1978 December 28

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

ANDREAS STYLIANOU,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3960).

Criminal Law—Evidence—Character of appellant—And previous disciplinary convictions of the same category as the offence—Discretion of trial Court to disallow cross-examination as to—In the light of the particular situation in the present case, appellant could not have been cross-examined as to his character and his said previous convictions—Section 1(*f*) *of the Criminal Evidence Act,* 1898 (*applicable in Cyprus by virtue of section* 3 *of Cap* 155).

Criminal Law—Evidence—"Hostile witness"—Approach to evidence of.

Criminal Law—Conviction—Evidence—Wrong approach to evidence of hostile witness—Appellant wrongly allowed to be cross-examined as to his character and as to his previous disciplinary convictions of the same category as the offence—Proviso to section 145(1)(b) *cannot be applied—Conviction quashed—Retrial ordered.*

Criminal Procedure—Appeal—Setting aside of conviction—Principles on which a new trial will be ordered—Section 145(1)(d) *of the Criminal Procedure Law, Cap.* 155.

The appellant was convicted by the Military Court of the offence of having used violence against a subordinate, contrary to section 81 of the Military Criminal Code and Procedure Law, 1964 and was sentenced to four months' imprisonment.

The trial Court based its decision to convict the appellant solely on the evidence of the complainant which it accepted as

credible, and it rejected the evidence of the appellant who denied having hit the complainant. The trial Court disregarded the evidence of the only two other prosecution witnesses who were, also, serving in the National Guard at the time, and who were treated at the trial as "hostile witnesses."

Upon appeal counsel for the appellant contended:

(a) That the trial Court erred in overlooking completely, and, thus, not taking at all into consideration in any way, the evidence given by the said two prosecution witnesses at the trial, which was favourable for the appellant.

(b) That the trial Court erroneously permitted counsel for the prosecution to cross-examine at length the appellant as regards previous disciplinary convictions of his, and, in particular, as to whether he was disciplinarily punished on previous occasions for having assaulted other soldiers while he was himself still serving in the National Guard.

Held, (1) that evidence of a witness for the prosecution who is treated at the trial, with the leave of the Court, as a hostile witness, is evidence which still forms part of the evidence as a whole before the trial Court, even though it is evidence which should be regarded as unreliable and generally of negligible value; and that the course of disregarding completely the evidence given by the said two witnesses, merely on the ground that they had been treated as hostile witnesses, was not in strict law the exactly correct course.

(2) That the trial Court had a discretion to disallow the complained of cross-examination of the appellant; that the appellant' s past disciplinary convictions were matters in respect of which, in the light of the particular situation in the present case, he could not have been cross-examined on the basis of section 1(f) of the Criminal Evidence Act, 1898 (which is applicable in Cyprus by virtue of s. 3 of Cap. 155) as none of the prerequisites for allowing such a course to be taken by the prosecution existed. (See *Selvey* v. *Director of Public Prosecutions* [1968] 2 All E.R. 497).

(3) That, apart from the manner in which the trial Court has

approached the evidence of the two hostile prosecution witnesses, the very fact that it wrongly allowed the appellant to be cross-examined as to his character and particularly, as regards previous disciplinary convictions of the same category as that to which belongs the offence of which he was convicted in the present instance, prevents this Court, in the circumstances of this particular case, from applying the proviso to section 145 (1)(b) of the Criminal Procedure Law, Cap. 155; that the better course, in the interests of justice, is to order a new trial before a differently constituted Military Court (see, *inter alia, Pierides* v. *Republic* (1971) 2 C.L.R. 263 at pp. 270–276); and that, accordingly, the conviction of the appellant is set aside and his retrial is ordered. (See section 145(1)(d) of Cap. 155).

Appeal allowed. Conviction set aside; retrial ordered.

Per curiam: Since we have ordered a new trial we do not propose to determine the appellant's appeal against sentence, but we feel bound to say, for the guidance of the Court which will try him again, that we would definitely not have been inclined to find that the sentence passed on him is excessive or wrong in principle, because the offence with which the appellant has been charged is, indeed, of a most serious and despicable nature.

Cases referred to:

R. v. *Harris*, 20 Cr. App. R. 144;

Selvey v. *Director of Public Prosecutions* [1968] 2 All E.R. 497;

Pierides v. *Republic* (1971) 2 C.L.R. 263 at pp. 270–276;

Anastassiades v. *Republic* (1977) 5 J.S.C. 516 at pp. 804–808 (to be reported in (1977) 2 C.L.R.);

Petrides v. *Republic*, 1964 C.L.R. 413 at p. 431;

Loizias v. *Republic* (1969) 2 C.L.R. 217 at p. 220.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Andreas Stylianou, who was convicted on the 19th October, 1978 at the Military Court sitting at Nicosia (Case No. 243/78) on one count of the offence of having used violence against a subordinate, contrary to section 81 of the Military Criminal Code and Procedure

Law, 1964 (Law 40/64) and was sentenced to four months' imprisonment.

P. Frakalas with *L. Georghiou*, for the appellant.

St. Tamassios, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. In this case the appellant has appealed against his conviction, on October 19, 1978, by a Military Court in Nicosia, of the offence of having used violence against a subordinate, contrary to section 81 of the Military Criminal Code and Procedure Law, 1964 (Law 40/64).

He was sentenced to four months' imprisonment and he has appealed, also, against this sentence as being excessive.

The salient facts of the case, as found by the trial Court, are that on the afore-mentioned date the complainant, who had enlisted recently in the ranks of the National Guard, went with other new conscripts to a store where various items of equipment would be supplied to them; outside the store there were many other soldiers who were hitting and insulting the new conscripts; at the entrance of the store stood the appellant in uniform; he was at the time a sergeant, and he struck the complainant with his hand in the eye, with the result that he fell unconscious on the floor of the store.

The trial Court based its decision to convict the appellant solely on the evidence of the complainant which it accepted as credible, and it rejected the evidence of the appellant who denied having hit the complainant. The trial Court disregarded the evidence of the only two other prosecution witnesses who were, also, serving in the National Guard at the time; and who were treated at the trial as "hostile witnesses".

Counsel for the appellant has complained that the trial Court erred in overlooking completely, and, thus, not taking at all into consideration in any way, the evidence given by the said two prosecution witnesses at the trial, which, according to counsel for the appellant, was favourable for his client.

Having carefully perused the relevant part of the judgment of the trial Court, we are inclined to agree with counsel for the appellant that the trial Court has, indeed, disregarded com-

pletely the evidence given by the aforesaid two witnesses at the trial, merely on the ground that they had been treated as hostile witnesses, and we, also, agree with counsel for the appellant that in strict law this was not the exactly correct course.

The evidence of a witness for the prosecution who is treated at the trial, with the leave of the Court, as a hostile witness, is evidence which still forms part of the evidence as a whole before the trial Court, even though it is evidence which should be regarded as unreliable and generally of negligible value (see Archbold on Pleading, Evidence and Practice in Criminal Cases, 39th ed., p. 283, para. 521a, as well as *R.* v. *Harris*, 20 Cr. App. R. 144).

As has been pointed out recently in "Justice of the Peace" (1977), vol. 141, p. 251:-

> "The better view seems to be that the evidence of the hostile witness is not neutralized, *i.e.*, set at nought, ignored, to be put out of mind, but potentially weakened. Thus the jury should be warned about it, they should treat it with the utmost caution, but they may nonetheless be satisfied beyond reasonable doubt that it is reliable and accurate and act upon it accordingly."

Had the only complaint of counsel for the appellant been that relating to the manner in which the trial Court has approached the evidence of the two hostile prosecution witnesses we would not have been prepared to set aside the conviction of the appellant, even though such complaint is not entirely devoid of merit, as we would have dismissed his appeal against conviction by holding, in accordance with the proviso to section 145(1)(b) of the Criminal Procedure Law, Cap. 155, that in the light of the totality of the circumstances of the present case no substantial miscarriage of justice has actually occurred.

Counsel for the appellant has, however, complained further that the trial Court permitted counsel for the prosecution to cross-examine at length the appellant as regards previous disciplinary convictions of his, and, in particular, as to whether he was disciplinarily punished on previous occasions for having assaulted other soldiers while he was himself still serving in the National Guard.

At the trial counsel for the appellant objected to such cross-

examination but his objection was rejected on the ground that the fact whether the appellant had in the past assaulted other soldiers was indicative of the character of the appellant; and, also, on the ground that what the appellant was being cross-examined about, at that particular stage of the trial, were "relevant matters".

The specific statutory provision governing this matter is section 1(f) of the Criminal Evidence Act, 1898, in England, which has been rendered applicable in Cyprus by virtue of section 3 of Cap. 155; and the relevant parts of it read as follows:-

> " Every person charged with an offence, and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defence at every stage of the proceedings, ... Provided as follows:- ... (e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged. (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence .....".

The above provision was considered at great length by the House of Lords in England in *Selvey* v. *Director of Public Prosecutions*, [1968] 2 All E.R. 497.

Having examined the aforesaid complaint of counsel for the appellant in the light of the provisions of section 1(f) of the

Criminal Evidence Act, 1898, and of the judgments delivered in the *Selvey* case *supra*, and other relevant case-law (see Archbold, *supra*, pp. 302–316, paras. 545–569b), we are of the view that the appellant's past disciplinary convictions, regarding which cross-examination of the appellant was allowed by the trial Court, were matters in respect of which, in the light of the particular situation in the present case, he could not have been cross-examined on the basis of section 1(f) of the Criminal Evidence Act, 1898, as none of the prerequisites for allowing such a course to be taken by the prosecution existed.

Even if, however, we were to take the view that it could be held that any of the said prerequisites had to some extent been shown to exist, we would be of the opinion that this was a case in which the trial Court, in the exercise of its discretion, should not have allowed such cross-examination, especially because of the vital, in the circumstances, importance of the appellant's credibility.

That the trial Court had a discretion to disallow the complained of cross-examination of the appellant is clearly established by the judgments delivered in the *Selvey* case, *supra* (see, also, Archbold, *supra*, at p. 312, para. 565, and Cross on Evidence, 4th ed., p. 373). In the *Selvey* case, *supra*, Viscount Dilhorne stated the following (at pp. 509–510):-

> "In *Maxwell* v. *Director of Public Prosecutions*[1] and in *Stirland's* case[2], it was said in this House that a Judge has that discretion. In *R.* v. *Jenkins*[3] SINGLETON, J., said[4]:
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> > 'If and when such a situation arises (the question whether the accused should be cross-examined as to character) it is open to counsel to apply to the presiding Judge that he may be allowed to take the course indicated ..... Such an application will not always be granted, for the Judge has a discretion in the matter. He may feel that even though the position is established in law, still the putting of such questions as to the

1. [1934] All E.R. Rep. 168.
2. [1944] 2 All E.R. 13.
3. [1945] 31 Cr. App. Rep. 1.
4. [1945] 31 Cr. App. Rep. at p. 15.

character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible. On the other hand, in the ordinary and normal case he may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section. The essential thing is a fair trial and that the legislature sought to ensure by s. 1(f).'

Similar views were expressed in *Noor Mohamed* v. *Regem*[1] by LORD DU PARCQ, in *Harris* v. *Director of Public Prosecutions*[2] in *R.* v. *Cook*[3], in *Jones* v. *Director of Public Prosecutions*[4] and in other cases.

In the light of what was said in all these cases by Judges of great eminence, one is tempted to say, as LORD HEWART said in *R.* v. *Dunkley*[5] that it is far too late in the day even to consider the argument that a Judge has no such discretion. Let it suffice for me to say that in my opinion the existence of such a discretion is now clearly established."

Also in the same case Lord Guest said (at pp. 519–520):–

"I am not persuaded, however, by the Crown' s argument and I am satisfied on a review of all the authorities that in English law such a discretion does exist. It was exercised for the first time in relation to this section in *R.* v. *Watson.*[6] Discretion as such has the general blessing of

1. [1949] 1 All E.R. 365.
2. [1952] 1 All E.R. 1044.
3. [1959] 2 All E.R. 97.
4. [1962] 1 All E.R. 569.
5. [1926] All E.R. Rep. at p. 190.
6. [1913] 8 Cr. App. Rep. 249.

LORD MOULTON in *Director of Public Prosecutions* v. *Christie*[1] and thereafter it has been the uniform practice of Judges to exercise it in this class of case. Discretion was recognised in this House in *Maxwell* v. *Director of Public Prosecutions*[2]; *Stirland* v. *Director of Public Prosecutions*[3]; *Harris* v. *Director of Public Prosecutions*[4], and *Jones* v. *Director of Public Prosecutions.*[5] Also in the Privy Council in *Noor Mohamed* v. *Regem*[6] and *Karuma, Son of Kaniu* v. *Reginam*[7]. In face of this long established practice it is, in my opinion, now too late to say that the Judge has no discretion. While I leave to others more versed than I am in English criminal law and practice to discuss the origin of this discretion I would assume that it springs from the inherent power of the Judge to control the trial before him and to see that justice is done in fairness to the accused."

Having given this matter anxious consideration, we have reached the conclusion that, apart from the manner in which the trial Court has approached the evidence of the two hostile prosecution witnesses, the very fact that it wrongly allowed the appellant to be cross-examined as to his character, and, particularly, as regards previous disciplinary convictions of the same category as that to which belongs the offence of which he was convicted in the present instance, prevents us, in the circumstances of this particular case, from applying the aforementioned proviso to section 145(1)(b) of Cap. 155; and the better course, in the interests of justice, is to order a new trial before a differently constituted Military Court; the relevant principles which have guided us in adopting such course are to be found in, *inter alia*, *Pierides* v. *The Republic*, (1971) 2 C.L.R. 263, 270-276, as well as the judgment of Hadjianastassiou J. in *Anastassiades* v. *The Republic*, (1977) 5 J.S.C. 516, 804-808*.

1. [1914-15] All E.R. Rep. 63.
2. [1934] All E.R. Rep. 168.
3. [1944] 2 All E.R. 13.
4. [1952] 1 All E.R. 1044.
5. [1962] 1 All E.R. 569.
6. [1949] 1 All E.R. 365.
7. [1955] 1 All E.R. 236.

* To be reported in (1977) 2 C.L.R.

We, therefore, set aside the conviction of the appellant and order his retrial under setion 145(1)(d) of Cap. 155.

Since we have ordered a new trial we do not propose to determine the appellant's appeal against sentence, but we feel bound to say, for the guidance of the Court which will try him again, that we would definitely not have been inclined to find that the sentence passed on him is excessive or wrong in principle, because the offence with which the appellant has been charged is, indeed, of a most serious and despicable nature.

In view, again, of the seriousness of such offence we order that the appellant shall remain in custody pending his appearance before the Military Court for a new trial (see, *inter alia*, the *Pierides* case, *supra*, at p. 277, as well as *Petrides and others* v. *The Republic*, 1964 C.L.R. 413, 431 and *Loizias* v. *The Republic*, (1969) 2 C.L.R. 217, 220). It will, of course, be open to the Military Court which will try the appellant afresh to release him out on bail at any stage pending his trial if it is persuaded that sufficient reasons for doing so exist.

In the result, this appeal is allowed, the conviction and sentence passed upon the appellant are hereby set aside and a new trial is ordered before a differently constituted Military Court; and it might be added that, in view of the rather long period of time that has elapsed since the commission of the offence in question, it is expected that arrangements will be made for the new trial to take place as soon as possible.

Appeal allowed.