[TRIANTAFYLLIDES, P., L. LOIZOU, MALACHTOS, JJ.]

PHIVOS PETROU PIERIDES,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3268).

Arson and setting fire to goods in a building—Sections 315(*a*) *and* 319 *of the Criminal Code, Cap.* 154, *respectively—Conviction—Appeal—New trial ordered on second count—Cf. section* 324 *of the Criminal Code—Cf. section* 7 *of the* (*English*) *Malicious Damage Act,* 1861.

Criminal Procedure—Appeal—Proviso to section 145 (1) (*b*) *of the Criminal Procedure Law, Cap.* 155—*Burden of satisfying the Court of Appeal that it should be applied lies on the prosecution—And it can only be applied if the Court of Appeal is, without doubt, satisfied that the trial Court, as well as any other Court trying the Appellant, would have convicted him even if any error on the part of the trial Court, found on appeal by the Court of Appeal, had not occurred—In the instant case the Court of Appeal is not satisfied that this is a proper case in which to apply the proviso, even though it might be said that there was evidence on record on which the Appellant might have been found guilty, irrespective of certain matters on the basis of which it has decided to order a new trial* (infra)—*Court of Appeal not prepared to hold, without doubt, that any trial Court would have, in any event, convicted the Appellant—See further immediately herebelow.*

Proviso to section 145 (1) (*b*) *of the Criminal Procedure Law, Cap.* 155—*Incorrect to say that it can only be applied in cases where evidence was either wrongly received or wrongly excluded but the Appellate Court feels without doubt that a trial Court would still have convicted on the remainder of the evidence; and that the proviso, therefore, cannot be applied where any other error has occurred—Cf. the proviso to section* 2(1) *of the* (*English*) *Criminal Appeal Act,* 1968, (*previously the proviso to section* 4(1) *of the Criminal Appeal Act,* 1907); *also the proviso to section* 6(1) *of the Criminal Appeal Act,* 1912 *of New South Wales, Australia—See further hereabove.*

Appeal—Proviso to section 145 (1) (*b*) *of Cap.* 155—*When it should be applied—In cases where "no substantial miscarriage of justice has actually occurred" the Supreme Court shall dismiss the appeal, "notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant"—Scope and effect of said proviso—See further* supra.

Miscarriage of justice—See supra; *see also immediately herebelow.*

Appeal in Criminal Proceedings—New trial—Considerations to be taken into account in ordering a new trial — One of such considerations being miscarriage of justice—Power to order new trial is discretionary—Relevant discretion to be exercised in the interests of justice—New trial may be ordered even when the first trial is not a nullity—In the instant case the Supreme Court held that the scales of justice lean towards a new trial, because, inter alia, *some of the conclusions reached by the trial Court are not warranted by the evidence relevant thereto and certain facts proved by such evidence could be said to be also consistent with innocence, and not, as the trial Court thought, with guilt only—Section* 145 (1) (*d*) *of the Criminal Procedure Law, Cap.* 155 *and section* 25(3) *of the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960)—*Cf. section* 8(1) *of the Criminal Appeal Act* 1912, *of New South Wales, Australia.*

New trial—Order for a new trial—Powers of the Supreme Court in this respect, discretionary—How and when such powers should be used—See immediately hereabove.

In this case the Appellant appealed against his conviction by the Famagusta Assizes on June 26, 1971, on a charge for arson contrary to section 315(a) of the Criminal Code Cap. 154 and on a charge for setting fire to goods in a building, contrary to section 319 of the Code. The Appellant was sentenced in respect of each offence to three years' imprisonment to run concurrently; he appealed also against the sentence on the ground that, in the circumstances of the case, it is manifestly excessive.

The Supreme Court allowed the appeal against conviction and for the reasons stated in their judgment ordered a new trial on count 2 under section 145 (1) (d) of the Criminal Procedure Law, Cap. 155 and section 25(3) of the Courts of Justice Law 1960 (Law No. 14 of 1960), the texts of which are set out *post* in the judgment of the Court. It is significant that before deciding to order a new trial, the Supreme Court

considered the possibility of applying the proviso to section 145 (1) (b) of Cap. 155 (*post*) and dismiss the appeal, but eventually they took the view that this is not a proper case in which to do so. The proviso 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".

After reviewing the facts and stating the reasons for ordering a new trial and also the reasons why this is not a proper case in which to apply the proviso to section 145 (1) (b) of Cap. 155 (*supra*), the Supreme Court:

Held: As to the course taken to order a new trial on count 2:

(1) On the material on record we have formed the view that regarding the first three out of the five factors mentioned in the judgment of the trial Court (*see* the relevant extract *post* in the judgment of the Supreme Court) and on which, *inter alia,* such Court based its decision to convict, some of the conclusions set out in the judgment appealed from are not warranted by the evidence relevant thereto and, moreover, certain facts proved by such evidence could be said to be also consistent with innocence, and not, as the trial Court thought, with guilt only.

(2) It has been argued by counsel for the Appellant that a new trial can only be ordered when the first trial is a nullity. In our opinion this is not so under the relevant statutory provisions in force in Cyprus (*supra*). There have been several instances in the past in which a new trial was ordered without the first trial having been a nullity (see, for example, the cases of *Nestoros* v. *The Republic,* 1961 C.L.R. 217, *Petrides and Others* v. *The Republic,* 1964 C.L.R. 413, HjiCosta (No. 2) v. *The Republic* (1965) 2 C.L.R. 95 and *Loizias* v. *The Republic* (1969) 2 C.L.R. 217). The relevant statutory provisions in force in Cyprus are section 145 (1) (d) of Cap. 155 and section 25(3) of the Courts of Justice Law, 1960 (*see* the text of those sections *post* in the judgment).

(3) (a) The power to order a new trial is of a discretionary nature and this discretion has to be exercised in the interest of justice (see, *inter alia,* the *Loizias* case, *supra,* and *Zanettos* v. *The Police* (1968) 2 C.L.R. 232).

(b) (*After referring to section* 8(1) *of the Criminal Appeal Act* 1912 *of New South Wales and after quoting a number of Australian cases* see *post*):

Having carefully weighed all proper factors we are of the opinion, unlike in the case of *Isaias* v. *The Police* (1966) 2 C.L.R. 43, in which the Supreme Court found, in the light of the individual circumstances of that case, the "scales of justice leaning against a new trial", that in the present case the scales of justice lean towards a new trial for, *inter alia,* the reasons for which a new trial was ordered in the *Nestoros* case (*supra*).

Held: Regarding the question whether or not to apply the proviso to section 145 (1) (*b*) *of Cap.* 155 (supra):

(1) We do not agree with the submission of counsel for the Appellant that the said proviso (*supra*) is, in any event, inapplicable to a case of this nature, because, as it was argued, it can only be applied in case where though evidence was wrongly received or wrongly excluded at the trial, the appellate Court feels, without doubt, that the trial Court would have certainly convicted on the remainder of the evidence; and that, therefore, it cannot be applied where any other error has occurred. We think that the application of the proviso is not of such a limited nature. In the case of *Polycarpou and Another* v. *The Republic* (1967) 2 C.L.R. 198 after the relevant case-law was reviewed, the proviso was applied even though the Supreme Court had been persuaded that it was unsafe for the Court below to accept as reliable the identification of a car belonging to one of the Appellants. Also, that the proviso may be applied in a case other than one in which there has occurred admission of inadmissible evidence or exclusion of admissible evidence is shown by the English case of *R.* v. *Pink* [1971] 1 Q.B. 508; the corresponding provision in England being now the proviso to section 2(1) of the Criminal Appeal Act, 1968, and previously the proviso to section 4(1) of the Criminal Appeal Act 1907.

(2) The manner of the application of a provision such as the proviso to section 145 (1) (b) of Cap. 155 (*supra*) is well settled; and it is not necessary to resort once again to a review of relevant case-law, as made for the purpose in the *Polycarpou* case (*supra*). As it is to be derived from, *inter alia*, the judgment in that case, and the case-law referred to therein, the relevant principle may be expressed in more than one ways but its essence is that the proviso can only be applied if the

Court of Appeal is, without doubt, satisfied that the trial Court, as well as any other Court trying the Appellant, would have convicted him, even if any error on the part of the trial Court, found on appeal by the Supreme Court, had not occurred.

(3) And, though the burden of upsetting a conviction lies on an Appellant, the burden of satisfying the Supreme Court that the proviso should be applied lies on the Respondent, the prosecuting authority (see *Mraz* v. *The Queen* [1954–1956] 93 C.L.R. 493 (an Australian case; also *R.* v. *Jones and Others,* 46 Cr. App. R.68, at pp. 70–71).

(4) After anxiously considering the possibility of applying the proviso we have reached the conclusion that we are not satisfied that this is a proper case in which so to do, even though it might be said that there was evidence on record on which the Appellant might have been found guilty, irrespective of the already mentioned matters on the basis of which we have decided to order a new trial; we are not prepared to hold, without doubt, that any trial Court would have, in any event, convicted the Appellant.

Appeal allowed. New trial ordered on count 2.

Cases referred to:

Polycarpou and Another v. *The Republic* (1967) 2 C.L.R. 198;

Mraz v. *The Queen* [1954–1956] 93 (Commonwealth) C.L.R. 493;

R. v. *Jones and Others,* 46 Cr. App. R.68, at pp. 70–71;

Nestoros v. *The Republic,* 1961 C.L.R. 217;

Petrides and Others v. *The Republic,* 1964 C.L.R. 413;

HjiCosta (*No.* 2) v. *The Republic* (1965) 2 C.L.R. 95;

Loizias v. *The Republic* (1969) 2 C.L.R. 217;

Zanettos v. *The Police* (1968) 2 C.L.R. 232;

Peacock v. *The King* [1911–1912] 13 (Commonwealth) C.L.R. 619, at p. 675;

Kelly v. *The King* [1923] 32 (Commonwealth) C.L.R. 509, at pp. 516–517;

Isaias v. *The Police* (1966) 2 C.L.R. 43;

R. v. *Child* [1871] 12 Cox C.C. 64;

R. v. *Nattrass* [1882] 15 Cox C.C. 73;

R. v. *Harris and Atkins* [1882] 15 Cox C.C. 75.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Phivos Petrou Pierides who was convicted on the 25th June, 1971 at the Assize Court of Famagusta (Criminal Case No. 2950/71) on two counts of the offences of arson and setting fire to goods in a building contrary to sections 315(a) and 319, respectively, of the Criminal Code Cap. 154 and was sentenced by Georghiou, P.D.C., Pikis and S. Demetriou, D.JJ. to three years' imprisonment on each count, the sentences to run concurrently.

G. Cacoyiannis with *N. Zomenis*, for the Appellant.

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

Cur. adv. vult.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: In this case the Appellant appealed against his conviction, by the Famagusta Assizes, on the 25th June, 1971, in relation to a count charging him with arson, contrary to section 315(a) of the Criminal Code (Cap. 154), and to a count charging him with setting fire to goods in a building, contrary to section 319 of the Code. According to the particulars set out in the said counts, the Appellant, on the 15th February, 1971, in Famagusta, set fire to a shop, being the property of Despina Petrou Pieridou, of Famagusta, and to drapery goods in such shop, being the property of the general partnership of "Petros Pierides & Sons", of which the Appellant is one of the partners.

The Appellant was sentenced in respect of each offence to three years' imprisonment, to run concurrently; he appealed, also, against the sentence on the ground that it is, in the light of the circumstances of the case, manifestly excessive.

It is not in dispute that the fire took place in the basement of the shop in question and that it started when the fumes

of an inflammable substance ignited, with explosive effect, while the Appellant was present in the basement.

The Assize Court, after dealing, in an elaborate judgment, with the evidence adduced during the trial of the case, and having rejected as untrue the statement which the Appellant made from the dock, stated the following:-

> "The falsification of the stock figures, the affairs of the company, the over insurance of the goods, the presence of the accused at the scene of the crime, the behaviour of the accused after the commission of the offence, are facts in the light of what appears in this judgment which constitute strong evidence pointing conclusively towards the guilt of the accused. We have, as indicated in the course of this judgment, examined the evidence before us with extreme care, and find that the guilt of the accused is the only rational inference that we can draw from the circumstantial evidence before us".

Having carefully examined everything that has been ably submitted by learned counsel for the Appellant and for the Respondent, we have come to the conclusion that it is our duty in this case to order a new trial, in the exercise of our powers under section 145 (1) (d) of the Criminal Procedure Law (Cap. 155) and under section 25(3) of the subsequently enacted Courts of Justice Law, 1960 (14/60).

In giving our reasons for having reached this decision, we shall abstain, as far as possible, from close particularity, because it is essential to say nothing which may possibly affect the new trial; in any case, we would like to stress that nothing set out in this judgment should be taken as indicating, in the least, an expression of opinion on the part of this Court regarding the guilt or innocence of the Appellant in relation to the fire which occurred, as aforesaid, in the basement of the shop.

Our reasons for ordering a new trial are, mainly, these:-

Firstly, on the basis of all the material on record we have formed the view that regarding the first three out of the five factors mentioned in the aforequoted extract from the judgment of the trial Court (and on which, *inter alia*, such Court based its decision to convict) some of the conclusions set out in the judgment appealed from are not warranted by the evidence

relevant thereto and, moreover, certain facts proved by such evidence could be said to be also consistent with innocence, and not, as the trial Court thought, with guilt only. Regarding the fifth of the said factors, we are of the opinion that when the behaviour of the Appellant after the outbreak of the fire is examined in the light of evidence such as that of prosecution witness Dr. HjiAthanassiou it cannot be said that it is behaviour indicative of guilt in so far as there are concerned certain of its material aspects about which the Court below made comments clearly against the Appellant.

Secondly, we think that it is quite possible that the expert prosecution witness Anastassiades—whose evidence was accepted by the trial Court, and much relied on in finding unacceptable the version of the Appellant as to how the fire started while he was in the basement of the shop—may have mistakenly stated the effect of the inflammable fumes of "benzene", instead of those of "benzine" or of petrol, on a person entering the basement of the shop immediately prior to the fire. It is not in dispute that benzene is a substance different from benzine, which like petrol, is prepared from petroleum; and, according to the contention of the prosecution, the inflammable substance which was used to start the fire was petrol or a liquid similar to petrol.

Before deciding to order a new trial we have considered whether or not, notwithstanding the foregoing, it was proper to dismiss the appeal by applying the proviso to section 145 (1) (b) of Cap. 155, which 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".

We are not in agreement with the submission of counsel for the Appellant that such proviso is, in any event, inapplicable to a case of this nature, because, as it was argued, it can only be applied in cases where though evidence was either wrongly received or wrongly excluded at the trial the appellate Court feels, without doubt, that a trial Court would have convicted on the remainder of the evidence; and that, therefore, it cannot be applied where any other error has occurred. We think that the application of the proviso is not of such a limited

nature: In the case of *Polycarpou and Another* v. *The Republic* (1967) 2 C.L.R. 198, after the relevant case-law was reviewed, the proviso was applied even though the Supreme Court had been persuaded that it was unsafe for the Court below to accept as reliable the identification of a car belonging to one of the Appellants. Also, that the proviso may be applied in a case other than one in which there has occurred admission of inadmissible evidence or exclusion of admissible evidence is shown by the English case of *R.* v. *Pink* [1971] 1 Q.B. 508; the corresponding provision in England being now the proviso to section 2(1) of the Criminal Appeal Act, 1968, and previously the proviso to section 4(1) of the Criminal Appeal Act, 1907.

The manner of the application of a provision such as the proviso to section 145 (1) (b) of Cap. 155 is well settled and it is not necessary to resort once again to a review of relevant case-law, as made for the purpose in the *Polycarpou* case (*supra*). As it is to be derived from, *inter alia*, the judgment in that case, and the case-law referred to therein, the relevant principle may be expressed in more than one ways but its essence is that the proviso can only be applied if the Supreme Court is, without doubt, satisfied, that the trial Court, as well as any other Court trying the Appellant, would have convicted him, even if any error on the part of the trial Court, found on appeal by the Supreme Court, had not occurred.

Though the burden of upsetting a conviction lies on an Appellant, it is to be derived from the wording and the object of the proviso that the burden of satisfying the Supreme Court that the proviso should be applied lies on the Respondent, the prosecuting authority; and that this is so is confirmed by the view taken by the High Court of Australia regarding a corresponding provision in Australian legislation—(after a review of relevant English case-law, some of which being the same as that referred to in the case of *Polycarpou, supra*)—in the case of *Mraz* v. *The Queen* [1954–1956] 93 C.L.R. 493.

An English case which may be usefully cited is that of *R.* v. *Jones and Others*, 46 Cr. App. R. 68, in which Ashworth, J. had this to say in delivering the judgment of the Court of Criminal Appeal (at pp. 70–71):-

> " There remains the all-important question of the proviso... We were naturally referred to the decision of this Court in HADDY [1944] 29 Cr. App. R. 182; [1944] K.B.

442 and to STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr. App. R. 40; [1944] A.C. 315. We were also referred to a recent decision of this Court in BRITTON, reported in the Solicitors' Journal for May 5, 1961. In the last-mentioned case this Court declined to apply the proviso when there had been two separate misdirections on important matters, taking the view that to maintain the conviction would involve applying the proviso twice over. In our view, however, that decision is not to be regarded as laying down a hard-and-fast rule that, if an Appellant can establish more than one instance of misdirection, the proviso cannot be applied. No doubt the fact that there has been more than one instance of misdirection in a summing-up affords a strong reason why the proviso should not be applied but, in our view, it is not conclusive. Each case falls to be decided on its own facts, and much will depend upon the nature of the misdirections complained of.....

So far as Richard Jones is concerned, the problem is one of very great difficulty and has caused us much anxiety. In the most telling part of his argument before us, Mr. Dovener listed twelve separate points, the cumulative effect of which might well be thought to indicate irresistibly the guilt of Richard Jones. He submitted that in the light of those points such defence as was put forward became threadbare and that no reasonable jury could have acquitted him. On the other hand, there is the decision in BRITTON'S case (*supra*) on which Mr. Wright strongly relied. To quote a vivid phrase of his, the application of the proviso, in a case where there are so many grounds of complaint would, he submitted, involve 'piling hypothesis upon hypothesis'. We need not elaborate the matter further. In McKENNA AND OTHERS [1960] 44 Cr. App. R. 63 at p. 75; [1960] 1 Q.B. 411 at p. 423 this Court used these words: ' Plain though many juries may have thought this case, the principle at stake is more important than the case itself'. In our view, those words are equally applicable in the case of Richard Jones and, accordingly, we feel unable to apply the proviso, and his appeal must be allowed".

After anxiously considering the possibility of applying the proviso we have reached the conclusion that we are not satisfied that this is a proper case in which to do so, even though it

might be said that there was evidence on record on which the Appellant might have been found guilty, irrespective of the already mentioned matters on the basis of which we have decided to order a new trial; we are not prepared to hold, without doubt, that any trial Court would have, in any event, convicted the Appellant.

It has been submitted by counsel for the Appellant—who was in agreement with counsel for Respondent that a new trial should not be ordered in this case, each one for exactly the opposite reason, the former contending that the appeal should be allowed and the latter contending that the appeal should be dismissed—that a new trial can only be ordered when the first trial is a nullity. In our opinion this is not so under the relevant statutory provisions in force in Cyprus. There have been several instances in the past in which a new trial was ordered without the first trial having been a nullity (see, for example, the cases of *Nestoros* v. *The Republic*, 1961 C.L.R. 217, *Petrides and Others* v. *The Republic*, 1964 C.L.R. 413, *HjiCosta* (No. 2) v. *The Republic* (1965) 2 C.L.R. 95 and *Loizias* v. *The Republic* (1969) 2 C.L.R. 217).

The statutory provisions in Cyprus empowering this Court in a case of this nature to order a new trial are, as already stated, section 145 (1) (d) of Cap. 155, which provides that the Supreme Court may -

> " order a new trial before the Court which passed sentence or before any other Court having jurisdiction in the matter"

and section 25(3) of Law 14/60 which provides that

> "Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby the High Court"—now this Supreme 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".

It is useful, in this respect, to refer to relevant provisions in the Criminal Appeal Act, 1912, of New South Wales, Australia:-

The proviso to section 6(1) of the Act, which corresponds to the proviso to section 145 (1) (b) of Cap. 155, reads as follows:-

> " Provided that the Court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

Then, instead of a provision such as our section 145 (1) (d), there follows section 8(1) of that Act which provides that

> " on an appeal against a conviction on indictment, the Court may, either of its own motion, or on the application of the Appellant, order a new trial in such a manner as it thinks fit, if the Court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court is empowered to make".

The power to order a new trial is of a discretionary nature and the relevant discretion has to be exercised in the interests of justice (see, *inter alia*, the *Loizias* case, *supra*, and *Zanettos* v. *The Police* (1968) 2 C.L.R. 232).

We take the view that what is expressly stated in section 8(1) of the aforesaid New South Wales Act is a consideration which may, in a proper case, be taken into account by this Court in deciding to order a new trial under the—already quoted—generally worded provisions in Cyprus.

It is pertinent to refer, also, to Australian case-law regarding certain of the considerations to be weighed in exercising the relevant discretion, as in that country Courts have been empowered, since many years past, to order, on appeal, a new trial in criminal proceedings. In the case of *Peacock* v. *The King* [1911-1912] 13 C.L.R. 619, which was decided by

the High Court of Australia on appeal from the Supreme Court of Victoria, O'Connor, J. had this to say in his judgment (at p. 675):-

> " Perhaps it is as well that no exhaustive or rigid definition of principles should be attempted. The Court must, however, exercise a legal discretion, that is to say, must act upon some legal principle. It appears to me that one principle at least may be laid down. Where the facts proved a first trial would have been sufficient to support the conviction, if the jury had been properly directed, it seems to me that in general a new trial may be granted to enable the faulty direction to be remedied. In exercising the discretion given by the Statute the interests, not only of the prisoner, but of the efficient administration of justice ought to be considered, always providing that no injustice is done to the accused. In this case there was, as I have pointed out, ample evidence to justify a verdict of guilty, if the jury thought fit to come to that finding on the evidence. If it were not for the misdirection as to the prisoner's statement, the verdict of the jury could not in my opinion have been disturbed. I think it is now in the interests of the administration of justice, and not unjust to the prisoner, that a new trial should be granted to enable the evidence to be again submitted to another jury with a proper direction as to the prisoner's statement. I agree therefore with my learned brother Barton that the conviction should be quashed and a new trial ordered".

Also, in the case of *Kelly* v. *The King* [1923] 32 C.L.R. 509, the following was stated by the High Court of Australia in its judgment (at pp. 516-517):-

> " The conviction being quashed, it remains to consider what further order should be made. It was suggested by counsel for the accused that the only order should be that the conviction be quashed. For the Crown it was contended that if the conviction were quashed a new trial should be ordered on the presentment for murder. We are all of opinion that this Court has jurisdiction to order a new trial on a charge of manslaughter only, and that the accused, having been found by the jury not guilty of murder, should not be again presented or tried on that charge.

> The question whether the Appellant in this case shall be again put upon his trial is one in which the interest of the community is involved as well as that of the individual. In the opinion of a majority of the Court the public interest will be best served by ordering a new trial on the charge of manslaughter only....."

Having carefully weighed together all proper factors we are of the opinion, unlike in the case of *Isaias* v. *The Police* (1966) 2 C.L.R. 43, in which the Supreme Court found, in the light of the individual circumstances of that case, "the scales of justice leaning against a new trial", that in the present case the scales of justice lean towards a new trial, for, *inter alia*, the reason for which a new trial was ordered in the *Nestoros* case (*supra*).

The conviction, therefore, of the Appellant on both counts is set aside, as well as the sentence imposed on him in respect thereof, and a new trial is ordered, only on the count charging him with setting fire to goods in a building, contrary to section 319 of Cap. 154.

We have decided not to order a new trial in respect of the count charging the Appellant with arson, contrary to section 315(a) of Cap. 154, because the only thing burnt, and alleged by the prosecution to be part of the building in which the fire took place, was an exposed piece of wire about three feet long leading up to one of the fluorescent fittings in the basement of the shop. It has been argued by counsel for Appellant that that piece of wire cannot be treated as part of a "building or structure" in the sense of these terms in section 315 (a) and had we had to decide on this issue in this appeal we might be inclined, as at present advised, to agree with him; but there is no need to pronounce finally thereon because, even assuming that that piece of wire was part of the building of the shop, the arson committed, through its having been burnt, could only be regarded, in the circumstances, as an offence of a trivial nature, arising out of the same facts on which the really substantial charge in this case has been based, viz. that of setting fire to goods in a building, contrary to section 319, and if the Appellant were to be found guilty of arson, for the burning of that exposed small piece of wire, no further sentence at all need have been imposed on him in relation thereto.

The new trial has to take place before a differently constituted Assize (as, and for the same reasons, in the *Petrides* case,

supra); and, bearing all relevant considerations in mind, we have decided to direct that the new trial (as in the *Loizias* case, *supra*) should take place in Nicosia, before a special Assize Court, as early as possible. The Appellant will have to remain, in the meantime, in custody (see, in this respect, again, *inter alia*, the *Petrides* and *Loizias* cases).

As stated by the Supreme Court in the *Petrides* case (*supra*), the Appellant is entitled to a fair hearing *de novo* without any weight at all being attributed to the fact that he has already been found guilty as charged; and, though the Assize Court before which the new trial is to take place is definitely free to assess sentence—if the Appellant were to be convicted—in a manner compatible with the gravity of the crime without being hindered in any way by the sentence imposed at the first trial, it must not be lost sight of that any time spent by the Appellant in prison prior to his second conviction, if any, may properly be taken into account in assessing sentence.

Before concluding, we would like to draw attention to the fact that section 319 of Cap. 154 appears to correspond to section 7 of the Malicious Damage Act, 1861, in England, and though the wording of these two sections is not identical in every respect, it is to be considered by the Assize Court, which will re-try this case, whether or not it is here, as it seems to be in England, an essential ingredient of the offence in question that there should have existed an intention of burning the building by setting fire to the goods therein; which intention, of course, may be inferred where an accused person knows that the probable result of his act will be the burning of the building, or is reckless whether the building catches fire or not (see, in relation to section 7 of the said English Act, the cases of *R.* v. *Child* [1871] 12 Cox C.C. 64, *R.* v. *Nattrass* [1882] 15 Cox C.C. 73, *R.* v. *Harris and Atkins* [1882] 15 Cox C.C. 75). If it were to be held that the proof of such an intention is required for a conviction under our own section 319 and this intention is not proved then an alternative course might be to convict under section 324 of Cap. 154, if the Appellant were to be found to be the culprit in this case. In the judgment of the trial Court there does not appear to exist any finding about such an intention having been established, either directly or by inference, nor was this matter raised in argument before us. So we have not thought fit to pronounce further thereon, as we have not heard arguments from counsel, but, on the other hand, we had to draw attention thereto.

1971
Oct. 8

—

PHIVOS PETROU PIERIDES
v.
THE REPUBLIC

In the result, there is made, hereby, an order for a new trial before a special Assize Court, in Nicosia.

Appeal allowed. New trial ordered.