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

VARNAVAS NICOLAOU & SONS LTD.,

Appellants,

v.

THE DISTRICT LABOUR OFFICER NICOSIA,

Respondent.

(*Criminal Appeal No.* 3286).

Criminal Procedure—Charge—Duplicity—Two offences charged in one count—One under sections 26(1) *and* 94(1) *of the Factories Law, Cap.* 134 *and the other under sections* 26(1) *and* 97 *of the same Law—Beyond doubt, however, from the description as a whole of the offence in the charge sheet, that the Appellant was in effect only charged with, and convicted of, the offence under section* 97*—Therefore, the Appellant was neither prejudiced in his defence nor does there exist any uncertainty about the offence of which he was convicted—Conviction, however, set aside by the Court acting* ex abundanti cautela, *and a conviction on a charge for the offence contrary to sections* 26(1) *and* 97 (supra) *substituted therefor—Cf. section* 145 (1) (*c*) *of the Criminal Procedure Law, Cap.* 155 *and proviso to section* 39 *of the same Law.*

Charge—Duplicity—See supra.

Factory—Dangerous machinery—Multiple disc saw or multi-blade saw—Failing to fence securely—Sections 26(1), 94(1) *and* 97 *of the Factories Law, Cap.* 134*—Whether part of the said machinery is "dangerous" within the meaning under said section* 26(1)*—Test applicable.*

The Appellant was charged with two distinct offences in one count, the one under section 26(1) and 94(1) of the Factories Law Cap. 134, the second under sections 26(1) and 97 of the same statute. However, from the description as a whole of the offence in the charge sheet it is beyond doubt that in effect the Appellant was only charged with, and convicted of, one offence *viz.* that under sections 26(1) and 97 of the said Law.

On those facts the Court, allowing the appeal but substituting for the conviction on the charge as framed (*supra*) a conviction

on a charge for failing to securely fence a dangerous part of a machine and causing thus bodily injury to a person contrary to sections 26(1) and 97 of the Law (*i.e.* The Factories Law Cap. 134)–

Held, (1). In the light of the proviso to section 39 of the Criminal Procedure Law, Cap. 155, we might dismiss this appeal under the proviso to section 145 (1) (b) of the said Law Cap. 155, on the ground that there was no substantial miscarriage of justice.

(2) We have, however, decided, *ex abundanti cautela,* to set aside the conviction of the Appellant on the charge as framed and convict him instead, under section 145 (1) (c) of Cap. 155, (*supra*) on a charge of failing to securely fence a dangerous part of a machine and causing thus bodily injury to a person contrary to sections 26(1) and 97 of the Factories Law Cap. 134 and sentence him again to £25 fine.

Appeal allowed. Conviction and sentence as aforesaid.

Cases referred to:

Midland and Low Moor Iron and Steel Co. Ltd. v. *Cross* [1965] A.C. 343;

Pierides v. *The Mayor etc. of Famagusta,* 14 C.L.R. 138, at p. 140;

Kyriacou v. *The Welfare Office,* 1961 C.L.R. 227.

Appeal against conviction.

Appeal against conviction by Varnavas Nicolaou and Sons Ltd. who were convicted on the 30th September, 1971 at the District Court of Nicosia (Criminal Case No. 425/71) on one count of the offence of failing to securely fence the dangerous parts of machinery contrary to sections 26(1), 94(1), 97 and 2(1) of the Factories Law, Cap. 134 and were sentenced by Papadopoulos, D.J. to pay a fine of £25.– and £3.– costs.

L. Clerides with *E. Lemonaris,* for the Appellant.

M. Kyprianou, Counsel of the Republic, for the Respondent.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: In this case the Appellant company appeals against its conviction on a count charging it with failing to securely fence a dangerous part of machinery contrary to sections 26(1), 94(1) and 97 of the Factories Law, Cap. 134.

The description of the offence was that the Appellant, on the 15th December, 1970, being the occupier of a factory manufacturing parquet wooden flooring, failed to securely fence a dangerous part, namely the multiple disc cutter, of a machine and whilst this machine was in use it caused bodily injury to its operator Paraskevi Yianni of Marathovounos.

The machine in question is described in the manufacturers' brochure, which is before us, as a multiple disc saw or a multi-blade saw.

Counsel for the Appellant has submitted that the machine was not dangerous, but if it were to be treated as being dangerous then this was an instance coming within the ambit of the proviso to section 26(1) and, therefore, the conviction appealed from ought, in any case, to be set aside.

Section 26(1) of Cap. 134 reads as follows:-

> "26. (1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:
>
> Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part".

The enacting part of section 26(1) is the same as section 14(1) of the Factories Act, 1961, in England; and it was held by the House of Lords in *Midland and Low Moor Iron and Steel Co. Ltd.* v. *Cross* [1965] A.C. 343, that in considering whether a part of machinery is "dangerous" within the meaning of section 14(1) one must have regard to the operation of that part while the machine is doing its ordinary work.

Applying the above test in the light of the material facts of this case we are of the view that the multiple disc cutter was a dangerous part of the machine concerned while such machine was doing its ordinary work; and that this dangerous part was not securely fenced because it was possible to have access to it, while the machine was in operation, through an opening which had become enlarged in the process of using the machine after its installation.

Moreover, there is no cogent evidence on record establishing that the nature of the operation of the machine is such that the multiple disc cutter cannot be secured by means of a fixed guard and that any device has been provided which automatically prevents the operator of the machine from coming into contact with the cutter; we are, therefore, of the opinion that this is not a case to which the proviso to section 26(1) is applicable.

Another argument which was advanced against the conviction of the Appellant has been that it is bad for duplicity in that the relevant count charged two offences: One under section 26(1) in conjunction with section 94(1) of Cap. 134 and another under the said section 26(1) in conjunction with section 97 of the same Law.

We are, indeed, of the view that the offence of contravening a provision of Cap. 134—such as section 26(1)—which is created by section 94(1) and is punishable under section 95, is different from the offence of contravening a provision of Cap. 134—such as section 26(1)—with the result that a person suffers bodily injury, which is created by section 97 and is punishable as provided therein; and the punishments provided for each of these two offences are different.

It is unfortunate that section 94(1) was included in the description of the offence of which the Appellant was found guilty; but in our view it is beyond doubt from the description as a whole of the offence that the Appellant was only charged with, and convicted of, an offence under section 97. It cannot, therefore, be said that the Appellant was prejudiced in any way as regards defending itself before the trial Court; nor does there exist any uncertainty about the offence of which the Appellant was convicted, which might cause it any difficulty in future if it is charged again with the same offence and puts in a plea of autrefois convict (see, *inter alia*, *Pierides* v. *The Mayor etc., of Famagusta*, 14 C.L.R. 138, at p. 140).

We might—in the light, also, of the proviso to section 39 of the Criminal Procedure Law, Cap. 155—dismiss this appeal, under the proviso to section 145 (1) (b) of Cap. 155, on the ground that there was no substantial miscarriage of justice. We have, however, decided, *ex abundanti cautela*, to set aside the conviction of the Appellant on the charge as framed and to convict him instead, under section 145 (1) (c) of Cap. 155 (see, also, *Kyriacou* v. *The Welfare Office*, 1961 C.L.R. 227) on a charge of failing to securely fence a dangerous part of a machine and causing thus bodily injury to a person contrary to sections 26(1) and 97 of Cap. 134.

In respect of the new conviction of the Appellant we impose on the Appellant once again a sentence of £25 fine.

This appeal is, therefore, allowed but the Appellant is convicted and sentenced as aforesaid.

Appeal allowed.