1980 May 18

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

G. ARAOUZOS AND SON,

Applicant,

v.

THE POLICE,

Respondents.

(Question of Law Reserved No. 172).

Constitutional Law—Human rights—Rights of person who has been acquitted or convicted of an offence—Rule against "double jeopardy"—Article 12.2 *of the Constitution—Said rule not applicable where earlier criminal proceedings terminated by nolle prosequi—Section* 154(3) *of the Criminal Procedure Law Cap.* 155 *does not conflict with, and does not have to be read subject to, the said Article* 12.2 *and section* 19 *of the Criminal Code, Cap.* 154.

Criminal Procedure—Charge—Duplicity—Continuing offence—Six separate offences charged—Counts not bad for duplicity—Paragraph (d) of section 39 *of the Criminal Procedure Law, Cap.* 155.

Criminal Procedure—Nolle prosequi—Effect—Section 154(3) *of the Criminal Procedure Law, Cap.* 154—*Section* 19 *of the Criminal Code, Cap.* 154.

Criminal Procedure—Autrefois acquit—Rule against "double jeopardy"—General principles—Test of applicability—Said rule not applicable where earlier criminal proceedings terminated by nolle prosequi—Section 154(3) *of the Criminal Procedure Law, Cap.* 155, *section* 19 *of the Criminal Code, Cap.* 154—*"Acquitted"* ("ἀπαλλαγείς") *in Article* 12.2 *of the Constitution.*

On October 29, 1977, by means of criminal case No. 18768/77, in the District Court of Limassol, the applicant firm was charged on two counts with having committed the offence* of common

* See the particulars of these offences at pp. 135–38 *post.*

nuisance and on four counts with having committed the offence of offensive trade. In an earlier criminal case ("the earlier case") in the same Court, the same applicant had been charged on two counts with having committed the offence* of offensive trade. The applicant firm pleaded not guilty to the charges of the earlier case and on October 26, 1977, during the hearing of such case, and after the evidence of one prosecution witness had been heard and while the evidence of a second prosecution witness was being heard, an adjournment was applied for by the prosecuting officer and on October 29, 1977, there was filed on behalf of the Attorney-General of the Republic a nolle prosequi; thereupon the trial Court dismissed the case and discharged the applicant. On the same day there was filed the said criminal case No. 18768/77; and when the applicant firm was called upon to plead to the charges its counsel raised for the opinion of the Supreme Court, under section 148 of the Criminal Procedure Law, Cap. 155, the following questions of law:

"(a) Whether the present proceedings, criminal case No. 18768/77, of the District Court of Limassol conflict with, or contravene, paragraph 2 of Article 12 of the Constitution and/or section 19 of the Criminal Code Cap. 154 and/or the maxim that no man should be brought into jeopardy more than once for the same offence.

(b) Whether paragraph 3 of section 154 of the Criminal Procedure Law, Cap. 155 should in the present case be read subject to paragraph 2 of Article 12 of the Constitution and/or section 19 of the Criminal Code Cap. 154 and/or the maxim that no man should be brought into jeopardy more than once for the same offence.

(c) Whether the six offences charged in the present case as separate offences for the offence of a continuing common nuisance are bad for duplicity".

Held, (1) that the rule against "double jeopardy" is applicable where the earlier criminal proceedings have been terminated through either a verdict of acquittal or conviction; that where

* See particulars of these offences at pp. 138-39 *post*.

such proceedings have been terminated by means of a nolle prosequi this development does not operate as a discharge or an acquittal on the merits; that when the provisions of paragraph (2) of Article 12 of the Constitution are construed against the background of the relevant principles of English Law, to which such provisions were intended to give constitutional effect, it becomes abundantly clear that the term "acquitted" ("ἀπαλλαγείς" in the Greek official text of the said paragraph (2)) means acquitted on the merits and not merely discharged as a result of entering a nolle prosequi; that, therefore, section 154(3) of Cap. 155 does not conflict with, and does not have to be read subject to, Article 12.2 of the Constitution and, furthermore, that it is not, in any way, incompatible with the maxim that no man should be brought into jeopardy more than once for the same offence; that, likewise, for the same reasons, section 154(3) of Cap. 155 does not conflict with, and does not have to be read subject to, section 19 of Cap. 154; that it cannot be said that when the applicant was discharged as a result of a nolle prosequi in criminal case No. 19737/76 he was found not to be criminally responsible in respect of any particular act or omission, in the sense of section 19 of Cap. 154 and that he could not, because of the provisions of such section, be prosecuted, once again, in relation to the same act or omission in criminal case No. 18768/77; and that, accordingly, questions of law (a) and (b) which have been reserved for the opinion of this Court have to be answered in the negative.

(2) That a count is bad for duplicity if by means of it an accused person is being charged with having committed two or more separate offences; that in this case the opposite seems to have happened as in respect of what both parties alleged to be a continuing offence there have been charged six separate offences, two for common nuisance and four for offensive trade, under sections 186* and 193* of Cap. 154, respectively; that even if, instead of framing two counts for common nuisance and four counts for offensive trade, there had been framed two counts, one for common nuisance and one for offensive trade charging the applicant respectively with the acts or omissions concerned in the alternative, again there could not have been put forward, the contention that the said two counts were bad for duplicity

* Quoted at pp. 148–49 *post*.

(see paragraph (d) of section 39 of Cap. 155 and the *Attorney-General of the Republic* v. *HjiConstanti*, (1969) 2 C.L.R. 5); that, therefore, the six counts to which the applicant has been called upon to plead in criminal case No. 18768/77 cannot be found to be bad for duplicity especially as there is nothing on the record before this Court to show that because of the way in which such counts have been framed the applicant has, in fact, been misled in any way; and that, accordingly, question of law reserved (c) has, also, to be answered in the negative.

Questions of law answered in the negative; case remitted to the trial Court.

Cases referred to:

Isaias v. *The Police* (1966) 2 C.L.R. 43 at p. 46;

R. v. *Ridpath*, 88 E.R. 670;

Goddard v. *Smith*, 91 E.R. 803;

Connelly v. *Director of Public Prosecutions* [1964] 2 All E.R. 401 at p. 412;

Director of Public Prosecutions v. *Humphrys* [1976] 2 All E.R. 497 at pp. 501, 533;

R. v. *Elia* [1968] 2 All E.R. 587 at pp. 590-592;

Attorney-General of the Republic v. *Hji Constanti* (1969) 2 C.L.R. 5;

Ex parte Burnby [1901] 2 K.B. 458;

R. v. *Thompson* [1914] 2 K.B. 99.

Question of Law Reserved.

Question of Law Reserved by the District Court of Limassol (Anastassiou, D.J.) (Criminal Case No. 18768/77), under section 148 of the Criminal Procedure Law, Cap. 155, for the opinion of the Supreme Court, on the application of the accused when charged but before pleading to charges of common nuisance and offensive trade, contrary to sections 186, 193 and 20 of the Criminal Code, Cap. 154.

P. Cacoyiannis, for the applicant.

N. Charalambous, Counsel of the Republic, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. gave the following judgment of the Court. The District Court of Limassol has reserved for the

opinion of the Supreme Court, under section 148 of the Criminal Procedure Law, Cap. 155, and in criminal case No. 18768/77 in the District Court of Limassol, the following questions of law:

"(a) Whether the present proceedings, Criminal case No. 18768/77, of the District Court of Limassol conflict with, or contravene, paragraph 2 of Article 12 of the Constitution and/or section 19 of the Criminal Code Cap. 154 and/or the maxim that no man should be brought into jeopardy more than once for the same offence.

(b) Whether paragraph 3 of section 154 of the Criminal Procedure Law, Cap. 155 should in the present case be read subject to paragraph 2 of Article 12 of the Constitution and/or section 19 of the Criminal Code Cap. 154 and/or the maxim that no man should be brought into jeopardy more than once for the same offence.

(c) Whether the six offences charged in the present case as separate offences for the offence of a continuing common nuisance are bad for duplicity."

The said questions of law have been reserved on the application of counsel for the applicant firm which is the accused in the aforementioned case.

The circumstances in which the above questions of law were reserved for the opinion of this Court appear, on the basis of the material before us, to be as follows:

In the said criminal case, No. 18768/77, the applicant was charged with having committed the offences of common nuisance and offensive trade by means of six counts which read as follows:

"STATEMENT OF OFFENCE

First Count

Common Nuisance, contrary to section 186 & 20 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused on the 2nd day of September, 1974 and on other days between that date and the 7th day of August,

1976, unknown to the Prosecution, at the locality 'Koutsoulia' area of Kato Polemidia, in the District of Limassol, did omit to discharge a legal duty, to wit, to prevent the dust and flies created from the elaboration, storing and conveyance of carobs, cereal crops and corn from business carried out within the premises of his factory and other open spaces, situated in the inhabited area of 'Koutsoulia' area and thereby cause common injury, danger or annoyance or obstruct or cause inconvenience to the public in the exercise of common rights.

STATEMENT OF OFFENCE
Second Count

Common Nuisance, contrary to section 186 and 20 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused between the 8th day of August, 1976 and the 28th day of October, 1977, on diverse dates, at the locality 'Koutsoulia' area of Kato Polemidia, in the District of Limassol, did omit to discharge a legal duty, to wit, to prevent the dust and flies created from the elaboration, storing and conveyance of carobs, cereal crops and corn from business carried out within the premises of his factory and other open spaces situated in the inhabited area of 'Koutsoulia' and thereby cause common injury or danger or annoyance or obstruct or cause inconvenience to the public in the exercise of common rights.

STATEMENT OF OFFENCE
Third Count

Offensive trade, contrary to sections 193, 186 and 20 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused on the 2nd day of September, 1974 and on other days between that date and the 7th day of August, 1976 unknown to the Prosecution, at the locality 'Koutsoulia' area of Kato Polemidia, in the District of Limassol, for the purpose of trade, to wit, by the elaboration, storing and conveyance of carobs, cereal crops and corn, within the premises of his factory and other open

spaces situated at the inhabited area of 'Koutsoulia' did make loud noises by the using of noises machines, goods vehicle and motor tractors, as to annoy a considerable number of persons in the exercise of their common rights.

STATEMENT OF OFFENCE
Fourth Count

Offensive trade, contrary to sections 193, 186 and 20 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused on diverse dates, between the 8th day of August, 1976 and the 28th October, 1977, at the locality 'Koutsoulia' area of Kato Polemidia, in the District of Limassol for the purpose of trade, to wit, by the elaboration, storing and conveyance of carobs, cereal crops and corn, within the premises of his factory and other open spaces situated at the inhabited area of 'Koutsoulia' did make loud noises by the using of noises machines, goods vehicle and motor tractors, as to annoy a considerable number of persons in the exercise of their common rights.

STATEMENT OF OFFENCE
Fifth Count

The accused on the 2nd day of September, 1974 and on other days between that date and the 7th day of August 1976, unknown to the Prosecution, at the locality 'Koutsoulia' area of Kato Polemidhia, in the District of Limassol, for the purpose of trade, to wit, by the elaboration, storing and conveyance of carobs, cereal crops and corn within the premises of his factory and other open spaces situated at the inhabited area of 'Koutsoulia', did make offensive or unwholesome smells by allowing the dust and smells created by the elaboration, storing and conveyance of carobs, cereal crops and corn, as to annoy a considerable number of persons in the exercise of their common rights.

STATEMENT OF OFFENCE
Sixth Count

Offensive trade, contrary to sections 193, 186 and 20 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused on diverse dates, between the 8th day of August, 1976 and the 28th day of October, 1977, at the locality 'Koutsoulia' area of Kato Polemidia, in the District of Limassol, for the purpose of trade, to wit, by the elaboration, storing and conveyance of carobs, cereal crops and corn within the premises of his factory and other open spaces situated at the inhabited area of 'Koutsoulia' did make offensive or unwholesome smells by allowing the dust and smells created by the elaboration, storing and conveyance of carobs, cereal crops and corn as to annoy a considerable number of persons in the exercise of their common rights."

In an earlier criminal case, No. 19737/76, in the District Court of Limassol, the same applicant had been charged with having committed the offence of offensive trade by means of two counts which read as follows:

"STATEMENT OF OFFENCE
First Count

Offensive trade, contrary to sections 193, 186 and 20 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused on the 2nd day of September, 1974 and on other days between that date and the 7th day of August, 1976, unknown to the Prosecution, at the locality 'Koutsoulia' area of Kato Polemidhia, in the District of Limassol, for the purpose of trade, did make loud noises with the machines of his carob factory in such place, to wit, in the inhabited area of Koutsoulia locality and such circumstances as to annoy a considerable number of persons in the exercise of their common rights.

STATEMENT OF OFFENCE
Second Count

Offensive trade, contrary to sections 193, 186 and 20 of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The accused on the 2nd day of September, 1974 and on other days between that date and the 7th day of August,

1976 to the Prosecution unknown, at the locality 'Koutsoulia' area of Kato Polemidhia, in the District of Limassol, for the purpose of trade, did make offensive or unwholesome smells in such place in such circumstances, to wit, by grinding carobs in an open place in his factory by the inhabited area of Koutsoulia locality, as to annoy a considerable number of persons in the exercise of their common rights."

The applicant pleaded not guilty to the above charges in the aforementioned case No. 19737/76 and on October 26, 1977, during the hearing of such case, and after the evidence of one prosecution witness had been heard and while the evidence of a second prosecution witness was being heard, an adjournment was applied for by the prosecuting officer and, eventually, on October 29, 1977, there was filed on behalf of the Attorney-General of the Republic a nolle prosequi; thereupon the trial Court dismissed the case and discharged the applicant firm, which was the accused in that case.

On the same day there was filed the aforesaid criminal case No. 18768/77.

On January 18, 1978, when the applicant firm was called upon to plead to the charges in the said case its counsel raised the questions of law which have been reserved for our opinion.

It is convenient to refer, at this stage, to the constitutional and legislative provisions which are involved in the present proceedings:

Paragraph 2 of Article 12 of the Constitution provides that—

"A person who has been acquitted or convicted of an offence shall not be tried again for the same offence. No person shall be punished twice for the same act or omission except where death ensues from such act or omission".

Section 19 of the Criminal Code, Cap. 154, reads as follows:

"A person cannot be twice criminally responsible either under the provisions of this Law or under the provisions of any other Law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already

been convicted of some other offence constituted by the act or omission."

Sub section (3) of section 154 of the Criminal Procedure Law, Cap. 155, reads as follows:

(3) Where a nolle prosequi is entered in accordance with the provisions of this section, the discharge of an accused person shall not operate as a bar to any subsequent proceedings against him for the same offence or on account of the same facts".

It is, also, useful, in relation to the maxim that no man should be brought into jeopardy more than once for the same offence–which forms part of the English Common Law and criminal procedure and practice–to refer to section 3 of Cap. 155, which provides as follows:

"3. As regards matters of criminal procedure for which there is no special provision in this Law or in any other enactment in force for the time being, every Court shall, in criminal proceedings, apply the law and rules of practice relating to criminal procedure for the time being in force in England".

The nolle prosequi in this case was entered under subsection (1) of section 154 of Cap. 155, which reads as follows:

"154.(1) In any criminal proceedings and at any stage thereof before judgment the Attorney-General may enter a nolle prosequi, either by stating in Court or informing the Court in writing that the Crown intends that the proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the nolle prosequi is entered."

As it has been held in *Isaias* v. *The Police*, (1966) 2 C.L.R. 43, 46, a nolle prosequi can be entered at any stage before judgment by the trial Court; and in the present instance it has been entered during the trial and before even judgment had been reserved by the trial Court.

It is appropriate to deal together with questions of law (a) and (b) above:

It is to be noted, first, that subsection (3) of section 154 of Cap. 155 does not introduce a new notion in our criminal proce-

dure unknown to the criminal procedure and practice applicable in England.

In Archbold on Pleading, Evidence and Practice in Criminal Cases, 40th ed., p. 84, para. 143, it is stated that a nolle prosequi puts an end to the prosecution, but does not operate as a discharge or an acquittal on the merits and the party concerned remains liable to be re-indicted; and reference is made there, in this respect, to, *inter alia*, the cases of *R.* v. *Ridpath*, 88 E.R. 670, and *Goddard* v. *Smith*, 91 E.R. 803.

Counsel for the applicant has submitted that section 154 of Cap. 155 conflicts with Article 12.2 of the Constitution and the maxim that no man should be brought into jeopardy more than once for the same offence.

This maxim is actually given effect to by means of the provisions of Article 12.2, above.

In relation to the application of the basic principles safeguarded by means of Article 12.2 of our Constitution it is relevant to bear in mind the following passage from the judgment of Lord Morris of Borth-y-Gest in *Connelly* v. *Director of Public Prosecutions*, [1964] 2 All E.R. 401 (at p. 412):

> "I pass, therefore, to a consideration of the questions which arise concerning the plea of autrefois acquit. In giving my reasons for my view that the direction given by the learned Judge was entirely correct, I propose to examine some of the authorities and to state what I think are the governing principles. In my view both principle and authority establish—(i) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted; (ii) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted; (iii) that the same rule applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; (iv) that one test whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an

offence of which, on the indictment, the accused could have been found guilty; (v) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus, if there is an assault and a prosecution and conviction in respect of it, there is no bar to a charge of murder if the assaulted person later dies; (vi) that on a plea of autrefois acquit or autrefois convict a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the Court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted; (vii) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings; (viii) that apart from circumstances under which there may be a plea of autrefois acquit a man may be able to show that a matter has been decided by a Court competent to decide it, so that the principle of res judicata applies; (ix) that apart from cases where indictments are preferred and where pleas in bar may therefore be entered the fundamental principle applies that a man is not to be prosecuted twice for the same crime."

In the later case of *Director of Public Prosecutions* v. *Humphrys*, [1976] 2 All E.R. 497, Viscount Dilhorne referred to the passage from the *Connelly* case, *supra*, which has already been quoted in this judgment, and said (at p. 501):

"The pleas of autrefois acquit and autrefois convict do not depend on an issue being determined in an earlier trial but on the result of that trial. In the course of his speech in *Connelly* v. *Director of Public Prosecutions*[1] my noble and learned friend, Lord Morris of Borth-y-Gest, made a full

1. [1964] 2 All E.R. 401 at 412.

and comprehensive review of the law relating to the plea of autrefois acquit. He pointed out that Blackstone in his Commentaries[1] had said that the pleas of autrefois acquit and autrefois convict were 'grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence'..."

Also, in the same case, Lord Edmund Davies stated (at p. 533):

"The rule against double jeopardy has as some of its offspring the pleas of 'autrefois acquit' and 'autrefois convict', or to use another language and a lot more words, 'Nemo bis vexari pro eadem causa' and 'Nemo bis puniri pro uno delicto'. These are special pleas in bar in trials on indictment and, if raised, their validity has to be determined by a jury. But the more expansive prohibition against double jeopardy extends also to summary trials (*Flatman* v. *Light*[2] per Lord Goddard C.J.), and the prevention of repeated punishments for the same offence is now governed by the Interpretation Act 1889, s. 33, which, as Humphreys J. said in *R.* v. *Thomas*[3], 'adds nothing and detracts nothing from the common law.'

The law is not that a man may not be punished twice for the same 'act', but for the same 'offence' (*R.* v. *Thomas*[4]), and in *Connelly*[5] Lord Reid observed that 'many generations of judges have seen nothing unfair in holding that the plea of autrefois acquit must be given a limited scope'. The nature and extent of the limitations were helpfully dealt with in considerable detail in a series of propositions enunciated by Lord Morris of Borth-y-Gest in *Connelly*[6]..."

From Archbold, *supra*, at p. 226, para. 377, it appears that the proposition that "A man may not be tried for a crime in respect of which he could in some previous indictment have been lawfully convicted" applies to "...an offence which in the earlier proceedings constituted a common law or statutory alternative to the

1. [1759] Bk 4, p. 329.
2. [1946] 2 All E.R. 368 at 370.
3. [1949] 2 All E.R. 662 at 664.
4. [1949] 2 All E.R. at 664.
5. [1964] 2 All E.R. at 406.
6. [1964] 2 All E.R. 401.

offence of which the defendant was convicted or acquitted. The offence would have been alternative in that, although it was not expressly charged, the jury could lawfully have convicted the defendant of it had that been appropriate."

In *R.* v. *Elia*, [1968] 2 All E.R. 587, it was held that even if the jury was discharged erroneously at the first trial such discharge does not bar a new trial. It is worth quoting, in this connection, at some length, from the judgment of Davies L.J. in that case (at pp. 590–592):

> "Even if the view indicated above be wrong and the Judge was in error in discharging the jury, the decisive point in this case, in the view of the Court, is that such an error on the part of the judge was no bar to the appellant being tried before another jury. Counsel for the appellant very properly put before the Court authorities which, in our view, are conclusive on this point. *R.* v. *Lewis*[1], was a case where, after a trial had started, the jury were discharged owing to the absence of some of the witnesses for the prosecution. In the course of giving the judgment of the Court of Criminal Appeal, *CHANNELL*, J., said[2]:
>
> > '... the rule as to autrefois acquit and autrefois convict cannot be urged here because the appellant was never in peril on Apr. 20[3]. The established law to the effect that the discharging of the jury is in the discretion of the Judge, and that his exercise of the discretion is not subject to review, is not affected by the Criminal Appeal Act, 1907, and therefore we have no jurisdiction to deal with it. However, although we cannot say it judicially, we would like to intimate that the Judge's discretion in this case appears, if we rightly understand the facts, to have been exercised in a way different from that in which it has been our individual practice to exercise it. A jury should not be discharged in order to allow the prosecution to present a stronger case on another trial. That is the rule on which Judges have acted and on which we ought to act, but we have no jurisdiction to deal with this matter'.

1. [1908–10] All E.R. Rep. 654.
2. [1909], 2 Cr. App. Rep. at p. 181.
3. April 20 was the date of the first trial.

So there was a case where the Court was of opinion that the Judge was wrong to discharge the jury but nevertheless held that they could not interfere. It is suggested by counsel for the appellant that the present case is different, since he says that the discharge was in breach of the statute; but even so, the appellant was not in peril at the first trial. He could not, therefore, plead autrefois acquit or autrefois convict, and there was no ground on which he could move to quash.

Two cases of respectable antiquity and high authority were cited in *R.* v. *Lewis*[1] which are most relevant to the present question. The first was *R.* v. *Charlesworth*[2], a decision of the Court of Queen's Bench. In that case SIR ALEXANDER COCKBURN, C.J., said[3]:

> 'Assuming that the Judge had not this power[4] or that he exercised it improperly, the question is, whether what he has done amounts to the acquittal of the defendant, and entitles him to have judgment entered up as if he had been acquitted. On this I can add nothing to the conclusive reasoning of CRAMPTON, J., in *Conway and Lynch* v. *Reginam*[5] on which so much observation has been made. There is no instance of such a plea as this, except in this case and that. It may be said with truth that may be because, since the practice established in the time of LORD HOLT, juries have not been discharged, and therefore the occasion for such a plea has not presented itself. On the other hand, the only pleas known to the law of England to stay a man from being tried on an indictment or information (and we must consider this as if it was a fresh information, and the defendant had pleaded to it the facts stated on the record) are the pleas of autrefois acquit and autrefois convict, and it is clear that this statement of facts amounts to neither. It is said that a man is not to be tried twice, and is not

1. [1908-10] All E.R. Rep. 654.
2. [1861], 1 B. & S. 460.
3. [1861], 1 B. & S. at pp. 506-508.
4. Viz., power to discharge the jury.
5. [1845], 5 L.T.O.S. 458 at p. 460.

a second time to be put in jeopardy; and that that applies equally to this case as to a case where a man has been convicted or acquitted. In that I cannot concur; and the judgment of CRAMPTON, J., is conclusive on that subject. When we talk of a man being tried twice, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by the verdict of a jury; and he is not tried nor put in jeopardy until the verdict is given. If that is not so, then in every case of a defective verdict a man could not be tried a second time; and yet it is well known that, though a jury have pronounced upon a case, yet, if their verdict be defective, it will not avail the party accused in the event of his being put on his trial a second time. Therefore, in my humble judgment (though it is not necessary to decide the point), as at present advised, I cannot come to the conclusion that there has been, in this case, a trial, or that the accused has been put in jeopardy, or put in the position, either in fact or in law, of a man who has been once acquitted, and who, having been once acquitted, cannot be put on his trial a second time.'

.....

The other case, five years later, was *Winsor* v. *Reginam*[1], in the Court of Queen's Bench and on appeal in the Exchequer Chamber[2]. In the course of delivering the judgment of the Exchequer Chamber, ERLE, C.J., said[3]:

'Even if it was assumed, for the sake of argument, that the statement on the record led the Judges of the Court of error to the opinion that the order for the discharge in question was an improper exercise of discretion on the part of the Judge who tried the case, still we should hold that such a discharge was no legal bar to a second trial on the same or on a fresh indictment. The only pleas known to the law founded upon a former trial are pleas of a former

1. [1866], L.R. 1 Q.B. 289.
2. [1866], L.R. 1 Q.B. 390.
3. [1866], L.R. 1 Q.B. at p. 395.

conviction or a former acquittal for the same offence, but if the former trial had been abortive without a verdict, there has been neither a conviction nor an acquittal, and the plea could not be proved.'

In the view of this Court, those authorities make it clear that whether JUDGE ROGERS was right or wrong at the end of the first trial in discharging the jury, as he did, whether he had the right in his discretion so to do or whether s. 13 of the Act of 1967 had taken away that right, there was no bar to the appellnat being put in charge of a fresh jury for trial."

From all the foregoing it appears clearly that the rule against "double jeopardy" is applicable where the earlier criminal proceedings have been terminated through either a verdict of acquittal or conviction; and, as already pointed out in the present judgment, where such proceedings have been terminated by means of a nolle prosequi this development does not operate as a discharge or an acquittal on the merits.

In our opinion, when the provisions of paragraph(2) of Article 12 of our Constitution are construed against the background of the relevant principles of English Law, to which such provisions were intended to give constitutional effect, it becomes abundantly clear that the term "acquitted" ("ἀπαλλαγείς" in the Greek official text of the said paragraph (2)) means acquitted on the merits and not merely discharged as a result of entering a nolle prosequi.

We are, therefore, of the opinion that section 154(3) of Cap. 155 does not conflict with, and does not have to be read subject to, Article 12.2 of the Constitution and, furthermore, that it is not, in any way, incompatible with the maxim that no man should be brought into jeopardy more than once for the same offence.

Likewise, for the same reasons, we are of the opinion that section 154(3) of Cap. 155 does not conflict with, and does not have to be read subject to, section 19 of Cap. 154.

It cannot be said that when the applicant was discharged as a result of a nolle prosequi in criminal case No. 19737/76 he was found not to be criminally responsible in respect of any particu-

lar act or omission, in the sense of section 19, above, and that, therefore, he could not, because of the provisions of such section, be prosecuted, once again, in relation to the same act or omission in criminal case No. 18768/77.

Consequently, questions of law (a) and (b) which have been reserved for the opinion of this Court have to be answered in the negative.

There remains to be dealt with question of law reserved (c) by means of which there is raised the issue of whether the six offences charged in criminal case No. 18768/77 in separate counts as separate offences, in respect of a continuing offence, are bad for duplicity:

A count is bad for duplicity if by means of it an accused person is being charged with having committed two or more separate offences (see Archbold, *supra*, p. 45, para 45).

In the present instance, however, the opposite seems to have happened. In respect of what both parties alleged to be a continuing offence there have been charged six separate offences, two for common nuisance and four for offensive trade, under sections 186 and 193 of Cap. 154, respectively.

Section 186, above, reads as follows:-

> "186. Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.
>
> It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public".

Section 193, above, reads as follows:

> "193. Any person who, for the purposes of trade or otherwise, makes loud noises or offensive or unwholesome smells in such places and circumstances as to annoy any

considerable number of persons in the exercise of their common rights, commits and is liable to be punished as for a common nuisance."

In this connection it is relevant to refer, also, to paragraph (d) of section 39 of Cap. 155, and to the proviso to the said section 39, which read, respectively, as follows:

"39. The following provisions shall apply to all charges and, notwithstanding any Law or rule of practice, a charge shall, subject to the provisions of this Law, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Law—

.....

(d) where an enactment constituting an offence states the offence to be the doing or the omission to do any one of different acts in the alternative, or the doing or the omission to do any act in any one of different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters constituting the alternative in the enactment may be stated in the alternative in the count charging the offence;

.....

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."

It would seem, therefore, that even if, instead of framing two counts for common nuisance and four counts for offensive trade, there had been framed two counts, one for common nuisance and one for offensive trade charging the applicant respectively with the acts or omissions concerned in the alternative, again there could not have been put forward, in view of the provisions of paragraph (d) of section 39, above, of Cap. 155, the contention that the said two counts were bad for duplicity (see, also, in this respect, the *Attorney-General of the Republic v. HjiConstanti*, (1969) 2 C.L.R. 5).

The prosecution, however, has chosen ex abundanti cautela

to frame six counts instead of two in order to avoid what is complained of by counsel for the applicant, namely that the charges concerned are bad for duplicity.

In trying to support his above contention counsel for the applicant has referred to the case of *Ex parte Burnby*, [1901] 2 K.B. 458, in which the accused was charged that "on the 26th 28th, 29th, and 31st days of January, and the 1st, 4th, 5th, and 6th days of February, 1901, at the parish of Colchester within the borough aforesaid, there being duly licensed to sell by retail intoxicating liquors in his house and premises known by the sign of the Royal Oak there situate, unlawfully did permit his house and premises to be used as a brothel, contrary to s. 15 of the Licensing Act, 1872." It was held that the fact that the days named in the information were non-consecutive did not prevent the charge from being a charge for one continuing offence and that, consequently, it was not bad for duplicity.

We fail to see how this case helps the case of the applicant; it only supports the proposition that in a case of a continuing offence—as counsel for the applicant alleges that it is the position in the present instance—the commission of the offence may be charged in one and the same count to have taken place on divers dates; and it cannot be treated at all as having laid down that the commission of such an offence cannot be charged by means of separate counts.

Another case which has been cited before us, and to which reference may usefully be made in this judgment, is that of *R.* v. *Thompson*, [1914] 2 K.B. 99; the relevant part of the headnote of the report of this case reads as follows:

> "An indictment under the Punishment of Incest Act, 1908, charged in one count that offences were committed 'on divers days between the month of January, 1909, and October 4, 1910', and in another count that offences were committed 'on divers days between October 4, 1910, and the end of February, 1913.' At the trial, after the prisoner had pleaded not guilty and the jury had been sworn, objection was taken that the indictment was bad for duplicity. The objection was overruled and the prisoner was convicted. On appeal:-

Held, that the indictment was bad in that it charged more than one offence in each count, but that, as the prisoner had not in fact been embarrassed or prejudiced in his defence by the presentment of the indictment in this form, there had been 'no substantial miscarriage of justice,' and that the appeal must, therefore, be dismissed under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907".

In the light of all the foregoing, and in view, also, of the provisions of section 39 of Cap. 155, which have been already referred to earlier on in this judgment (and see, too, the *HjiConstanti* case, *supra*), we are of the opinion that it cannot be held that the six counts to which the applicant has been called upon to plead in criminal case No. 18768/77 can be found to be bad for duplicity, as complained of by its counsel, especially as there is nothing on the record before us to show that because of the way in which such counts have been framed the applicant has, in fact, been misled in any way; therefore, question of law reserved (c) has, also, to be answered in the negative.

In the result, all three questions of law which have been reserved for the opinion of this Court have to be answered in the negative and the case is now remitted to the District Court of Limassol for further proceedings in the light of our above opinion.

Questions of law answered in the negative; case remitted to the trial Court.