thereof by the trial Judge—In the instant case no amendment was necessary—The trial Judge could have proceeded under section 85 (1) *and convict without making any amendment of the counts as originally framed—But stating that certain of the allegations contained in the particulars had not been established—Since what has been proved was amply sufficient to support such conviction*

This is an appeal against conviction of obtaining money by false pretences and by pretending to exercise witchcraft and tell " fortunes ". It was argued on behalf of the appellant that on the evidence the trial Judge could not reach a verdict beyond reasonable doubt. Another ground was that the trial Judge, after making his findings, proceeded to amend the charge so as to confine the particulars set out in the counts to the established facts ; and he convicted the appellant on the amended charge without complying with the provisions in sections 83 and 84 of the Criminal Procedure Law, Cap. 155.

Dismissing the appeal, the Court :—

Held, (1). As regards the factual aspect of the case the appellant has to satisfy us that the findings of the trial Judge cannot be sustained on the evidence. There is a line of cases establishing this position and the approach of this Court to findings of fact made by trial Courts (See e.g. *Lazarou* v. *The Police* (1969) 2 C.L.R. 184 ; *Stylianou* v. *The Police* (1970) 2 J.S.C. 158). In this case we have no difficulty or hesitation in coming to the conclusion that the findings of the trial Judge were well supported by the evidence on record.

(2)—(*a*). It is unfortunate that the trial Judge did not refer specifically to the section under which he amended the charge. He did not say that he was making use of the provisions in section 83 or 85 of Cap. 155 (*supra*). The fact, however, remains that he amended the charge by confining the particulars of the different counts to those established to his satisfaction ; and excluding those which he did not find sufficiently proved.

(*b*) We think, however, that the case comes clearly under section 85 (1) of the Criminal Procedure Law, Cap. 155 ; and the trial Judge need not have amended the charge ; he could convict under section 85 (1) on the counts as they stood, making it clear that part of the particulars had not been established, if what he considered as sufficiently established, was enough to support the count charged ; bearing always in mind that the onus was on the prosecution to prove the offence.

(*c*) We think that the trial Judge in his anxiety to be fair to the accused amended the charge in a way which did not prejudice the defence at all.

Appeal dismissed.

Cases referred to :

Lazarou v. *The Police* (1969) 2 C.L.R. 184 ;

Stylianou v. *The Police* (1970) 2 J.S.C. 158.

1970
May 20
—
FATMA
MEHMET
v.
THE POLICE

Appeal against conviction.

Appeal against conviction by Fatma Mehmet who was convicted on the 28th February, 1970, at the District Court of Kyrenia (Criminal Case No. 1406/69) on two counts of the offence of obtaining money by false pretences and on two counts of the offence of pretending to exercise witchcraft or tell fortunes contrary to sections 298 and 304, respectively, of the Criminal Code Cap. 154, and was sentenced by Demetriades, D.J., to 15 months' imprisonment on each of the false pretences counts and 6 months' imprisonment on each of the witchcraft counts, all sentences to run concurrently.

A. M. Berberoglu, for the appellant.

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

The judgment of the Court was delivered by :—

VASSILIADES, P.: The appellant, a gipsy woman of mature age, was convicted in the District Court of Kyrenia on a charge containing four counts : Two for obtaining money by false pretences from two persons (hereinafter the complainants) contrary to section 298 of the Criminal Code, Cap. 154 ; and two for pretending to exercise witchcraft and tell " fortunes ", contrary to section 304 of the Code. She was convicted on all four counts and was sentenced to fifteen months' imprisonment on each of the counts for false pretences ; and six months' imprisonment on each of the counts under section 304 ; all sentences running concurrently. She appeals against the convictions.

Her appeal is made on the grounds stated in the notice prepared and filed by counsel on her behalf. The first ground is that the trial Judge " erred in amending the counts in the charge while delivering the judgment ". The next two grounds challenge the findings of the trial Court on the contention that they are not warranted by the evidence considered as a whole ; and the fourth ground is that on the evidence before the court, the appellant was entitled to the benefit of the doubt.

The version of the prosecution is that the appellant together with some four or five other gipsies, in their usual round in the small town of Kyrenia, entered the public labour office where the two complainants were working (and other persons happened to be present) and offered to sell skewers, an article usually made and sold by gipsies.

When none of the persons in the office appeared to be interested in this offer, the gipsies tried something more interesting : They offered to tell " fortunes " ; (to foretell future events in her customer's life). In fact this attracted more attention and some of the persons present agreed to have their fortune told, even if rather for fun than seriously ; and at the end each of them paid a shilling for the service or the joke. But apparently one of the gipsies created, as does happen sometimes, the suitable climate for the second attempt ; and suggested to the complainants (a young married woman in her 30's and a young man working in the same office) another meeting in the afternoon when the gipsy would be better able to give her customers what they thought that they could have from this fortune-teller. This was on November 30, 1965.

The case for the prosecution is that between that date and November 22, 1966, that is for a period of about a year, the two complainants (the persons referred to above, both employed in the Labour Office of Kyrenia) were under the spell of the appellant before us, one of the five gipsies who went to their office on November 30, 1965.

During this period the spell and influence of this gipsy on the two complainants were such that they parted, they say, with considerable sums of money and valuables. It is common ground that the female complainant reached such state of mental condition that in August, 1966, she had to receive treatment at the mental hospital where she was kept as an inmate for while. It is the allegation of the complainants that during this period the appellant succeeded in taking away, gradually, some £900 in cash from the female complainant and some £1,700 from the male complainant. In addition, she managed to take away from them, they say, different valuable articles.

The 22nd November, 1966, to which we have referred, marks the end of the adventure with a complaint to the Police, to whom one must presume that the two complainants gave a description for the identification of the gipsy in question. Ever since, the Police opened a file and were looking for the gipsy. Some three years later, on December 5, 1969, the appellant was arrested under a warrant issued in connection with this and certain other matters. Her version throughout is that she had nothing whatever to do with this case ; that she knew nothing about it ; she did not know the complainants ; she could not remember if she ever told them

their fortune ; she may have done ; but she never took such money or valuables from anybody ; if there is any truth in the complainants' version, they are making a mistake in the identity of the gipsy concerned.

The prosecution called seven witnesses in support of their case ; the appellant gave evidence for her defence. She was defended by experienced counsel throughout the trial, at the conclusion of which the Judge reserved his judgment, which he delivered a few days later from carefully-considered notes.

After dealing with the evidence and making his assessment of the testimony before him, the trial Judge proceeded to make his findings ; and thereupon he proceeded to amend the charge so as to confine the particulars in the counts to the established facts ; and he convicted the appellant on the amended charge.

As has already been stated, this is one of the grounds upon which the conviction is challenged. It is contended on behalf of the appellant that the amendment of the charge at that stage was contrary to the statutory provisions under which the Judge must have purported to act ; and, in any case, was such as to prejudice the defendant.

At the hearing of the appeal before us, learned counsel for the appellant submitted that there were such discrepancies in the evidence of the main witnesses, especially that of the two complainants, that the trial Court should not have convicted upon such evidence. The discrepancies were noted, counsel pointed out, in the judgment of the learned trial Judge, who did not hesitate to state that, on certain points, such as the amounts stated by the complainants to have been obtained from them by the appellant, their (the complainants') evidence was found unacceptable as unsatisfactory. It is due to such discrepancies, counsel submitted, that the Judge in the end found it necessary to amend the counts in the charge so as to convict on the particulars which he considered had been established by the evidence to his satisfaction.

The case for the appellant, as argued before us, is that, upon the evidence of the complainants, the trial Judge could not reach a verdict beyond reasonable doubt. In any case, he could not safely find against the appellant on the issue of identification. The story of the complainants was such that on the face of it, it appeared to be entirely incredible. It was obviously an imaginary and a concocted story, counsel submitted.

As regards the amendment of the charge, it was submitted that the trial Judge did not refer to the particular statutory provisions under which he purported to amend the charge at that stage. He must have purported to act under section 83 of the Criminal Procedure Law, Cap. 155, counsel submitted ; and if that is so, the Judge has, obviously, failed to comply with the requirements of section 84.

The case for the prosecution at the trial was that the two complainants were the victims of this clever and crafty gipsy, who, making use of what is not unusual in this country with some people, viz. the belief that some gipsies possess supernatural powers in fortune telling and sorcery, managed to put them gradually under her spell and to take away from them considerable amounts of money and valuables. According to the prosecution, she exploited for her purposes, the credulity of her victims by inducing in them the belief that she could smooth out their family difficulties, transform their relations with certain other persons, and restore the health of some of their relatives.

Two main issues of fact arise in this case : The first is whether it has been sufficiently established by the prosecution that the version of the complainants has a foundation of truth ; and is not a concocted story ; and secondly whether the appellant was correctly identified as the gipsy who exploited the complainants. Independently of the facts, a third point is taken on behalf of the appellant : whether the way in which the trial Judge purported to lay the foundation for the conviction by amending the charge, at the end of his judgment was contrary to the provisions of the statute (Cap. 155) ; and was prejudicial to the appellant.

Having heard counsel from both sides, we have no difficulty in deciding this appeal. As regards the factual aspect of the case, the appellant has to satisfy us that the findings of the trial Judge cannot be sustained by the evidence on record. There is a line of cases establishing this position and the approach of this Court to findings by trial Judges. (*Lazarou* v. *The Police* (1969) 2 C.L.R. 184 ; *Stylianou* v. *The Police* (1970) 2 J.S.C. 158). In this case we have no difficulty or hesitation in coming to the conclusion that the trial Judge's finding that the version of the complainants was founded on truth was a correct finding, well supported by the evidence on record. It was not an imaginary and concocted story, as suggested by the appellant.

The second issue is that of identification. One of the witnesses for the prosecution who was present only on the first occasion, on November 30, 1965, stated that he could not be sure that the gipsy who told his fortune in the office of the complainants, some four years earlier was or was not the appellant. But his case was very different from that of the two main witnesses who had been under the spell of this woman for months, under very different circumstances. They had ample opportunity to know the appellant well enough to be able to identify her. We find it impossible to accept the suggestion that these two witnesses pinned their nasty adventure on the appellant while they were in fact the victims of some other gipsy.

We now come to deal with the procedural point. There can be no doubt that the trial Judge in amending the charge purported to act under the relevant provisions of the Criminal Procedure Law, Cap. 155. He expressly says so in his judgment. It is unfortunate that the Judge did not specifically refer to the section under which he acted. He did not say that he was making use of the provisions in section 83 or 85. This opened the door to the submission that he may have felt some hesitation as to whether he should have acted as he did. The fact, however, remains that he amended the charge by confining the particulars of the different counts to those established to his satisfaction ; and excluding those which he did not find sufficiently proved.

It is the contention of the appellant that the Judge in amending the charge failed to comply with the requirements of section 84. It is clear that for an amendment under the provisions of section 83 of the Criminal Procedure Law, those in section 84 must be complied with ; and failing due compliance, the irregularity may well go to the root of the conviction unless the case can be brought within the proviso in section 145 (1) (*b*) of the same statute. But we do not think that this is the case now before us.

Here, we think that the case comes clearly under section 85 (1) ; and the Judge could have convicted on the counts as they were originally framed, stating that certain of the allegations in the particulars had not been established. If what has been proved was sufficient to support the count upon which the accused was charged, the Judge could convict without making any amendment

As observed during the argument, by my brother Mr. Justice Josephides, the provisions in this part of the Criminal Procedure Law (sections 83, 84 and 85) were the

result of statutory amendments to enable the Courts to do justice in a case where tehnicalities might lead to acquittal notwithstanding proof of sufficient particulars to support a count ; as happened in several cases prior to the amendment of the statute. Cases decided in other jurisdictions where different considerations apply are, therefore, of no help here after the amendments introduced by these sections of our Criminal Procedure Law. As has been aptly said by Chief Justice Warren of the United States we should not become so obsessed with the techniques of the judicial machinery that we forget the purposes of a system of justice.

As we have already said, we think that the Judge in the instant case, need not have amended the charge ; he could convict under section 85 (1), on the counts as they stood, making it clear that part of the particulars had not been established, if what he considered as sufficiently established, was enough to support the count charged ; bearing always in mind that the onus was on the prosecution to prove the offence in such count.

Having reached this conclusion, we have no difficulty in deciding this appeal ; and in coming to the result that the main grounds upon which it was made, fail. We have no reason to disturb the findings of the trial Judge ; and on the procedural ground, we think that the Judge in his anxiety to be fair to the accused amended the charge in a way which did not prejudice the defence at all. As already pointed out the defence all along was that the version of the complainants was pure imagination ; and that, in any case, the appellant was not the gipsy who took their money and things.

The appeal fails ; and is dismissed. In all the circumstances, however, we think that the sentence should run from conviction ; and we order accordingly.

Appeal dismissed.