1985 November 27

[A. LOIZOU, STYLIANIDES, PIKIS, JJ.]

MARCOS PANTELI,

Applicant,

v.

DISTRICT LABOUR OFFICER FAMAGUSTA,

Respondent.

(Criminal Appeal No. 4629).

Criminal Procedure Law, Cap. 155—S.39(a)—Double charge—Meaning of—Test of—Whether the count encompasses two or more offences.

Double charge—Implications of—Whether proceedings a nullity —This may be unavoidable if duplicity destroys the foundations of a criminal trial, the certainty in the charges, so as to become oppressive for the accused.

The Social Insurance Law, sections 4(1), 73(1)(h), 80, 81 and 90(1) and Reg. 11 of the Social Insurance Contributions Regulations.

The appellant was convicted on seven counts for failure to pay social insurance contributions between December 1978 and January 1984 and other contributions coincident on his obligation to pay social insurance.

Objections as to the validity of the charges on grounds of duplicity were dismissed by the trial Court. The convictions were challenged inter alia as bad for duplicity.

Held, allowing the appeal:

(1) The rule against double charges is a fundamental rule of Criminal Procedure, requiring that no more than one offence be made the subject of any one count (s. 39 (a) of the Criminal Procedure Law, Cap. 155).

(2) A double charge is one setting forth in the same count more than one offence. It matters not that the

offences are similar in nature, committed in succession or that they conform to the same pattern. The test is whether the charge encompasses two or more offences.

To determine the question in this case the definition of the relevant offences should be looked at; sections 4(1) and 80 of Law 41/80 and Reg. 11 of the Social Insurance Contribution Regulations impose an obligation on an employer to pay social insurance contributions for every person in his employment, the month following the engagement of his services. In case of failure to do so a corresponding offence is committed. Liability to pay other contributions, the subject of counts 2-5, is coincident on liability to pay social insurance contributions and an offence is committed in case of failure to make the appropriate payment. It is, therefore, clear that each count in the present case is bad for duplicity.

(3) Though Judicial opinion appears to be divided, the correct approach is that a duplicitous charge does not render per se the proceedings a nullity. This may be the unavoidable result if the irregularity is massive and destroys in its wake the foundation of a criminal trial, the certainty in the charges necessary to enable the accused to defend himself effectively.

In the present case duplicity was not only on a massive scale but the counts were in their inception oppressive for the accused requiring him to account indiscriminately for activities stretching for a period of six years.

Appeal allowed.

Observations by the Court: Delay in bringing criminal proceedings does not of itself constitutes abuse of process. This may be the effect of delay if accompanied by a mala fide use of the criminal process.

Cases referred to:

Ioannis Solomou Akritas v. *Regina,* 20 (Part II), C.L.R. 110;

Police v. *Economides,* 20 (Part II) C.L.R. 11;

Police v. *Pericles Papaioannou,* 17 C.L.R. 50;

Frangiskos Kyriacou v. *The Welfare Officer*, 1961 C.L.R. 227;

P. v. *Kourra*, 14 C.L.R. 143;

Mayor of Nicosia v. *Vassilis Pavlikka*, 15 C.L.R. 68;

R. v. *General Medical Council Ex Parte Gee*, Times Law Report—November 5, 1985;

Wilmot, 24 Cr. App. Rep. 63;

Molby [1921] 2 K.D. 364;

D.P.P. v. *Burgess* [1970] 3 All E.R. 266;

Ware v. *Fox* [1967] 1 All E.R. 100 (D. C.);

R. v. *Horsham Justices* [1980] Crim. L.R. 566 (D.C.);

R. v. *Grays Justices* [1982] 3 All E.R. 653 (D.C.);

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

Appeal against conviction and sentence.

Appeal against conviction and sentence by Marcos Panteli who was convicted on the 11th April, 1985 at the District Court of Famagusta (Criminal Case No. 629/85) on seven counts of the offence of failing to pay social insurance contributions contrary to sections 73(1)(h), 80(1)(2)(4)(9), 81, 84 and 90(1), of the Social Insurance Laws 1980—1984 and was sentenced by Arestis, D. J. to pay fines ranging from £10.- to £50.- on the various counts.

G. Pittadjis, for the appellant.

Ch. Kyriakides, Senior Counsel of the Republic, with *E. Panteli*, for the respondents.

Cur. adv. vult.

A. Loizou J.: The judgment of the Court will be given by Pikis, J.

Pikis J.: Appellant was convicted on seven counts for failure to pay social insurance contributions between December, 1978, and January, 1984, and other contributions

coincident on his obligation to pay social insurance, namely-

(a) Failure to pay additional contributions.[1]

(b) Failure to pay contributions for Annual Holidays.[2]

(c) Failure to pay contributions to the Redundancy Fund.[3] and

(d) Failure to pay contributions to the Industrial Training Fund.[4]

Also, he was convicted on two counts for failure to keep-

(a) a Social Insurance Contributions Book,[5] and

(b) procure Social Insurance Cards[6] for personnel he allegedly employed during the revelant period, namely, Athanassia and Eleni Michael.

The convictions were challenged as bad for duplicity also as founded on unreliable evidence.

A third objection that the offences were prescribed wholly or in part, was rightly abandoned in view of the provisions of s. 88 of the Criminal Procedure Law, as amended by Law 41/78.

After balancing prosecution and defence evidence, the trial Judge found as a fact that appellant employed the complainants for nearly the whole six-year period at his "Fresh-Fish" restaurant, without caring to observe his obligations under the Social Insurance Law and kindred enactments providing for the obligation of an employer to pay social insurance and related contributions. He dismissed objections to the validity of the charges on grounds of du-

[1] Section 73(1)(h), s 80(1)(2)(4)(9), ss 81, 84 and 90(1)—Social Insurance Law and Regulations made thereunder
[2] Sections 3(1), 5, 9(1)(2) and 14(1)(b) of the Annual Holidays with Pay Law and Regulations made thereunder
[3] Section 25(1)(2)(a)(b)(d) of the Termination of Employment Law and Regulations made thereunder
[4] Sections 20(1)(2), 32 and 37(1)(2)(c) of the Industrial Training Law and Regulations made thereunder
[5] Sections 3(a), 4, 5, 9, 73(1)(g), 80(8)(9), 81 and 84 of the Social Insurance Law and Regulations made thereunder
[6] Sections 3(a), 4, 5, 9, 73(1)(g), 80(8)(9), 81 and 84 of the Social Insurance Law and Regulations made thereunder

plicity as wholly unfounded. Counsel for the respondents supported the ruling of the trial Court as well merited, and argued the charges cannot be faulted as duplicitous. Counsel for the appellant, on the other hand, urged that not only the charges were bad for duplicity but opposed them as inherently oppressive. He drew attention to the observations of the Supreme Court in *Mayor of Nicosia* v. *Vassilis Pavlikka*,[1] deprecating the practice of requiring the accused to answer to a charge referring indiscriminately to acts occurring over a long period of time as oppressive.

The rule against double charges is a fundamental rule of criminal procedure, requiring that no more than one offence be made the subject of any one count. In Cyprus, it finds expression in the provisions of s. 39(a) of the Criminal Procedure Law—Cap. 155. It is a rule of elementary fairness, as *Mann, J.*, recently reminded in *R.* v. *General Medical Council, Ex Parte Gee*[2].

There is amplitude of authority in England as well as in Cyprus on the subject of double charges.[3] It is regrettable the trial Judge did not seek guidance from the caselaw and, more regrettable still, he did not pause to ponder the submission. If the trial Judge had done so he would unfailingly notice the duplicitous nature of the charges.

Simply, a double charge is one setting forth in the same count more than one offence. It matters not that the offences are similar in nature, committed in succession or that they conform to the same pattern. The test is whether the charge encompasses two or more offences.[4] If so, it is bad for duplicity. To determine whether more offences than one were included in each of the counts preferred against the accused, we must turn to the definition of the offences of failure to pay social insurance contributions. By virtue

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1 15 C.L.R. 68.

2 Times Law Report—November 5, 1985—Q.B.D.

3 See, inter alia, Ioannis Solomou Akritas v. Regina, 20 (Part II) C.L.R. 110; Police v. Economides, 20 (Part II) C.L.R. 11; Wilmot, 24 Cr. App. Rep., 63; Molloy [1921] 2 K.D. 364; DPP v. Burgess [1970] 3 All E.R. 266. See, also, Criminal Procedure in Cyprus, pp. 48-53, and Archbold—Criminal Pleading and Practice, 39th ed.—para. 49(VI).

4 See, inter alia, Police v. Pericles Papaioannou, 17 C.L.R. 50; Ware v. Fox [1967] 1 All E.R. 100 (D.C.).

of the provisions of s. 4(1) and s. 80 of Law 41/80, and Reg. 11 of the Social Insurance Contribution Regulations,[1] an obligation is imposed to pay social insurance contributions for every person in his employment, the month following the engagement of his services, a corresponding offence is committed in case of failure to do so. Liability to pay other contributions, the subject of counts 2 - 5, is coincident on liability to pay social insurance contributions, and an offence is committed in case of failure to make the appropriate payment. It is clear that each count contained a multitude of offences which though similar in nature were separate and distinct the one from the other; they could only be made the subject of separate counts. Consequently, the charges were bad for duplicity. There remains to examine the effects of duplicity on appeal.

Judicial opinion is divided on the implications of duplicity. Earlier authority[2] suggests that proceedings founded on duplicitous charges are illegal and cannot be saved by amendment. Later authority is to the contrary effect. In *Frangiskos Kyriacou* v. *The Welfare Officer*,[3] the proceedings were saved by allowing an appropriate amendment on appeal, an approach not dissimilar to that in *R.* v. *Thompson*,[4] where the proviso was applied in the absence of a substantial miscourage of justice.

The correct approach appears to be that while duplicitous charge does not render per se the proceedings a nullity, this may be the unavoidable result if the irregularity is massive and destroys in its wake the foundation of a criminal trial, the certainty in the charges necessary to enable the accused to defend himself effectively. In this case, duplicity was not only on a massive scale but the counts were in their inception oppressive requiring the accused to account indiscriminately for activities stretching over a period of six years. No valid verdict could be founded on any one of the charges. Therefore, the proceedings were abortive in their entirety.

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1 Regulatory Administrative Acts 240/80.
2 P. v. Kourra, 14 C.L.R. 143; Mayor of Nicosia v. Vassilis Pavlikka, 15 C.L.R. 68.
3 1961 C.L.R. 227.
4 [1914] 2 K.B. 99.

Taking the view, as we do, that the extent of the irregularity vitiated the proceedings, it becomes unnecessary to examine complaints of contradictions in the findings of the trial Court and other factual aspects of the case. What we propose to do is to set aside the charge in its entirety and discharge the accused. Quashing the verdict of the trial Court in these circumstances, does not disentitle the prosecution from bringing proceedings founded on the same facts provided, of course, they comply with the rules and practice of criminal pleading. Delay in bringing criminal proceedings does not of itself constitute abuse of process. This may be the effect of delay if accompanied by a mala fide use of the criminal process[1].

In the result the appeal is allowed; the verdict is quashed and the accused is discharged.

Appeal allowed.

[1] R. v. Horsham Justices [1980] Crim. L.R. 566 (D.C.); R. v. Grays Justices [1982] 3 All E.R. 653 (D.C.).