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Jan. 23

[TRIANTAFYLIDIS, P., STAVRINIDES, A. LOIZOU, JJ.]

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UNAL HUSSEIN
MAHMOUT, ALIAS
KAOURMAS
AND ANOTHER
v.
THE REPUBLIC

1. UNAL HUSSEIN MAHMOUT, ALIAS KAOURMAS,
(Cr. Appeal 3382)
2. ANDREAS GEORGHIOU THEOFANOUS,
(Cr. Appeal 3383)
Appellants,

v.

THE REPUBLIC,

Respondent.

(Criminal Appeals Nos. 3382, 3383).

Criminal Law—Jurisdiction of the Cyprus Courts—Extra-territorial jurisdiction—Section 5 (1) (d) of the Criminal Code, Cap. 154 (as amended by Law No. 3 of 1962)—Jurisdiction of the Cyprus Criminal Courts to try offences committed outside the territorial limits of the Republic by citizens of the Republic—No proof that the Appellants, convicted of rape committed within the Sovereign Base Area of Akrotiri, were then citizens of the Republic—Convictions and sentences quashed—New trial ordered—Section 145 of the Criminal Procedure Law, Cap. 155.

Extra-territorial jurisdiction of the Cyprus Criminal Courts—Offences committed outside the territorial limits of the Republic by citizens of the Republic—No proof in these cases that the Appellants are citizens of the Republic—Convictions and sentences quashed—New trial ordered.

The Appellants in these consolidated criminal appeals were convicted of rape and sentenced to four and five years' imprisonment, respectively. According to the particulars of the charge the Appellants on August 7, 1972, in the Sovereign Base Area of Akrotiri, did have carnal knowledge of a girl without her consent. The Appellants were tried by the Assizes in Limassol in accordance with directions by the Supreme Court given under section 6(1) of the Criminal Code, Cap. 154 (as amended by Law No. 3 of 1962). An essential ingredient, under section 5(1) of the Criminal Code (as amended, *supra*), for their convictions of the offence of rape—which was, allegedly, committed outside the Republic—is that they must be citizens of the Ré-

public: In the count on which the Appellants were convicted there was no averment that they were citizens of the Republic nor has this been proved on their trial.

On those facts the Supreme Court allowed the appeals, quashed the convictions and sentences, and ordered under section 145 of the Criminal Procedure Law, Cap. 155, a new trial before the next Assizes in Limassol (see, *inter alia*, in this respect the case of *Petrides and Others (infra)* as well as the case of *Chrysanthou (infra)*).

Cases referred to:

Petrides and Others v. The Republic, 1964 C.L.R. 413, at p. 428;

Chrysanthou v. The Police (1970) 2 C.L.R. 95, at p. 103.

Appeals against conviction and sentence.

Appeals against conviction and sentence by Unal Husseyin Mahmout alias Kaourmas and Andreas Georghiou Theofanous who were convicted on the 2nd November, 1972, at the Assize Court of Limassol (Criminal Case No. 9887/72) on one count of the offence of rape contrary to section 144 of the Criminal Code, Cap. 154 and were sentenced by Loris, P.D.C., Hadji-tsangaris and Chrysostomis, D.JJ. to four and five years' imprisonment each, respectively.

V. Dervish, for the Appellant in appeal 3382.

A. Pandelides, for the Appellant in appeal 3383.

V. Aristodemou, Counsel of the Republic, for the Respondent.

Mr. Aristodemou: Your Honours, I would like at this stage to make a statement that, in the light of the arguments heard so far, I concede that, on the material before the Assize Court, it was not established with the degree of certainty required in criminal proceedings that the Appellants are citizens of the Republic, this being one of the prerequisites for the trial Court's criminal jurisdiction under section 5 of the Criminal Code as amended by Law 3/62. Since there was no jurisdiction, the convictions appealed from are nullities and Your Honours' Court may exercise any of the powers vested in it under section 145 of the Criminal Procedure Law:

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Court (to both counsel for Appellants): Do you want to be heard on the possibility of a new trial?

Mr. Dervish: I submit, with respect, that it would be most unfair to the Appellants to subject them again to the inconvenience, financially and otherwise, of having to face a new trial, in these circumstances. It is due to no fault of theirs that the proceedings which were brought against them have now become abortive. They have stayed in prison since their conviction on the 2nd November, 1972. My client is a married man, he has children, he has suffered great losses in his business, he has spent a very substantial amount of money in order to defend himself, and I submit that it would be very unfair to subject him to all that again. He was in custody until the end of the preliminary inquiry, from the date of the offence; and then he was let out on bail; and from the date of the commencement of the Assize Court proceedings—the 24th October—he was in custody.

Mr. Pandelides: Your Honours, I do respectfully submit to the Court that the nature of the case does not warrant a new trial. My client has also been in custody from the date he was arrested—on the 7th August—until the end of the preliminary inquiry, and then from the date of the conviction until today; and, in view of the circumstances which were put before Your Honours' Court, I submit that the ends of justice will not be served if a new trial is ordered.

Mr. Aristodemou: I would say that it is in the interest of justice to order a new trial in this case.

The following judgment was delivered by:

TRIANTAFYLIDIS, P.: Both the Appellants, in these consolidated criminal appeals, have challenged their convictions of the offence of rape, under section 144 of the Criminal Code, Cap. 154, as well as the sentences of imprisonment, for four and five years respectively, which were passed on them for such offence.

According to the particulars of the charge, on the basis of which they were tried and convicted, the Appellants on the 7th August, 1972, in the Sovereign Base Area of Akrotiri, did have unlawful carnal knowledge of a female—a girl from England—without her consent.

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Though the alleged offence was committed outside the territorial limits of the Republic of Cyprus, the Appellants were prosecuted before, and tried by, an Assize Court in Limassol, within the Republic, in view of the fact that by virtue of section 5 (1) (d) of Cap. 154, as amended by the Criminal Code (Amendment) Law, 1962 (Law 3/62), the Criminal Code is applicable to an offence committed "in any foreign country by a citizen of the Republic if the offence is one punishable in the Republic with death or imprisonment exceeding two years and the act or omission constituting the offence is also punishable by the law of the country where it is committed".

Under section 6(1) of Cap. 154, as amended by Law 3/62, it was directed by the Supreme Court that the Appellants were to be tried in Limassol. At the time of the making of such direction it was neither alleged nor examined—(not being then the proper stage for the purpose, as the direction was sought and made without notice having been given in the matter to the Appellants)—whether the Appellants were, at the time of the commission of the offence concerned, citizens of the Republic.

In the count on which the Appellants were convicted there is no averment that they were citizens of the Republic; nor, as very fairly conceded by counsel for the Respondent, has this been proved on their trial.

As, therefore, the existence of an essential ingredient, under section 5 (1) (d) of Cap. 154, as amended by Law 3/62, for their convictions of the offence of rape, which was—allegedly—committed outside the Republic, was not established, such convictions have to be set aside, together with the sentences imposed on the Appellants as a result thereof.

Having heard counsel on whether, in the circumstances, a new trial should be ordered, and having paid due regard to all that has been submitted by them in this connection, we have decided that the interests of justice require us to order, under section 145 (1) (d) of the Criminal Procedure Law, Cap. 155, a new trial of the Appellants, on the count of rape in question, before the next Assizes in Limassol (see; *inter alia*, in this respect the cases of *Petrides and Others v. The Republic*, 1964 C.L.R. 413, at p. 428, and *Chrysanthou v. The Police*, (1970) 2 C.L.R. 95, at p. 103).

It should, of course, be made abundantly clear that neither our order for a new trial, nor the already referred to direction of

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the Supreme Court for trial in Limassol, can be treated as precluding the raising at the new trial of any issue which relates to the jurisdiction of the Assize Court in Limassol to try this case.

As the next Limassol Assizes are due to commence in May there is till then sufficient time for the learned Attorney-General of the Republic to consider as a whole the position in this case, in the light of all the arguments advanced during this appeal—and we are, certainly, not pronouncing in any way, at this stage, on any of the issues raised thereby—and to decide if, in the exercise of his relevant powers, he should allow the new trial to proceed or he should enter a *nolle prosequi*; we have thought fit to refer expressly to the possibility of a *nolle prosequi* being entered in this case, so that if such a course is adopted it may not seem that it is a course inconsistent in any way with our order for a new trial.

The Appellants have remained in custody since their conviction on the 2nd November, 1972, and as they were on bail before their trial, they are again released on bail till their new trial, on the same terms as before.

Appeal allowed. New trial ordered.