

1979 April 3

[TRIANTAFYLIDIS, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

NICOS YIASSEMIDES,

*Appellant,*

v.

THE POLICE,

*Respondents.*

(*Criminal Appeal No. 3873*).

5 *Criminal Procedure—Trial in criminal cases—Irregularity—Conviction on several counts—And acquittal, by oversight at close of prosecution case, on count closely similar to counts on which appellant was convicted—Appellant elected to say nothing, when advised of his rights under section 74 of the Criminal Procedure Law, Cap. 155, because of such acquittal—Mistake discovered and explained to parties at stage of delivery of reserved judgment—Mistake may have influenced the conduct of appellant’s defence—*  
10 *Irregularity of such a nature that led to substantial miscarriage of justice—Retrial ordered.*

15 The appellant was convicted on eighteen counts of the offence of having being involved in fraudulent dealings with goods chargeable with customs duty which had not been paid. When called to make his defence on the above counts, he was acquitted on six other counts, one of them being count No. 8, which was closely similar to the counts on which he was convicted; and when his rights, under section 74 of the Criminal Procedure Law, Cap. 155, were duly explained to him by the trial Judge he elected to say nothing. Immediately before the delivery of his reserved  
20 judgment, the trial Judge explained that he had, due to an oversight on his part acquitted the appellant on count No. 8, instead of calling upon him to defend himself on that count, too. Then the Judge proceeded to deliver his judgment by means of which he convicted the appellant, also, on count No. 8, without having  
25 informed him then in relation to such count of his rights under section 74 of Cap. 155.

Upon appeal against conviction Counsel for the appellant

argued that he was influenced in advising the appellant not to give evidence on oath, and not to call any evidence, in relation to the other counts on which the appellant was, eventually, convicted, because he thought, in the light of the particular circumstances of the present case, that once the appellant had not been called upon to defend himself on count No. 8, which was closely similar to the other said counts, the trial Judge, for similar reasons for which he had already acquitted the appellant on count No. 8, and which he had not divulged in his relevant ruling at the close of the case for the prosecution, would, in the end, not find it safe to convict the appellant on the other counts.

*Held*, that there is no doubt that there exists in the present case an irregularity attributable to a mistake committed in all good faith by the trial Judge, which he very properly proceeded to explain to the parties when he discovered it; that the fact remains that this mistake has, according to counsel for the appellant, influenced, to a material extent, the conduct of the defence of the appellant and this Court is not prepared to say, without doubt, that it may not have done so; that the said irregularity is of such a nature that this Court is bound to hold that due to it there has occurred a substantial miscarriage of justice; that, therefore, it has decided to order a retrial of this case, which, in the circumstances, has to take place before another Judge of the District Court of Larnaca; and that as in relation to count No. 8 there ought not to be a retrial the appellant is only to be retried on all the other counts on which he was found guilty, and he is acquitted on count No. 8.

*Appeal allowed. Retrial ordered.*

#### **Appeal against conviction.**

Appeal against conviction by Nicos Yiassemides who was convicted on the 15th April, 1978 at the District Court of Larnaca (Criminal Case No. 7117/77) on eighteen counts of the offence of having been involved in fraudulent dealings with goods, contrary to section 191(1)(a) of the Customs and Excise Law, 1967 (Law 82/67) and was sentenced by Constantinides, D.J. to pay divers fines ranging from £10 to £35 and totalling £340 as well as £95 costs.

*A. Poetis*, for the appellant.

*R. Gavrielides*, Counsel of the Republic, for the respondents.

TRIANTAFYLLIDES P. gave the following judgment of the Court. The appellant has appealed against a judgment of the District

Court of Larnaca by means of which he was, on April 15, 1978, convicted on eighteen counts charging him with having been involved in fraudulent dealings with goods, namely precious stones, which are chargeable with customs duty which had not  
5 been paid, contrary to section 191(1)(a) of the Customs and Excise Law, 1967 (Law 82/67). He was sentenced, on April 26, 1978, to pay divers fines ranging from £10 to £35 and totalling £340, as well as £95 costs.

On April 4, 1978, when he was called upon to make his defence  
10 on the aforesaid counts, he was acquitted on six other counts, one of them being count No. 8, which is closely similar to the counts on which he was convicted. In relation to the counts on which he was called upon to make his defence, his rights, as an  
15 accused person, were duly explained to him by the trial Judge under section 74 of the Criminal Procedure Law, Cap. 155, and he elected not to say anything.

On April 15, 1978, immediately before the delivery of his reserved judgment, the trial Judge explained that he had, due to an oversight on his part, acquitted, on April 4, 1978, the appellant on count No. 8, instead of calling upon him to defend himself on that count, too. Then the Judge proceeded to deliver his judgment by means of which he convicted the appellant, also, on count No. 8, without having informed him then in relation to such count—and we leave open the question of whether such  
20 a course was possible at that stage—of his rights under section 74 of Cap. 155.

Counsel for the appellant has argued before us that he was influenced in advising the appellant not to give evidence on oath, and not to call any evidence, in relation to the other counts on which the appellant was, eventually, convicted, because he  
30 thought, in the light of the particular circumstances of the present case, that once the appellant had not been called upon to defend himself on count No. 8, which was closely similar to the other said counts, the trial Judge, for similar reasons for which  
35 he had already acquitted the appellant on count No. 8, and which he had not divulged in his relevant ruling at the close of the case for the prosecution, would, in the end, not find it safe to convict the appellant on the other counts.

We do not think that it can be said that counsel for the appellant adopted an unreasonable course in this respect. The appellant was charged, in separate counts, with having sold to various persons precious stones for which customs duty had not been paid and count No. 8, together with counts Nos. 7, 9, 10 and 25, related to sales to one and the same person, prosecution witness Leonidas Demetriou; so, once the appellant had been acquitted on count No. 8, notwithstanding the fact that by calling upon the appellant to make his defence the trial Judge could be regarded as having accepted that the various sales, by the appellant, of precious stones, including those to witness Demetriou, had actually taken place, it was not unreasonable on the part of counsel for the appellant to expect that on some other general ground, such as lack of proof that the appellant did know that customs duty had not been paid for the precious stones sold by him as aforesaid, would lead eventually to his acquittal on all, or at least on many of, the other counts, as it had already happened in so far as count No. 8 was concerned.

Counsel for the respondents has submitted that, in any event, the at the end of the trial conviction of the appellant on count No. 8, in respect of which he had not been called upon to defend himself after the close of the case for the prosecution, ought to be set aside by us on appeal, but he contended that no substantial miscarriage of justice has occurred in relation to the conviction of the appellant on the remaining counts.

There is no doubt that there exists in the present case an irregularity attributable to a mistake committed in all good faith by the trial Judge, which he very properly proceeded to explain to the parties when he discovered it. But, the fact remains that this mistake has, according to counsel for the appellant, influenced, to a material extent, the conduct of the defence of the appellant; and we are not prepared to say, without doubt, that it may not have done so. In our view the said irregularity is of such a nature that we are bound to hold that due to it there has occurred a substantial miscarriage of justice and, therefore, we have decided to order a retrial of this case, which, in the circumstances, has to take place before another Judge of the District Court of Larnaca; and as in relation to count No. 8 there ought not to be a retrial the appellant is only to be retried

on all the other counts on which he was found guilty, and he is acquitted on count No. 8.

In the result, this appeal is allowed and a new trial is ordered accordingly.

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*Appeal allowed. New trial ordered.*