1985 July 3

[TRIANTAFYLLIDES, P., PIKIS, KOURRIS, JJ.]

EKATERINI ONISIFOROU CHARALAMBOUS ALIAS KETI AND ANOTHER,

Appellants,

v.

THE REPUBLIC,

Respondents.

(Criminal Appeals Nos. 4615-4616).

Criminal Law—Possession of firearms—Presumption of innocence—Section 74 of Law 38/74—Creates a presumption of fact—Relationship between this presumption and the general burden of proof in a criminal trial requiring proof of the guilt of the accused beyond any reasonable doubt—Court should acquit if at the end of the day it entertains reasonable doubts as to the guilt of the accused.

Right of a person accused of a crime to remain silent—No adverse inferences can be drawn form the exercise of such right given by Law.

Evidence—Credibility of witnesses—The issue of credibility is never decided on probabilities as such.

Constitutional Law—Presumption of innocence—Article 12.4 of the Constitution.

Practice—Retrial—Power to order—Sections 25(3) of the Courts of Justice Law 14/60 and section 145(1)(d) of the Criminal Procedure Law—Power discretionary—Discretion to be exercised judicially—Factors to be taken into consideration in deciding the exercise of the discretion—Case for retrial strong if conviction quashed by reason of a misdirection and there was evidence which could ground a conviction, but not of such nature as to satisfy the application of the proviso.

A search of the residence of the appellants on 3.12.1984,

made by the Police on the strength of a judicial warrant, in the presence of appellant 1, wife of appellant 2, led to the discovery of a revolver loaded with five rounds of ammunition in a bedside drawer in the bedroom of the appellants, as well as twenty four rounds of ammunition stacked in a ladies handbag stored in a cupboard of the bedroom. Appellant 1 denied ownership of the revolver and the ammunition; she also denied knowledge of their existence. Appellant 2 made a similar denial when apprised of the findings of the Police.

Appellants faced joint charges of possession of the revolver and the twenty-nine rounds of the ammunition. They denied knowledge of their existence. Numerous friends and relations frequented their house, including some who had keys to their home. The house accommodated, apart from themselves, their 17 year old son.

Appellant 2 gave evidence on oath maintaining that he had nothing to do with the illegal objects. He could not exclude the possibility that one of their numerous visitors might have hidden the objects in their house. Appellant 1 made a statement from the dock denying knowledge of the existence of the illegal objects, notwithstanding admission to the ownership of the handbag wherein the twenty four rounds of ammunition were found.

The Limassol Assize Court acquitted them on the count of possession of the ammunition, including the five rounds loaded in the revolver, but convicted them on the count of possession of the revolver.

It appears that the Assize Court, while considering, as a matter of fact, the finding of the said illegal objects in the said premises inadequate to support a conviction presumable because of the lose control the appellants had over the premises, thought that the provisions of section 20 of Law 38/74 cast a different complexion on the case relating to the revolver.

Further the Assize Court, in examining the evidence of appellant 2, held that on a balance of probabilities they were disposed to reject the same; the Assize Court criti-

cised the failure of appellant 2 to put forward the version he advanced on oath when first confronted by the Police.

Held, allowing the appeal and ordering a retrial (1). As a matter of common sense there is an inconsistency between the two verdicts of the Assize Court for factually the knowledge of the appellants as to the revolver and control over it, could not have been different from the control of the rounds of ammunition found therein. The Assize Court rejected the evidence of appellant 2. Therefore, in returning a verdict of guilty as to the possession of the revolver, they gave full effect to the presumption of section 20 of Law 38/1974. The two verdicts revealed ambivalence on the part of the Court whether appellants were, as a matter of fact, in possession of the revolver and its contents.

(2) Section 20 of Law 38/74 creates a factual presumption, attributing knowledge and control to the person or persons in possession of premises within which firearms are found. In the absence of any explanation on the part of such persons, the presumption remains unshaken and justifies a finding of possession of the firearm. When, however, an explanation is given, the strength of such presumption falls to be tested.

(3) The presumption of innocence that holds until one's guilt is proved beyond any reasonable doubt is entrenched in Cyprus by the provisions of Article 12.4 of the Constitution. Regarding the question that arises respecting the nature of the burden cast on the person in possession of premises by section 20 of Law 38/74 and its relationship to the general burden of proof requiring the prosecution to prove the guilt of the accused beyond any reasonable doubt and generally the relationship between the general burden of proof and the presumption arising from the proof of particular facts, it cannot be the Law that one may be found guilty of a charge, if at the end of the day the Court entertains reasonable doubts as to his guilt. Otherwise, the existence of doubts on the part of the Court will have to be reconciled with the conviction of the accused. In the present case, unless it is held that the evidential burden cast on the person in the possession of premises wherein firearms are found creates an evidential onus detachable

from the general issue in the criminal trial, namely proof beyond any reasonable doubt of the guilt of the accused, the approach of the Assize Court must be decreed erroneous. It seems that the Assize Court did fall into this error as, though they entertained doubts as to the knowledge and control of the appellants over the rounds of ammunition within the revolver, they put these doubts on one side in relation to the revolver by an artificial process of examination of discharge of the evidential burden cast under section 20 on the appellants.

(4) There is no rule of law that inconsistency between two verdicts, necessitates quashment of the guilty verdict. An acquital may be inevitable if the verdict is in itself unreasonable. But if the inconsistency is explicable by reference to a misdirection (as it is in the present case) of the Court on the issues before it, the possibility of retrial under section 20 on the appellants.

(5) The comments made by the Court criticising the second appellant's failure to put forward the version he advanced on oath when first confronted by the Police tend to compromise the right of a person accused of a crime to remain silent. No adverse inferences can be drawn from the exercise of a right given by Law.

(6) The issue of credibility of a witness is not decided as a matter of probabilities as such; this is another error into which the trial Court evidently fell in evaluating the evidence of appellant 2.

Held, further, (1) The power given to the Court by virtue of section 25(3) of the Courts of Justice Law 14/1960 and the similar power given to the Court by virtue of section 145(1)(d) of the Criminal Procedure Law, Cap. 155 should be exercised judicially. The interests of the accused that invariably militate against a second trial must be balanced with those of the community for proper enforcement of the Law.

(2) Where a conviction is quashed by reason of a faulty direction the case for a new trial is strong, if the evidence before the Court could, on a proper direction,

ground a conviction, and is not of such a nature as to justify the application of the proviso. The seriousness of the offence, the prevalence of the offence, its complexity, the time that elapsed and the expense involved are some of the factors to which the Court should have regard in deciding whether to order a retrial.

(3) In the present case there was evidence which, on proper direction, could support a conviction; the proviso cannot be applied as the Court cannot predicate with certainty what the verdict of the Assize Court would be had they properly directed themselves. Having balanced every consideration relevant to the exercise of the discretion to order a retrial, the conclusion is that a retrial is in the interest of justice.

Appeal allowed. Conviction and sentence imposed quashed. Order for retrial. Appellants released on bail pending trial before the Assize Court.

Cases referred to:

Wolmington v. *D.P.P.* [1935] A.C. 481 and [1935] All E.R. Rep. 8;

Jayasena v. *R.* [1970] 1 All E.R. 219 (P.C.);

Ourania Modestou Pitsillou v. *The Police* (1969) 2 C.L.R. 168;

R. v. *Drury*, 72 Cr. App. Rep. 114 (C.A.);

R. v. *Durante* [1972] 3 All E.R. 962 (C.A.);

R. v. *Gilbert*, 66 Cr. App. Rep. 237;

Au Pui-Kuen v. *Attorney-General of Hong Kong* [1979] 1 All E.R. 769 (P.C.);

R. v. *Rose* [1982] 2 All E.R. 731 (H.L.);

Pierides v. *The Republic* (1971) 2 C.L.R. 263;

Nestoros v. *The Republic*, 1961 C.L.R. 217;

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

Loizias alias Aristos v. *The Police* (1969) 2 C.L.R. 217;

Kaourmas and Another v. *The Republic* (1973) 2 C.L.R. 6;

Reid v. *Queen* [1979] 2 All E.R. 904 (P.C.).

Appeals against conviction.

Appeals against conviction by Ekaterini Onisiforou Charalambous alias Keti and Another who were convicted on the 8th February, 1985 at the Assize Court of Limassol (Criminal Case No. 27736/84) on one count of the offence of possessing a revolver without a permit contrary to section 54(1)(2)(b) of the Firearms Law, 1974 (Law No. 38 of 1978) (as amended by Law No. 27/78) and section 20 of the Criminal Code, Cap. 154 and were sentenced by Hadjitsangaris, P.D.C., Artemis, S.D.J. and Eleftheriou D.J. to 15 months' imprisonment each, the sentence of appellant one being suspended for 3 years.

Chr. Pourghourides, for the appellant.

Cl. Antoniades, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Pikis.

PIKIS J.: A search of the residence of the appellants on 3rd December, 1984, made by the police on the strength of a judicial warrant, led to the discovery of a revolver loaded with five rounds of ammunition in a bedside drawer in the bedroom of the appellants, as well as twenty-four rounds of ammunition stacked in a ladies' handbag stored in a cupboard of the bedroom. The search was conducted in the presence of appellant 1, the wife. She denied ownership of the revolver and rounds of ammunition, as well as knowledge of their existence. Appellant 2, the husband, made a similar denial when apprised of the findings of the police in the marital bedroom. A confession allegedly made by appellant 1 to police authorities was rejected because of doubts entertained about its provenance and the suspicious circumstances under which it was taken.

Appellants faced joint charges of possession of the revolver and twenty-nine rounds of ammunition, that is, the twenty-four rounds found in the handbag and the five encased in the revolver. They denied knowledge of the existence of the firearm as well as the explosive substances. Numerous friends and relations frequented their house, including some who had keys to their home. Moreover, the house accommodated, apart from themselves, their 17-year old son. Appellant 2 testified on oath he had no knowledge of the existence of the revolver or rounds of ammunition, and maintained he had nothing to do with the illegal objects. As they had numerous visitors he could not exclude the possibility of one of them having hidden the objects in their house. And as he was not making frequent use of the bedside drawer the presence of the revolver therein might have remained unnoticed for a considerable interval of time. Appellant 1, in a statement made from the dock, likewise denied knowledge of the existence of the revolver and rounds of ammunition notwithstanding admission to the ownership of the handbag wherein the explosives were found.

The Limassol Assize Court acquitted them on the count of possession of the rounds of ammunition, including the five rounds loaded in the revolver, but convicted them of joint possession of the revolver. Notwithstanding the identical facts founding the charges of possession of the revolver and the five rounds of ammunition inside the revolver, the trial Court made a distinction between the two, because of the provisions of s. 20 of the Firearms Law 1974[1].

Counsel for the appellants challenged the conviction for the revolver as unsafe and unsatisfactory because of its factual inconsistency with the acquittal of the appellants on the count for possession of the explosives, particularly that part relating to the five rounds of ammunition found within the revolver. Further, he questioned the criticism made by the trial Court of the failure of appellant 2 to put forward the version advanced on oath when first confronted by the police with possession of the revolver and submitted it amounted to a misdirection of the evaluation

[1] 38/74.

of his evidence by the Court, as it compromises the right of a person accused of a crime to remain silent in face of an accusation. In the contention of counsel for the appellants this was not the only misdirection. In the summing up and examination of the evidence of appellant 2, another major flaw is the way they approached the discharge of the burden cast by section 20 of Law 38/74 on the person in possession of the premises wherein a firearm is found. It was incorrect on the part of the Court, so it was argued, to treat the discharge of this burden as requiring proof on a balance of probabilities or proof in any way, other than creating at the end of the day a reasonable doubt in the mind of the Court as to the knowledge and control appellants had over the revolver the basic issue at the trial.

Counsel for the Republic submitted that the existence of an inconsistency between two verdicts is not necessarily fatal for the conviction and it ought not to be treated as fatal in this case where the inconsistency is, as it appears from the judgment, due to a misappreciation of the legal issues by the Court. In the submission of counsel for the Republic the judgment of the Court, viewed as a whole, amply supports the finding made by the Assize Court on the illegal possession by appellants of the revolver in question.

No doubt there is a strong element of inconsistency between the verdict of the Court on count 1 finding appellants guilty of possession of the revolver, and that part of the verdict of the Court on count 2 concerning possession of the five rounds of ammunition inside the revolver. As a matter of logic and common sense, the person or persons in possession of the revolver were. in all probability, in possession of the rounds of ammunition as well. It appears that while the Assize Court considered, as a matter of fact, the finding of the revolver in the premises in the possession of the appellants inadequate to support the charges presumably because of the loose control they had over the premises, the provisions of s. 20 cast a different complexion on the case in relation to the revolver. The two verdicts revealed ambivalence on the part of the Court whe-

ther appellants were, as a matter of fact, in possession of the revolver and its content.

Section 20 of Law 38/74 creates a factual presumption, attributing knowledge and control to the person or persons in possession of premises within which firearms are found. In the absence of any explanation on the part of the persons in possession, the presumption remains unshaken and justifies a finding of possession of the firearm. Where, however, an explanation is given the strength of the legal presumption created by s. 20 falls to be tested. A question arises respecting the nature of the burden cast on the person in possession by s. 20 and its relationship to the general burden of proof requiring the prosecution to prove a criminal case against the accused beyond any reasonable doubt. The presumption of innocence that holds until one's guilt is proven beyond any reasonable doubt, an unchanging feature of criminal trial under English law[1], is entrenched in Cyprus by the provisions of Article 12.4 of the Constitution, providing "every person charged with an offence shall be presumed innocent until proved guilty according to Law." The implications of *Wolmington* on the burden of proof in a criminal trial and, its relationship to presumptions arising from the proof of particular facts and their rebuttal, were examined by Lord Devlin in *Jayasena* v. *R.*[2] The eminent Judge pointed out it is at the least incorrect to extricate any specific burden cast on the accused stemming from proof of certain parts from the general burden of proof cast on the prosecution to prove its case beyond any reasonable doubt. As we comprehend the judgment in *Jayasena*, it cannot be the Law that one may be found guilty of a charge if at the end of the day the Court entertains reasonable doubts about his guilt. To this principle we subscribe unreservedly. Otherwise, we would have to reconcile the existence of doubts on the part of the Court with the conviction of the accused.

The inference from the acquittal of the accused on count 2, is that the Court did not consider the nature of the control the appellants had over articles in their bedroom, such

[1] See, Wolmington v. DPP [1935] (AC) 481 — Also in [1935] All E.R. Rep. 8.
[2] [1970] 1 All E.R. 219 (PC).

as to attribute the requisite knowledge and control over them. The reasoning of the Court in acquitting the appellants on count 2 is extremely laconic. It is just stated that the evidence against the appellants consists simply of the finding of the rounds in their bedroom, evidence insufficient of itself to prove beyond reasonable doubt possession of the illegal articles by the appellants. Having regard to the evidence before the Court, they must have attached some weight to the evidence of appellant 2 and the statement from the dock of appellant 1 that a good number of persons had access to their house. Notwithstanding this finding and the doubts they must have necessarily entertained as to knowledge of the appellants about the rounds of ammunition, including those in the revolver, and possession of them, they found the appellants guilty of possession of the revolver because of the implications of s. 20 of Law 38/74. As a matter of common sense, there is an inconsistency between the two findings for factually the knowledge of the appellants as to the revolver and control over it, could not have been different from the control of the rounds of ammunition found therein. In examining the evidence of appellant 2, they held that on a balance of probabilities they were disposed to reject his version, and dismissed it accordingly. Therefore, full effect was given to the presumption of s. 20 and a verdict of guilty was returned on count 2. Unless we hold that the evidential burden cast on the person in possession of premises wherein firearms are found creates an evidential onus detachable from the general issue in the criminal trial, namely proof beyond reasonable doubt of the guilt of the accused, the approach of the trial Court must be decreed erroneous. As Lord Devlin explained in *Jayasena*, supra, it is misleading to segregate an incidental evidential burden from the general issue in the criminal trial. It very much seems to us that the trial Court did fall into this error for, while at the end of the day they entertained doubts as to knowledge and control of the appellants over the rounds of ammunition within the revolver, apparently because of their non exclusive control of the premises, they put these doubts on one side in relation to the revolver by an artificial process of examination of discharge of the evidential burden, cast under s.20, on the appellants, independently and separately from the ge-

neral issue. Dicta in *Ourania Modestou Pitsillou* v. *The Police*[1], strongly suggest that whatever side evidential burden may be cast on the accused incidental to the facts of the case, the duty of the Court is to acquit him if in the end the Court is in doubt whether he committed the offence. At the end of the day there is a stark element of inconsistency between the acquittal on count 2 and conviction on count 1. There is no rule of Law that inconsistency between two verdicts necessitates quashment of a guilty verdict[2]. An acquittal may be inevitable if the verdict is in itself unreasonable[3]. However, if, as in this case, the inconsistency is explicable by reference to the misdirection of the Court on the issues before it, the Court must consider the possibility of a retrial. To this end we shall turn our attention as well, because examination of the judgment of the trial Court as a whole, does suggest that they evaluated the evidence of appellant 2 on a balance of probabilities and not as a matter of credibility. The discharge of any particular burden of proof presupposes findings of fact. A question of discharge of the general or a particular burden can only arise after the Court makes its findings on the credibility of witnesses. It is pegged to the ponderation of credible evidence. The credibility of witnesses is always a question of fact for the fact-finding body; of course, a witness may be believed or disbelieved, depending on the naturalness of his evidence, but not infrequently a witness may be believed despite the unnaturalness of his evidence; but never is the issue of credibiiity decided as a matter of probabilities as such. This is another error into which the trial Court evidently fell. Also, comments were made tending to compromise the right of a person accused of committing a crime to remain silent[4]. No adverse inferences can be drawn from the exercise of a right given by Law. It is the only premise upon which citizens can exercise their rights freely without fear of consequences.

The above misdirections in the judgment make the verdict of the trial Court on count 1 unsafe, as well as unsatisfactory. Upon this conclusion, the Court has three alternatives open to it: (a) To quash the conviction, (b) to order a retrial or (c) apply the proviso.

---

[1] (1969) 2 C.L.R. 168, 173
[2] See, inter alia, R. v. Drury, 72 Cr App. Rep. 114 (C.A.).
[3] See, R. v. Durante [1972] 3 All E.R. 962 (CA).
[4] See, inter alia, Gilbert, 66 Crim. App. Rep., p. 237.

Retrial:

Section 25(3) of the Courts of Justice Law[1] confers power on the Court to order a new trial whenever it adjudges the circumstances of the case so justify. Similar power is conferred on the Supreme Court by the provisions of s. 145(1) (d) of the Criminal Procedure Law—Cap. 155. The jurisdiction to order a retrial does not originate from the common law but from statutes introduced in former British colonies. It was first introduced in India by the Indian Code of criminal procedure. As explained in the decision of the Privy Council in *Au Pui-Kuen* v. *Attorney-General of Hong-Kong*[2] like every discretionary power vested in the Court, it must be judicially exercised, the interests of justice being the predominant consideration. Under English law, a material irregularity can lead only to the quashing of a conviction unless there is room for the application of the proviso. A venire de novo can only issue where the trial is abortive, that is, null ab initio.[3] The principles that should guide the Court in deciding whether to order a retrial were extensively examined by the Supreme Court in *Phivos Petrou Pierides* v. *The Republic* (1971) 2 C.L.R. 263[4]. The interests of the accused that invariably militate against the embarrassment of a second trial, must be balanced with those of the community for proper enforcement of the Law. Where, as in this case, a conviction is quashed because of a faulty direction, the case for a retrial is invariably strong provided, of course, the evidence before the Court could, on a proper direction, ground a conviction, as it was indeed the case before the Assize Court.

In *Reid* v. *Queen*[5] the Courts were reminded that the power to order a retrial should never be used as a means of affording the prosecution a second chance to prove its case. If the evidence adduced by the prosecution on the first occasion was for any reason insufficient or inadequate to establish the charge, the only appropriate order is the quash-

1 14/60.
2 [1979] 1 All E.R. 769 (PC).
3 See, R. v. Rose [1982] 2 All E.R. 731 (HL).
4 See, also, Nestoros v. The Republic, 1961 C.L.R. 217; Isaias v. The Police (1966) 2 C.L.R. 43; Loizias alias Aristos v. The Republic (1969) 2 C.L.R. 217; Kaourmas And Another v. The Republic (1973) 2 C.L.R. 6.
5 [1979] 2 All E.R. 904 (PC).

ment of the conviction. Retrial, it was stated, may appropriately be resorted to when the evidence before the Court, though sufficient to sustain, subject to a proper direction, a conviction, is not yet of such a nature as to justify the application of the proviso. Some of the factors to which the Courts should have regard in deciding whether to order a retrial, are :-

(a) The seriousness of the offence;
(b) the prevalance of the offence;
(c) its complexity;
(d) the time that elapsed, and
(e) the expense involved.

Reverting to the facts of the case, we note the following: There was evidence before the trial Court that could support on a proper direction a conviction for possession of the revolver. We cannot predicate with the necessary certainty what the verdict of the Court would be had they properly directed themselves in the areas indicated in our judgment. Therefore, there is no room for the application of the proviso to s. 145(1)(b) of the Criminal Procedure Law - Cap. 155. On the one hand, the offence was serious and the time that elapsed from its commission not such as to render evidence dependent on distant recollections or require the accused to have to account for events that occurred a long time ago. On the other hand, we must reflect upon and weigh the implications on the accused in having to stand trial a second time. Having balanced every consideration relevant to the exercise of our discretion, we believe retrial is in the interests of justice and we order accordingly. In so directing, we have no doubt that in case accused are convicted, the trial Court will take into account, in passing sentence, not only the period of imprisonment already served but the fact they had to stand trial a second time, too. The case will be tried anew before a differently composed bench of the Limassol Assize Court.

Subject to the above order, we set aside the conviction of the appellants, as well as the sentence imposed. The appellants will be released on the same terms regarding bail, as those under which they were released, pending trial before the Assize Court.

Appeal allowed.
Retrial ordered.