

1980 September 30

[TRIANTAFYLIDIS, P., HADJIANASTASSIOU, DEMETRIADES, JJ.]

PANTELIS KATELARIS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeals Nos. 4157, 4159.*)

Criminal Law—Contradictory statement—Section 113(1)(a) of the Criminal Code, Cap. 154—Intent—Principles applicable when presence of is required as an essential ingredient of the offence—Evidence in murder trial—Admission of uncertainty as regards what a witness had stated earlier—Prosecution failed to discharge its onus of proving required intent—Lurking doubt entertained as to guilt of appellant—Conviction quashed. 5

The appellant was a witness at the trial on information of Georghios Rossides and Soteris Demetriades for the offence of premeditated murder. When he gave evidence at the preliminary inquiry he stated that just before midnight he saw outside his house a land-rover in which there was a wounded person and that near the land-rover there were three persons, one of whom was the accused Demetriades, whom he identified in Court at the preliminary inquiry. When he testified at the trial the appellant said in examination-in-chief that Demetriades was, indeed, one of the three persons near the land-rover on the night in question. He said the same when he was cross-examined by counsel appearing for accused Rossides, but when he was cross-examined by counsel appearing for accused Demetriades and was pressed whether he was certain as regards the identity of the persons whom he saw on that night he replied that this was “certainly probable”. This reply led to his prosecution and conviction of the offence of having made, as a witness, a contradictory statement contrary to section 113(1)(a)* of the Criminal Code, Cap. 154. 10 15 20 25

* Quoted at p. 232 *post*

Upon appeal against conviction and sentence:

5 *Held*, that the presence of an intent was an essential ingredient of the offence in question; that when a particular intent is an essential ingredient of the commission of an offence such intent must be established by the prosecution; that the intent may be gathered from the whole of the evidence adduced; that if there is any doubt as to the existence of the intent the accused is entitled to the benefit of such doubt; that, on the basis of the totality of the material before this Court, this is a case in which the prosecution did not fully discharge the onus of satisfying the trial Court that the appellant made a contradictory statement with the required intent; that, therefore, there remains a lurking doubt whether he is guilty of the offence of which he has been convicted; and accordingly the appeal against the conviction of the appellant and the sentence which was passed upon him must be allowed.

*Appeal allowed.**Per curiam:*

20 It would, indeed, be most undesirable to discourage persons, who give evidence at a criminal trial, from admitting on being cross-examined that they are not certain about what they have narrated in examination-in-chief; that is one of the reasons why we have decided not to accept that, in a case such as the present one, an admission of uncertainty as regards what a witness has stated earlier inevitably leads to his conviction of an offence contrary to section 113(1)(a), without there being room for doubt, in a proper case, that the contradictory statement was not made with the requisite intent.

30 Cases referred to:

- R. v. Georghiades* (No. 2), 22 C.L.R. 128 at p. 133;
Pefkos v. The Republic, 1961 C.L.R. 340;
Stavrinou v. Republic (1969) 2 C.L.R. 97 at pp. 103, 104;
Eracleous v. The Police (1972) 2 C.L.R. 102 at p. 106.

35 Appeals against conviction and sentence.

Appeals against conviction and sentence by Pantelis Katelaris who was convicted on the 17th July, 1980 at the District Court of Nicosia (Criminal Case No. 243/80) on one count of the offence of contradictory statement contrary to section

113(1)(a) of the Criminal Code Cap. 154 and was sentenced by Nicolaou, D.J. to one year's imprisonment

L.N. Clerides, for the appellant.

A. M. Angelides, Counsel of the Republic, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant was convicted, on July 17, 1980, by the District Court of Nicosia of the offence of having made, as a witness, a contradictory statement contrary to section 113(1)(a) of the Criminal Code, Cap. 154, and was sentenced, on July 25, 1980, to one year's imprisonment.

The material parts of section 113, above, read as follows:

"113. (1) Any person who—

(a) being a witness at the trial on information of a person for any offence, on his examination as such witness, wilfully makes any statement tending to prove the guilt or innocence of the accused, inconsistent with or contradictory to what he has stated on his examination as a witness concerning the same matter before the District Court; or

(b)
is deemed to have given false testimony within the meaning of section 110 of this Code.

According to the particulars of the offence of the count on which the appellant was convicted, the appellant on his examination as a witness on oath, on February 25, 1980, at the trial on information—in criminal case No. 22915/79, by an Assize Court in Nicosia—of Georghios Rossides and Soteris Demetriades for the offence of the premeditated murder of Costas Mishaoulis made a statement tending to prove the innocence of the said accused, contradictory to what he had stated on oath at his examination as a witness concerning the same matter at the preliminary inquiry held on December 6, 1979.

The appellant had stated at the preliminary inquiry that on July 17, 1974, just before midnight, he saw outside his house a land-rover in which there was a wounded person (who turned out later to be the deceased Mishaoulis) and that near the

land-rover there were three persons, one of whom was the accused Demetriades, whom he knew and identified in Court at the preliminary inquiry.

5 According to the particulars of the offence in the count in question, the appellant, at the trial before the Assize Court, when it was put to him, while he was cross-examined, that Demetriades was not one of the persons near the land-rover, replied that this was "certainly probable".

10 As it appears from the record before us, when he testified at the trial the appellant said in examination-in-chief that Demetriades was, indeed, one of the three persons near the land-rover on the night in question. He said the same when he was cross-examined by counsel appearing for accused Rossides, but when he was cross-examined by counsel appearing
15 for accused Demetriades and was pressed whether he was certain as regards the identity of the persons whom he saw on that night he gave the aforesaid answer which led to his prosecution.

20 We have had to consider whether in the present case the appellant has made the contradictory statement with the requisite particular intent which is required under section 113(1)(a) of Cap. 154 for the commission of the offence in question. The burden of proving such an intent lay, all along, on the prosecution.

25 In *R. v. Georghiades (No. 2)*, 22 C.L.R. 128, Zekia J.—as he then was—stated the following (at p. 133):—

30 "The intent as a necessary ingredient of attempt cannot be established by positive direct proof. There are of course certain presumptions, such as for instance: a person intends the natural consequences of his act, but in the great majority of cases intent has to be inferred from facts and conduct. When the presence of intent in an attempt to commit a particular offence is sought to be established the nature of the evidence must be such
35 as to rule out all other inferences inconsistent with the presence of such intent. It is not enough in ascertaining whether a particular intent is proved or not to say that this was a reasonable inference to be drawn from the facts but one must go further and be able to say that that

was the only reasonable inference which could be drawn from the facts as found; if there be another reasonable view or probability consistent with innocence capable to be taken on the same facts then the onus of proving beyond reasonable doubt the existence of the particular intent has not been discharged.” 5

The *Georghiades* case, *supra*, was followed in *Pefkos v. The Republic*, 1961 C.L.R. 340.

In *Stavrinou v. The Republic*, (1969) 2 C.L.R. 97, the following were stated by me (at p. 103): 10

“...I take the law to be as laid down in, *inter alia*, *Regina v. Nicos Sampson Georghiades (No. 2)* 22 C.L.R. 128, and as restated in *Pefkos and Others v. The Republic*, 1961 C.L.R. p. 340; in other words, that when the presence of intent is an essential ingredient of the offence charged 15 it is not enough to say, in ascertaining whether a particular intent is proved or not, that this was a reasonable inference to be drawn from the facts, but one must go further and say that this was the only reasonable inference that could be drawn.” 20

Also, in the same case, Josephides J. said (at p. 104):

“It is well settled that intent can be inferred as a fact from the surrounding circumstances of a particular case, and that it is not sufficient that such an inference is a reasonable one; it should be the only reasonable inference that can 25 be drawn from the facts. The burden of proving intent is throughout on the prosecution; and, if on the totality of the evidence there is room for more than one view as to the intent of the accused, and on a review of the whole evidence the Court either think the intent did not exist 30 or they are left in doubt as to the intent, the accused is entitled to the benefit of such doubt: see *Pefkos and Others v. The Republic*, 1961 C.L.R. 340 at pages 351–2 and 367–9; *Reg. v. Nicos Sampson Georghiades (No. 2)* (1957) 22 C.L.R. 128, at page 133; *R. v. Steane* [1974] 35 K.B. 997 at page 1004; and *Aristidou v. The Republic* (1967) 2 C.L.R. 43 at pp. 89, 91 and 92.”

Lastly, in *Eracleous v. The Police*, (1972) 2 C.L.R. 102, this Court said the following (at p. 106):

“It is, also, well settled that when a particular intent is 40

an essential ingredient of the commission of an offence such intent must be established by the prosecution (see *Stavrinou v. The Republic* (1969) 2 C.L.R. 97). The intent may be gathered from the whole of the evidence adduced; but if there is any doubt as to the existence of the intent the accused is entitled to the benefit of such doubt.”

On the basis of the totality of the material before us we find that this is a case in which the prosecution did not fully discharge the onus of satisfying the trial Court that the appellant made a contradictory statement with the required intent, and, therefore, there remains in our minds a lurking doubt whether he is guilty of the offence of which he has been convicted.

In reaching this conclusion we have been particularly impressed by the fact that the appellant in examination-in-chief at the trial before the Assize Court repeated the version which he had given at the preliminary inquiry and, also, affirmed it when cross-examined by counsel for accused Rossides, and it was only when he was pressed later, by counsel for accused Demetriades, as regards his certainty about the identification of the latter accused that he made a statement by which he conceded that, in effect, he could not exclude the probability that he had made a mistake in identifying such accused.

It would, indeed, be most undesirable to discourage persons, who give evidence at a criminal trial, from admitting on being cross-examined that they are not certain about what they have narrated in examination-in-chief; that is one of the reasons why we have decided not to accept that, in a case such as the present one, an admission of uncertainty as regards what a witness has stated earlier inevitably leads to his conviction of an offence contrary to section 113(1)(a), without there being room for doubt, in a proper case, that the contradictory statement was not made with the requisite intent.

In the light of all the foregoing these appeals, one of which was made against the conviction of the appellant and the other against the sentence which was passed upon him, are allowed accordingly.

Appeals allowed.