CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

ON APPEAL

AND

IN ITS ORIGINAL JURISDICTION

CYPRUS LAW REPORTS

VOLUME 2 *(Criminal)*

1985 January 10

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

DEMETRIS DEMOSTHENOUS,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 4601).

Criminal Procedure—Plea of guilty—Facts in mitigation inconsistent with plea of guilty—Proper course is to draw attention to such inconsistency and if counsel insists on the accuracy of such facts plea of guilty cannot be accepted but a plea of not guilty should be entered—Position different when address in mitigation gives a more favourable version for the accused regarding circumstances of the offence but such version amounts still in law to the offence to which the plea of guilty was entered—Retrial ordered.

The appellant pleaded guilty on two counts of the offence of carrying arms to terrorize. Though in the address in mitigation reference was made to facts inconsistent with the plea of the appellant the trial Judge did not

follow the proper course of drawing counsel's attention to such discrepancy.

Upon appeal against sentence counsel for the appellant based his argument that the sentence was manifestly excessive again on facts which were inconsistent with the plea of guilty.

Held, that if at any stage of the address in mitigation reference is made to facts inconsistent with the plea of the accused the proper course for the trial Court to follow, is to draw counsel's attention to the inconsistency and if counsel insists on the accuracy of such facts, then the Court should not accept the plea of guilty and should enter instead a plea of not guilty and proceed to hear the case; that it was the duty of the trial Judge to clarify the position before proceeding to impose sentence; and that, therefore, the conviction and sentence must be quashed and a retrial before another Judge be ordered.

Held, further, that the position is different when in an address in mitigation a more favourable version is given for the accused as regards the circumstances of the offence but such version amounts still in law to the offence to which the plea of guilty was entered, such plea in mitigation not being considered as inconsistent with the plea of guilty.

Appeal allowed.
Retrial ordered.

Cases referred to:

District Officer Nicosia v. *HadjiYiannis,* 1 R.S.C.C. 79;

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

Attorney-General of the Republic v. *Mahmout,* 1962 C.L.R. 181;

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

Phylaktides v. *Republic* (1979) 2 C.L.R. 157.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Demetris Demosthenous who was convicted on the 22nd November, 1984 at the District Court of Limassol (Criminal Case No. 23895/84) on two counts of the offence of carrying arms to terrorize contrary to section 80 of the Criminal Code, Cap. 154 and was sentenced by Fr. Nicolaides, Ag. S.D.J. to pay £50.—fine on each count and the forfeiture of the gun was also ordered.

S. Patsalides with *A. Xenophontos,* for the appellant.

M. Photiou, for the respondents.

A. Loizou J. gave the following judgment of the Court. The appellant was found guilty on his own plea on two counts, of carrying arms to terrorize contrary to section 80 of the Criminal Code, Cap. 154.

The particulars of the offences were that on the 5th day of July 1984, at Limassol he did carry in public without lawful occasion an offensive arm to wit, a D.B.B.L. shotgun Reg. No. LL 5027 in such a manner as to cause terror, as regards the first count, to one Andronikos Nicolaou, and as regards the second count to one Froso Georghiou Kyriakou, both of Limassol. These offences are misdemeanours and the maximum sentence provided by section 80 of the Criminal Code is two years' imprisonment and forfeiture of the arms or weapons so used.

Although such forfeiture is still stated in the Law to be imperative, yet in the light of the Case Law of the Supreme Constitutional Court (see inter alia *The District Officer Nicosia and Georghios HadjiYiannis,* 1 R.S.C.C. p. 79) and now of this Court, such imperative provisions hampering the exercise of a discretion by Courts according to the justice and the merits of each particular case, are unconstitutional as being inconsistent with the provisions of Article 12.3 of the Constitution, namely that no law shall provide for a punishment which is disproportionate to the gravity of the offence and the Courts have to construe and apply them with such modifications as may be necessary to bring them in conformity with the Constitution as provided by Article 188.1 thereof.

The learned trial Judge in imposing sentence made it clear that the question of forfeiture was discretionary and imposed on the appellant a sentence of £50.— fine on each count and ordered the forfeiture of the gun used.

The appellant appealed against the sentence imposed and in particular complained as regards the order and forfeiture of the exhibits.

It was apparent on the record that in the address in mitigation reference was made to facts inconsistent with the plea of the accused. The learned trial Judge did not follow the proper course of drawing counsel's attention to the discrepancy and proceeded with this discrepancy.

Before this Court, counsel for the appellant based his whole argument that the sentence imposed was manifestly excessive on these facts which were inconistent with the plea of guilty. We felt compelled to draw counsel's attention to this situation and point out the Case Law of this Court on the subject. He insisted on the accuracy of such facts and grounds and counsel for the respondent has fairly conceded that the better course in this case was for this Court to quash the conviction and order a new trial.

In the case of *Kefalos* v. *The Police* (1972) 2 C.L.R. p. 1, the position was summed up by reference to the cases of *The Attorney-General of the Republic* v. *Mahmout*, 1962 C.L.R. 181, to which there may be added an older case that of *Ioannis Efstathiou* v. *The Police*, Vol. 22 C.L.R. 191, and *Phylaktides v. The Republic* (1979) 2 C.L.R. 157.

The position in Law is that if at any stage of the address in mitigation reference is made to facts inconsistent with the plea of the accused the proper course for the trial Court to follow, is to draw counsel's attention to the inconsistency and if counsel insists on the accuracy of such facts, then the Court should not accept the plea of guilty and should enter instead a plea of not guilty and proceed to hear the case.

Moreover the Supreme Court will order a retrial of a case where facts presented to the trial Court tend to nega-

tive the presence of one or more of the ingredients of the offence. The position, however, is different when in an address in mitigation a more favourable version is given for the accused as regards the circumstances of the offence but such version amounts still in law to the offence to which the plea of guilty was entered, such plea in mitigation not being considered as inconsistent with the plea of guilty.

In the circumstances it was the duty of the trial Judge to clarify the position before proceeding to impose sentence upon the appellant.

In view, however, of the fact that this case is going to be tried again, we feel that we should abstain from saying anything more regarding the facts or the merits of the case.

In the result the conviction and the sentence imposed on the appellant are set aside and a retrial is ordered before another Judge.

Conviction and sentence set aside. Retrial ordered.