1971
Oct. 29
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NICOS KYRIACOU
MILIOTIS
v.
THE POLICE

[STAVRINIDES, A. LOIZOU, MALACHTOS, JJ.]

NICOS KYRIACOU MILIOTIS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3246).

Self-defence—Assault—Statement of the law on the question of self-defence—See R. *v.* Julien [1969] 2 *All E.R.* 856, *accepted and followed in* R. *v.* McInnes [1971] 3 *All E.R.* 295, *at p.* 300 *per Edmund Davies L.J.—Whether there is obligation first to indicate unwillingness to fight—Plea of self-defence failed in the present case by reason that the Appellant was first to start the fight.*

Assault—Plea of self-defence—See supra.

Appeal—Findings of fact resting on credibility of witnesses—Principles upon which the Court of Appeal will interfere—It will be slow to upset such findings unless it can be shown from the record that such findings could not be made on the evidence adduced—

Findings of fact—Credibility of witnesses—Approach of the Supreme Court to appeals against such findings.

Evidence in criminal cases—Co-accused—Evidence on oath of one co-accused can be acted upon as evidence against the others—Whilst statement to the police by such co-accused is only evidence against the maker.

Sentence—Appeal against sentence—Assault and affray—Sections 89 *and* 95 *of the Criminal Code Cap.* 154, *respectively—Sentence imposed left undisturbed on appeal as being neither excessive nor wrong in principle.*

Assault and Affray—Sections 89 *and* 95 *of the Criminal Code Cap.* 154—*See* supra.

The main defence in this case was a plea of self-defence by the Appellant.

The facts sufficiently appear in the judgment of the Court, dismissing this appeal both against conviction and sentence.

The interesting feature of this case is that the Supreme Court adopted and applied the statement of the law regarding the question of self-defence as given in two recent English cases (*infra*):

Held: (*After reviewing the facts and accepting the findings made by the trial Court regarding this assault and affray case*):

(1) The trial Court considered the question of self-defence and referred to the case *R.* v. *Julien* [1969] 2 All E.R. 856. The statement of the law on self-defence as given therein has been accepted and followed in the recent case of *R.* v. *McInnes* [1971] 3 All E.R. 295, where Edmund Davies L.J. in reading the judgment of the Court had this to say at p. 300:

> "The modern law on the topic was, in our respectful view, accurately set out in *R.* v. *Julien* by Widgery, L.J. in the following terms:
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> 'It is not, as we understand it, the law that a person threatened must take to his heals and run in the dramatic way suggested by counsel for the Appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and to the extent that that is necessary as a feature of the justification of self-defence, it is true, in our opinion, whether the charge is a homicide charge or something less serious' ".

(2) It is clear, that the trial Court made its findings and arrived at its verdict, guided by the proper legal principles. Self-defence was disproved by the prosecution, the trial Court having found on the evidence that the Appellant was the first to start the fight.

Appeal dismissed.

Cases referred to:

R. v. *Julien* [1969] 2 All E.R. 856;

R. v. *McInnes* [1971] 3 All E.R. 295, at p. 300;

R. v. *Wheeler*, 52 Cr. App. R. 28;

Lambrou v. *The Police*, 1962 C.L.R. 295;

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Shioukiouroglou v. *The Police* (1966) 2 C.L.R. 39;

Mehmet v. *The Police* (1970) 2 C.L.R. 62.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Nicos Kyriacou Miliotis who was convicted on the 29th March, 1971 at the District Court of Famagusta (Criminal Case No. 763/71) on two counts of the offences of affray and disturbance contrary to sections 89 and 95, respectively, of the Criminal Code Cap. 154 and was bound over in the sum of £100.- for one year to come up for judgment on count 1 and ordered to pay £3.- fine on count 2.

Appellant appeared in person.

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

STAVRINIDES, J.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU, J.: This is an appeal from the conviction and sentence of the Appellant by the District Court of Famagusta for two offences, namely, affray contrary to section 89 and disturbance contrary to section 95 of the Criminal Code Cap. 154.

The Appellant upon conviction on count 1 was discharged under section 33 of the Code, upon entering into his own recognizance in the sum of £100 for one year, conditional that he shall appear and receive judgment as and when called upon; a condition thereof being that the accused was not to be called upon so long as he did not commit a similar offence. The sentence on the second count was £3 fine.

The grounds of appeal as set out in the notice thereof, signed by the Appellant himself, are: "(a) That the conviction of the Appellant, based, as it was, on evidence which was not independent, was logically and legally invalid and/or unjust; and, (b) the trial Court rejected a request of the Appellant that a certain police sergeant, Christakis Constantinides, be called to give evidence on his behalf".

The Appellant, who conducted his appeal in person, as he did his own defence before the trial Court, abandoned the

second ground of appeal. The first ground, therefore, upon which the appeal was argued, poses for consideration the question how far this Court is to interfere with the findings of fact of a trial Court. By section 25(3) of the Courts of Justice Law, 14 of 1960, this Court "in 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, and draw its own inferences.....". Wide as these powers are, it has been recognized in a number of decisions that where the trial Court findings of fact depend on its view of the credibility of witnesses, this Court will be slow to upset such findings unless it can be shown from the record that such findings could not be made on the evidence. (*Vassos Lambrou* v. *The Police*, 1962 C.L.R. 295; *Iordanis Pavlou Shioukiouroglou* v. *The Police* (1966) 2 C.L.R. 39; *Mehmet* v. *The Police* (1970) C.L.R. 62).

In the light of the foregoing, it is useful to consider briefly the facts of the present case. The accused has been married for 28 years and has 12 children, ranging from 6 to 26 years of age. He was living with his wife until about December, 1970, when the wife left the conjugal home and went and co-habited with Loukis Nikou Neochoritis, the person who was jointly charged and convicted with the Appellant and who hereinafter will be referred to as accused No. 2. On the 22nd January, 1971, the Appellant went up to the house where his wife was staying at the time, his intention—as he claimed—being to discuss with her a possible return to the conjugal home. Accused No. 2 arrived by car but left, only to return shortly afterwards. There in the public street the Appellant and accused No. 2 had an altercation and they came to grips. According to the Appellant, accused No. 2 took hold of a wooden table leg he had in his car and aimed it at the Appellant; it was seized by him and his wife took it away. The trial Court, on this point, found that it was the Appellant who attacked accused No. 2 first and that accused No. 2 attempted to hit back with a stick. After this incident the two of them came to grips and fell on the ground, Appellant taking the better of accused No. 2 during this fight. The trial Judge further found that the fight was a violent one; and might cause fear in a reasonable person, and that much noise and commotion was produced during this fight which took place in a public street. Accordingly he found both accused guilty of the offences charged.

The evidence before the trial Court consisted of the statements of each of the two accused made to the Police; the evidence of the Police investigating officer; the wooden table leg, a brick with blood stains on it, the torn shirt of the Appellant, all three seized and produced by the policeman; and the evidence of each accused given on oath when called upon to make his defence.

It was the contention of the Appellant, both in his statement to the Police and on oath at the trial, that he was first attacked by accused No. 2 and that he acted in self-defence; and it was along these lines, that the appeal was argued by him before us. The evidence of accused No. 2, however, was to the effect that it was accused No. 1 who started the fight first. Very rightly the trial Judge pointed out that the statement to the Police of one accused was only evidence against himself and not evidence against a co-accused. The evidence on oath, however, of one accused could be acted upon as evidence against the other. The trial Court considered the question of self-defence and referred to the case of *Rex* v. *Julien* [1969] 2 All E.R. 856. The statement of the law on self-defence as given therein, has been accepted and followed in the recent case of *Rex* v. *McInnes* [1971] 3 All E.R. 295, where Edmond Davies, L.J. in reading the judgment of the Court had this to say at p. 300:

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> > ' It is not, as we understand it, the law that a person threatened must take to his heals and run in the dramatic way suggested by counsel for the Appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and to the extent that that is necessary as a feature of the justification of self-defence, it is true, in our opinion, whether the charge is a homicide charge or something less serious' ".

It is clear, that the trial Court made its findings, and arrived at its verdict, guided by the proper legal principles. We have considered the evidence and we are not prepared to say that

it was not open to the trial Judge on that evidence to find that the Appellant was the first to start the fight and that self-defence was disproved by the prosecution, as an essential part of their case. (*Rex* v. *Wheeler*, 52 Cr. App. R. 28).

In the result we hold that there was sufficient evidence to justify the verdict of the trial Court which, in the circumstances, ought not to be disturbed.

What remains to be considered is the appeal against sentence. It should be said straight away that the Appellant has not been able to show anything that this Court might consider that the sentence imposed was in any way manifestly excessive or wrong in principle, so as to justify us in interfering. If anything need be said it is that the Judge has treated the Appellant with considerable leniency feeling, as he said, considerable sympathy with the fate of the Appellant who had to suffer a great indignity and misfortune after 28 years of married life.

We accordingly dismiss this appeal both against conviction and sentence.

Appeal dismissed.