[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

IBRAHIM H. MAKKI,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3350).

Criminal Procedure—Charge—Amendment—At a stage when accused was giving evidence—Counts charging importation and possession of narcotic drugs—" Director of Medical Services" substituted by " Minister of Health"—Both before and after amendment accused charged throughout with the same offences—Not in any way misled or prejudiced by amendment—Proviso to section 39 *of the Criminal Procedure Law, Cap.* 155.

Charge—Amendment—Rightly made—See supra.

Amendment of charge—See supra.

Trial in Criminal Cases—Onus of proof—In deciding whether the trial Court has approached the evidence with the correct test as to the onus of proof one should not give undue importance to particular expressions—But read the judgment as a whole.

Possession and importation of narcotic drugs—The Narcotic Drugs Law, 1967 (*Law No.* 3 *of* 1967)*—Drug found in the pocket of accused's jacket when searched at the airport—Two different explanations put forward by accused—Conviction with the certainty required in a criminal case.*

Onus of proof in criminal cases—See supra.

Cases referred to:

The Attorney-General v. *Hjiconstanti* (1969) 2 C.L.R. 5, at p. 8;

Harden, 46 Cr. App. R. 90;

Charitonos and Others v. *The Republic* (1971) 2 C.L.R. 40.

The facts sufficiently appear in the judgment of the Court dismissing this appeal against conviction on two counts charging

the Appellant with importation and possession of a narcotic drug contrary to the provisions of the Narcotic Drugs Law, 1967 (Law No. 3 of 1967) and the Regulations made thereunder.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Ibrahim H. Makki who was convicted on the 10th May, 1972 at the Assize Court of Nicosia (Criminal Case No. 3521/72) on one count of the offence of importing narcotic drugs contrary to sections 4 and 24 of the Narcotic Drugs Law, 1967 and regulation 21 of the Narcotic Drugs Regulations, 1967 and of possessing narcotic drugs contrary to sections 6 and 24 of the Narcotic Drugs Law, (*supra*) and regulation 5 of the Narcotic Drugs Regulations (*supra*) and was sentenced by Stavrinakis, Ag. P.D.C., Papadopoulos, D.J. and Pierides, Ag. D.J. to eight months' imprisonment on each count, the sentences to run concurrently.

M. Christophides with *E. Lemonaris*, for the Appellant.

M. Kyprianou, Senior Counsel of the Republic with *N. Charalambous*, Counsel of the Republic, for the Respondent.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: This is an appeal against the conviction of the Appellant by an Assize Court in Nicosia, on the 10th May, 1972, on both counts of an information charging him, respectively, with importation and possession of a narcotic drug, contrary to the provisions of the Narcotic Drugs Law, 1967 (Law 3/67), and the Regulations made thereunder.

As the said counts were originally drafted they stated that the Appellant, on the 7th April, 1972, imported, on his arrival at the airport, and possessed at the same time and place, a quantity of cannabis resin, namely 0.4 grams, without a permit from "the Director of Medical Services". It is common ground that, under the relevant legislation, there could be no question of a permit from the Director of Medical Services legalizing what the Appellant was accused of having committed and that such a permit should have emanated from the Minister of Health. Both counts were amended, by the substitution of "the Minister of Health" in the place of "the Director of

Medical Services", on an application of the prosecution made during the trial.

It has been submitted by learned counsel for the Appellant that the trial Court ought not to have allowed the amendment of the counts, as aforesaid; especially, as the application for amendment was made rather late during the trial, at the stage when the Appellant—then the accused—was giving evidence.

We are of the opinion that this appeal cannot succeed on this ground, because it has never been the contention of the Appellant that he possessed any permit whatsoever from any authority in Cyprus which allowed him, or which might be taken by him as allowing him, to do what he has done; his defence has been, all along, that he never knew about the existence of the cannabis resin in the pocket of the jacket which he was wearing on his arrival at the airport; therefore, it cannot be said that the Appellant was in any way misled by the erroneous reference in the counts to "the Director of Medical Services" instead of to "the Minister of Health" or that he was prejudiced in his defence by the amendment of the counts, in order to correct what was a mis-statement entirely irrelevant to the circumstances on the basis of which the issue of his guilt or innocence was to be determined.

In this respect it is useful to bear in mind the provisions of section 39 of the Criminal Procedure Law, Cap. 155, regarding the framing of charges, and to point out that such section concludes as follows:-

> " Provided that no error in stating the offence or the particulars required to be stated in the charge shall be regarded at any stage of the case as non-compliance with the provisions of this Law unless, in the opinion of the Court, the accused was in fact misled by such error".

Regarding the application of the above proviso to section 39 reference may be made, *inter alia*, to the judgment of Josephides, J. in *Attorney-General* v. *Hjiconstanti* (1969) 2 C.L.R. 5, at p. 8.

It is correct that in the case of *Harden*, 46 Cr. App. R. 90, it was held by the Court of Criminal Appeal in England that an amendment of a count of an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged; but it was also pointed out then

that the distinction between an amendment which substitutes a new offence and one which merely corrects a misdescription of the original offence may be one of degree, depending on the circumstances of the particular case; and, in the present instance, we are of the view—(as Widgery, J. was in the *Harden* case in respect of the amendment of a count in that case)—that before and after the amendment of the counts on which the Appellant was tried there were being charged throughout the same offences.

Another submission of counsel for the Appellant has been that the trial Court misdirected itself as to the onus of proof in a criminal case, thus contravening the relevant principles which were expounded on more than one occasion (see, *inter alia*, *Charitonos and Others* v. *The Republic* (1971) 2 C.L.R. 40).

As was stressed in the *Charitonos* case a judgment has to be read as a whole; and in deciding whether the trial Court has approached the evidence with the correct test as to the onus of proof one should not give undue importance to particular expressions. In the present case it appears that, in their very conscientious effort to deal thoroughly with the various factual issues which had arisen, the learned trial Judges have used expressions which, if taken in isolation, might perhaps be open to more than one interpretations; but when their judgment is read as a whole there can exist no doubt that they did not misdirect themselves in any way regarding the onus of proof or any other matter related to the evidence before them.

A brief reference to the salient facts of this case will serve to show that it was open to the Assize Court to reach, without reasonable doubt, the conclusion that the Appellant was guilty:

As already stated, on his arrival at the airport the Appellant was found having in the pocket of his jacket the cannabis resin. When he was being searched at the airport his behaviour appeared to be such as to be consistent with knowledge about the existence of the cannabis resin in his pocket; but, of course, such behaviour could not be treated, and was not actually treated by the Assize Court, as constituting alone sufficient evidence on which to convict; it was part of the whole picture.

The Appellant put forward, immediately, the explanation that the jacket he was wearing belonged to his brother and

that he had borrowed it, thus clearly implying that he had no knowledge of the existence of the drug.

Then, at his trial, he relied on the possibility that the cannabis resin might have been placed in his pocket by a certain Ahmet, who knew of his coming to Cyprus, who was at a party with him prior to his departure from Lebanon for Cyprus, and who had a grudge against him.

In our view the finding of the drug in question in the pocket of the jacket that the Appellant was wearing on his arrival at the airport, coupled with his whole subsequent conduct, warranted an inference of guilt which, in the absence of any other evidence that might create some doubt in the mind of the trial Judges, warranted his conviction with the certainty required in a criminal trial.

The appeal against conviction is, therefore, dismissed.

There was an appeal against sentence, which was abandoned; so, we do not have to deal with the issue of the sentence passed on the Appellant; but we have to take into account the period of imprisonment, which was for eight months, in deciding whether we should order that the sentence should run from the date of conviction or let it run from today; and thinking, as we do, that the sentence was very much on the lenient side, having regard to the seriousness of the offences of which the Appellant was found guilty, we will let the law (section 147 of Cap. 155) take its course so that the sentence will run from today.

Appeal dismissed.