1977 May 9

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ]

STAVROS MICHAEL IOANNIDES,

Appellant,

v.

THE REPUBLIC,

Respondent

(*Criminal Appeal No* 3798)

Criminal Procedure—Plea—Plea of guilty—It must be clear—Young offenders—Need to scrutinize plea especially in cases of conscripts who appear unrepresented—And need to seek assistance of counsel in cases where imprisonment is contemplated and to accept a provisional plea of guilty—Charge of stealing—Plea in mitigation inconsistent with plea of guilty in that accused denied one of the ingredients of the offence—Retrial ordered

The appellant, a conscript of 18 years of age, pleaded guilty to the offence of stealing a motor-cycle, contrary to section 255(1)* of the Criminal Code, Cap 154 and was sentenced to three months' imprisonment At the time of the offence he was serving in the National Guard and the motor-cycle in question was under the shed of a house which was near his Regiment and had been abandoned by his occupier together with some of his belongings, including the motor-cycle in question

The appellant was unrepresented at the trial and when addressing the Court in mitigation he said

> " I had been at this place for a period of four months, at this guard post, and because the motor-cycle was a very old one—almost ruined—I took it and I pushed it for a distance of 50 meters to the guard post I did not do it for the purpose of making the motor-cycle mine, or for any private

* Section 255(1) reads as follows

> "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof".

purposes. The officer in charge knew about it. I spent some money in order to repair it and I succeeded in starting it. It took me 2 days in fact to start it. All the soldiers there were using it themselves, and it was used also for bringing some of our requirements at that post. That was the purpose I took it, not to make any profit. When the officer in charge asked me where I found it, I told him that I found it at a yard of a deserted house, but I did not know who was the owner of the motor-cycle".

Upon appeal Counsel for the appellant contended:

(a) That the Court erred in law because on the basis of the facts presented it was incumbent on it to direct and to enter a plea of not guilty, and that the conviction was not warranted in the circumstances of this case.

(b) That the sentence was manifestly excessive.

Held, (1) that the need to scrutinize the plea of the accused, particularly of a young conscript serving his country, becomes all the greater when the accused is unrepresented; that the present accused had put before the trial Court facts which clearly and distinctly show that the Court should not have accepted his plea of guilty, but on the contrary, it should have entered a plea of not guilty once one of the ingredients of stealing was not accepted by the accused; that it is considered necessary, in the interest of justice, and for the guidance of everyone, that before the Court accepts a plea of guilty, the plea must be clear; that a plea of guilty from a young person must be given particular attention, and in cases where the Court thinks that imprisonment will be imposed, the aid of a lawyer must be sought to help the Court; and that in the cases of persons of tender years the proper course, when they are unrepresented, is to accept a plea of guilty provisionally until from the outline of all the facts it transpires that the decision to plead guilty was a right one in the particular circumstances.

(2) That in the light of the facts of this case, and having regard to previous case-law of this Court and to the fact that the accused was unrepresented there is no alternative but to order a retrial before a different Military Court once the accused had made a statement denying that he had an intention to deprive permanently the owner of his property; and that, accordingly, the

appeal must be allowed (see, *inter alia*, *Lytrides* v. *Municipality of Famagusta* (1973) 2 C.L.R. 119).

Appeal allowed. Retrial ordered.

Cases referred to:

R. v. *Blandford* [1961] All E.R. 1021 at pp. 1025–1026;

Efstathiou v. *Police*, 22 C.L.R. 191;

Polycarpou v. *Police* (1967) 2 C.L.R. 152;

Kefalos v. *Police* (1972) 2 C.L.R. 1;

Lytrides v. *Municipality of Famagusta* (1973) 2 C.L.R. 119 at p. 121.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Stavros Michael Ioannides who was convicted on the 18th April, 1977 at the Military Court sitting at Nicosia (Case No. 238/77) on one count of the offence of stealing, contrary to section 255(1) of the Criminal Code, Cap. 154 and section 5 of the Military Criminal Code and Procedure Law, 1964 (Law 40/64) and was sentenced to three months' imprisonment.

Appellant appeared in person.

Chr. Tselingas, for the respondent.

HADJIANASTASSIOU J. gave the following judgment of the Court. This is an appeal from the judgment of the Military Court delivered on April 18, 1977, convicting the accused Stavros Ioannides on his own plea of guilty for the offence of stealing a motor-cycle, the property of Andreas Paplomatas, contrary to the provisions of s. 255(1) of the Criminal Code 154, and to section 5 of the Military Criminal Code and Procedure Law 1964 (Laws 1964–1967), and sentencing him to a term of imprisonment for a period of three months. He appealed in person whilst in prison, viz., that the sentence of imprisonment was excessive.

The facts are simple and are these:–

The accused, a young conscript of 18 years of age, of Polemidhia village of Limassol, whilst serving at the 211 Regiment at a locality near the Race Club, entered the house of the complainant, and according to the prosecution, he stole a motor-cycle which was under a shed in the yard of the house in question. The complainant, when the Turkish invasion had started, had left his house—like so many other Greek-Cypriots

have done—because of the danger, and went to another place. In this said house he left some of his belongings, including the motor-cycle in question.

When the Turkish operations were over, he used to visit his home every now and then, which was near the dead zone, bordering the areas occupied by the Turkish troops. On September 11, 1975, when he visited his home, he noticed that his motor-cycle was missing. He reported the matter to the police and after some inquiries the police called the accused to the police station for interrogation. The accused admitted that he was the person who took the motor-cycle and delivered it to the police.

On April 18, 1977, when the case came before the Military Court, the accused admitted that he stole the said motor cycle and the prosecution informed the Court that the accused had neither previous convictions nor any disciplinary offences committed by him.

There is no doubt, as it appears from the record, that neither the accused nor the Court had asked for a lawyer to defend him, and the accused, in addressing the Court in mitigation, gave facts which were inconsistent with the plea of the accused, but the Military Court did not intervene in any way to warn the accused that these facts were inconsistent with his plea of guilty

The accused, in mitigation, in effect, made it clear that he did not intend when taking possession of the motor cycle, to deprive the owner permanently of his motor cycle, and had this to say:-

> " I had been at this place for a period of four months, at this guard post, and because the motor-cycle was a very old one—almost ruined—I took it and I pushed it for a distance of 50 meters to the guard post. I did not do it for the purpose of making the motor-cycle mine, or for any private purposes. The officer in charge knew about it. I spent some money in order to repair it and I succeeded in starting it. It took me 2 days in fact to start it. All the soldiers there were using it themselves, and it was used also for bringing some of our requirements at that post".

Then the accused went on to add:

> " That was the purpose I took it, not to make any profit. When the officer in charge asked me where I found it, I

told him that I found it at a yard of a deserted house, but I did not know who was the owner of the motor-cycle."

As we said earlier, in spite of the fact that the Military Court had before it the statement of the accused, and particularly that some of the ingredients of the offence he was charged with were not admitted by him, nevertheless, the Military Court in passing sentence on him, told the accused that his act was stealing and it was punishable with many years of imprisonment.

Then the Court, having taken into consideration that the accused had no previous convictions of any kind, came to the conclusion by majority to impose a sentence of 3 months' imprisonment; the President of the Court in dissenting said that he imposed an imprisonment of 3 months with suspension of the sentence for a period of 6 months.

Section 255(1) of Cap. 154 says:-

" A person steals who, without the consent of the owner, fraudently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

On appeal, counsel for the appellant argued very ably indeed (a) that the Court erred in law because on the basis of the facts presented it was incumbent on it to direct and to enter a plea of not guilty, and that the conviction was not warranted in the circumstances of this case; (2) that the sentence imposed by the Court was manifestly excessive.

Having considered the argument of counsel, we find ourselves in agreement that the need to scrutinize the plea of the accused, particularly of a young conscript serving his country, becomes all the greater when the accused is unrepresented. The present accused had put before the trial Court facts which in our view, clearly and distinctly show that the Court should not have accepted his plea of guilty, but on the contrary, it should have entered a plea of not guilty once one of the ingredients of stealing was not accepted by the accused.

We consider it necessary, in the interest of justice, and for the guidance of everyone, that before the Court accepts a plea of

guilty, the plea must be clear. A plea of guilty from a young person must be given particular attention, and in cases where the Court thinks that imprisonment will be imposed, the aid of a lawyer must be sought to help the Court. Indeed, a plea of guilty must be rejected in the cases in which the plea is inconsistent, and instead a plea of not guilty recorded when the accused admits only some of the ingredients of the offence. We would also like to place on record that in the cases of persons of tender years the proper course, when they are unrepresented, is to accept a plea of guilty provisionally until from the outline of all the facts it transpires that the decision to plead guilty was a right one in the particular circumstances.

If authority is needed, we think the warning of Widgery, Justice (as he then was) is very helpful. Widgery, J., had this to say in *R.* v. *Blandford, JJ*, [1961] All E.R. 1021 at pp. 1025–1026:–

> " In my judgment, it follows from those two cases, which are in no sense in conflict, that a time comes when the magistrate is functus officio and cannot reconsider or re-open the question of whether the accused's plea of guilty should be accepted or not. Following the language used in *R.* v. *Guest* [1964] 3 All E.R. 385, that point is reached when an unequivocal plea has been made and has been accepted by the magistrate in the sense that the magistrate is satisfied that it is safe to act on the plea, he being further satisfied that the accused really intends to put in a plea in that sense. In every instance when a magistrate receives the reply "Guilty" to the common form question asking the accused to plead, it is necessary for the magistrate to consider whether it is safe to accept the plea and to enter a conviction. Of course, in many cases the question is not a difficult one. If the accused is represented, if the accused as in *R.* v. *West Kent Quarter Sessions Appeal Committee, Ex p. Files* [1951] 2 All E.R. 728, is a man of mature years who clearly understands what is being put to him, it may well be that the magistrate can accept the plea in the sense that he can regard it as being a satisfactory plea on which he can safely act without further enquiries. In cases, however, where the accused is not represented or where the accused is of tender age of for any other reasons there must necessarily be doubts as to his ability finally to decide

whether he is guilty or not, the magistrate ought, in my judgment, to accept the plea as it were provisionally, and not at that stage enter a conviction. He ought, in my judgment, in these cases to defer a final acceptance of the plea until he has had a chance to learn a little bit more about it, and to see whether there is some undisclosed factor which may render the unequivocal plea of guilty a misleading one. I have no doubt that experienced magistrates in fact do in these cases wait until they have heard the facts outlined by the prosecution and wait until they have heard something of what the accused has to say. If at that stage the magistrate feels that nothing has been disclosed to throw doubts on the correctness of the plea of guilty, he properly accepts it, enters a conviction and that is an end of the matter so far as the point is concerned. If, however, before he reaches that stage he finds that there are elements in the case which indicate that the accused is really trying to plead not guilty or, as Lord Goddard put it [1952] 1 All E.R. at p. 469, 'guilty but...', then the magistrate has, in my judgment, no discretion, but must treat the plea as what it is, namely a plea of 'not guilty'."

In *Ioannis Efstathiou* v. *The Police*, 22 C.L.R. 191, Zekia, J., (as he then was) made the following observations:-

" It is indeed desirable for a trial Judge to be very slow in accepting a plea of guilty in cases where counsel appearing on behalf of the accused puts forward facts and grounds in mitigation which amount in effect to a plea of not guilty. In such cases the attention of counsel should be drawn, and, if counsel or the accused insists on such facts and grounds which are inconsistent with the commission of the offence described in the charge, then the Court should not accept the plea of guilty."

In *Nicos Polycarpou* v. *The Police*, (1967) 2 C.L.R. 152, Vassiliades, P., said:-

" Mr. Frangos is not before the Court today to meet an appeal against conviction; he is here to answer the appeal in the notice which is an appeal against sentence. Nevertheless, in the circumstances, and guided by the report in The *Attorney-General v. Sidki Mahmout*, 1962 C.L.R. p. 181, took the very fair stand of not objecting to a retrial.

In view of the fact that this case is going to be tried again, we should abstain from saying anything more regarding the facts or the merits of the case. We, moreover, think that the case should be tried by a different Judge.

By consent of the parties, this appeal shall be treated as an appeal against conviction; the conviction shall be set aside following the same course as in the case referred to above, with an order for retrial before another Judge."

In *Christos Ioannou Kefalos* v. *The Police* (1972) 2 C.L.R. 1, Triantafyllides, P. had this to say at pp. 2 and 3:

" Counsel for the Appellant has raised the point that the plea in mitigation, which was made by the Appellant after he had pleaded guilty, was inconsistent with his plea of guilty inasmuch as the Appellant denied the existence of an intention to defraud, which is an essential ingredient of the offence for which he had been brought before the trial Court. Counsel for the Respondents did not object to such point being raised and we allowed it to be argued, as the notice of appeal was, as stated, framed by the Appellant, while in prison, and without legal assistance.

It is well-established that if the plea in mitigation is inconsistent with the plea of guilty then the conviction on the basis of the plea of guilty cannot be sustained and a new trial has to be ordered; see, *inter alia*, *The Attorney-General of the Republic v. Mahmout*, 1962 C.L.R. 181; *Polykarpou* v. *The Police* (1967) 2 C.L.R. 152. It is significant to note that in each of these two cases the Appellant had the benefit of legal advice when he appeared before the Court below. In the present case the position is much stronger in favour of the Appellant because he appeared without counsel before the trial Court; and after the facts had been explained by the prosecution he made a statement which shows that he was in a way denying an intention on his part to defraud. In the circumstances it was the duty of the trial Judge to clarify the position before proceeding to impose sentence upon the Appellant.

We agree with, and we appreciate, the fair submission of counsel for the Respondents that the better course in this case is to quash the conviction and order a new trial.

In the result, therefore, the conviction and the sentence imposed on the Appellant are set aside and a retrial is ordered before another Judge."

In *Iacovos Lytrides* v. *Municipality of Famagusta* (1973) 2 C.L.R. 119, the Court of Appeal had this to say at pp. 120 and 121:

" It appears from the record before us that the Appellant, who was represented before the trial Court by counsel (other than the one who has appeared before us) changed his originally entered plea of not guilty to one of guilty, on the advice of his counsel; and, after this had been done, the Court allowed, unfortunately, counsel for the Appellant—then the accused—to make allegations, during his plea in mitigation, which were inconsistent with guilt.

We are of the view that the trial Court should have ascertained whether counsel insisted on these allegations and if he was found to do so the Court should have ordered a plea of not guilty to be entered and should have proceeded to try the case on that basis.

In the circumstances, and in the light of our relevant previous case-law, which is referred to in, *inter alia*, *Kefalos* v. *The Police* (1972) 2 C.L.R. 1, we have to order a retrial before another Judge."

In the light of the facts of this case, and having regard to the cases quoted in this judgment, and that the accused was unrepresented we have no alternative but to order a retrial before a different Military Court once the accused had made a statement denying that he had an intention to deprive permanently the owner of his property and in these circumstances we allow the appeal.

Appeal allowed. Retrial ordered.