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[STRONGE, C.J., SERTSIOS AND FUAD, JJ.]

REX

v.

SAVVAS COSTA KONDOMENIOTIS.

Criminal Law—Stealing—Property pledged—Re-delivery of property to pledgor—Cyprus Criminal Code, 1928, *Clause* 245 (2) (iii) *and* 260 (*b*).

Appellant had signed a bond for £113 in favour of D., and as security pledged ewes and lambs to D. After *teskeres* were issued in D.'s name, she gave back the animals to the appellant to look after, and he pledged some of them to other persons as security for money lent to him.

He was convicted upon two counts of stealing ewes the property of D. which had been entrusted to him for the purpose of being kept by him in safe custody.

Held: (by Stronge, C.J., & Fuad, J; Sertsios, J., dissenting).

(1) that re-delivery of the animals by the pledgee D. to the appellant extinguished the contract of pledge;

(2) that when appellant pledged some of the animals to other persons D. was not the owner within the meaning of Clause 245 (2) (iii) of the Criminal Code and therefore the conviction for theft of the property of D. was bad.

(3) per Sertsios, J.: that, with the transfer of the animals, D. was given by the bond an absolute right of sale, and by issuing *teskeres* in her name appellant made D. the legal owner of the animals; further that the delivery of the animals to appellant was not a parting with possession of them any more than it would have been if she had given them to a third person for the same purpose; and that D. retained her special property in the animals, and was therefore the owner within the meaning of Clause 245 (2) (iii) of the Criminal Code and that the appellant was rightly convicted of theft.

Appeal from conviction by the Assize Court, Kyrenia (Thomas, J., Abbott, P.D.C., and Izzet, D.J.).

Pavlides, Acting Solicitor-General, for the Crown.

The facts appear sufficiently from the judgments.

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Stronge, C.J.

JUDGMENT:—

STRONGE, C.J.: The appellant in this case was charged before the Kyrenia Assize Court with stealing certain ewes the property of one Despinou Nicola Kalava which had been entrusted by her to the appellant to be retained by him in safe custody. The appellant was convicted and sentenced to 6 months' imprisonment.

The facts though free from complexity are to a certain extent—so far at all events as my experience here goes—unusual.

The appellant owed Despinou certain money on foot of a bond dated 1st March, 1932. As security for this debt he delivered to her a number of ewes and lambs and on the same day and the day following procured *teskeres* for these animals to be issued in Despinou's name. In her evidence Despinou stated that after the issue of the *teskeres* she gave the animals back to appellant to look after, and it is common ground that the appellant did in fact get them back. Subsequently to his doing so the appellant took and pledged 13 of the animals with other persons as security for money lent by them to him. It is not uncommon for different minds to arrive at diverse conclusions from the same set of facts, and I shall therefore as regards the nature of the transfer of the ewes by the appellant to Despinou content myself with observing that notwithstanding the *prima facie* evidence of ownership arising from the *teskeres* in Despinou's name I have arrived at the conclusion from inspection of the bond itself and from Despinou's evidence as well as the evidence touching appellant's subsequent dealing with the 12 ewes that the transaction between him and Despinou was not a transfer of the ownership nor ever intended or regarded by either of the parties as such, but was in substance and reality merely a pledge of the ewes to Despinou as security for the amount which appellant owed her. The *teskeres* were procured not for the purpose of evidencing a change in the ownership but under the mistaken idea that they would impart additional validity to the pledge or pawn and the physical change of possession consequent thereon.

The question therefore to which the proved facts, as I view them, give rise is this :

The appellant, the owner of the chattels, not having parted with his right of ownership in them but having merely given Despinou a special property in them as pledgee, did re-delivery of them to him (their owner) by Despinou, the pledgee, operate to put an end to her special property in them and extinguish the contract of pledge ? If it did not and as to this the onus rests on the prosecution—the conviction should stand. If on the other hand the re-delivery to the appellant terminated Despinou's special property in the animals she was no longer owner in any of the senses imparted to that term by Section 245 (2) (iii) of the Criminal Code and the appellant could not be convicted of stealing her property and the conviction should consequently be set aside. Now in order to prevent a re-delivery by the pledgee to the owner-pledgor effecting an extinction of the contract of pledge it is clear on the authority of *Reeves* v. *Capper* (1) and

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North Western Bank v. *Poynter* (1) that the re-delivery to the pledgor must be for some purpose consistent with the continuance of the contract of pledge.

On this point in the present case the prosecution on whom the onus lay, has failed, I think, to show clearly and satisfactorily that the re-delivery was for such a purpose. In my view, the statement by Despinou that she gave the animals back to the accused to look after—and this is the sole evidence there is on the point—is not sufficient to establish the nature of the agreement on which they were delivered to him and to show clearly that it was as her agent or servant he received them. It should have been amplified, I think, so as to place the relationship beyond doubt by, *e.g.*, evidence as to appellant's remuneration (if any) for looking after them and also on the point as to who was in the circumstances to receive the usufruct of profits of the flock. This point and it is a vital one having been thus left in doubt it follows—this being a criminal cause or matter—that the benefit of that doubt must be given to the appellant.

It is only right I think to observe that the point we are now deciding was not mentioned by either side at the trial and the attention of the learned Judges was consequently not directed to the necessity of ascertaining with precision the exact terms on which the sheep were re-delivered to their owner the appellant.

Sertsios, J.

SERTSIOS, J.: This is an application by one Savva Costa Kondomeniotis for leave to appeal against conviction by the Assize Court, Kyrenia. On the date of the hearing of this application the applicant argued that he was innocent. He had asked complainant, he said, to advance some more money to him but she refused. At the material time he said that there was no produce from the sheep he was looking after, and both his family and himself were starving, and it was for this reason that he was bound to give out of the sheep he had pledged to Despinou twelve ewes to witness No. 2, Xenophon Christodoulou, from whom he alleged that he got in return £2 in cash and in kind. He also said that he gave out of the same sheep again one ewe to witness No. 3, son of the witness Xenophon Christodoulou, and got 8*s.* from him in return. He added that he never meant to deprive the complainant of any of those sheep and that his transaction with witnesses Nos. 2 and 3 was intended to be nothing else but a pledge of the *produce* of the 12 ewes and not of the ewes themselves. Applicant, moreover, stated in evidence that, in the course of his negotiations, he mentioned distinctly to the witness Xenophon Christodoulou that he had pledged the sheep to witness No. 1

(1) (1895) A.C. 56.

Despinou, a point on which accused himself was not cross-examined. It is true that the witness in question stated that accused had told that he was going to hand over to him the certificates of ownership of the sheep, but this cannot be correct, as the *teskeres* for the animals were in Despinou's name and not in that of the accused.

During the hearing of this application a point of law was raised, namely, that the animals pledged to the complainant Despinou having been re-delivered by her to the accused, the contract of pawn was extinguished and thus the pawnee having been divested entirely of the possession of the animals pledged, the charge of theft against the pawner, namely, the accused, was not sustainable. The learned Solicitor-General argued that the property still remained with the complainant Despinou in whose name the *teskeres* for the animals had been issued, and that, consequently, the accused was rightly charged with, and convicted of, theft.

In preparing my judgment in this case I had to rely only upon the evidence appearing on the record of the Court below, inasmuch as the bond which was produced by the witness Despinou Nicola in the Court below and marked as Exh. D.N.K. 1, was not available. A few days later I had an opportunity of seeing and reading the document in question, which upon request was sent to this Court from the Kyrenia District Court Registry.

So, in dealing with the point raised, I am bound to leave the question of the bond last after having first more conveniently dealt with the evidence as appearing on the Record.

Now, dealing with the point raised, the essence of the extinction of the contract of pledge lies in the pawnee being divested wholly of his special property and possession in the property pledged. In the case of *Babcock and others* v. *Lawson and another* (1) the firm of Dennis and Co. had deposited certain goods with the plaintiffs as security for an advance. But they afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold the goods to the defendants and that they would hand over to the plaintiffs the money to be received in payment. The firm of Dennis and Co. obtained an advance from the defendants and deposited the goods which they had obtained from the plaintiffs, namely, from the pledgees, with the defendants. It was held by the Court of Appeal that plaintiffs could not recover the goods from the defendants inasmuch as the defendants had obtained them from Dennis and Co. *bona fide* and for a good consideration. Bramwell, L.J., in delivering the judgment of the

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Court of Appeal in this case, stated the following, which I consider it is necessary to repeat here for the purposes of my judgment:

"This is a very plain case. The action is only maintainable by the plaintiffs in respect of the special property they have in the goods. The defendants have entered into no contract with them. The plaintiffs had only a special property in the goods as pledgees; that property they gave up under a fraud, and had the pledgors still retained the goods, they could have resumed them (in spite of the fact that they had parted with the goods). They might have said: 'You the pledgors have got these goods by a fraud, and our special property in them is not divested.' But they cannot say that against a person who has obtained possession of them from the pledgors *bona fide*." So under this judgment the plaintiffs (pledgees), had the pledgors not parted with the goods, could have resumed them, as their special property in the goods was not divested. But they could not resume them from the defendants who, being *bona fide* purchasers for value, had obtained possession of them from the pledgors. Moreover, for the purposes I am going to explain later, it may be as well to state here that in several passages of the judgment quoted above the pledgee in a contract of pledge is looked upon as having a special property in the goods pledged to him.

As regards the present case, the accused's version regarding the delivery of the 12 ewes to witness Xenophon Christodoulou and of the one ewe to witness No. 3, Theophanis Xenophontos, is quite different from that of the witnesses Nos. 2 and 3. Witness, namely, No. 2 said that the accused had pledged to him the 12 ewes themselves and not the produce thereof as contended by the accused before he got the money, and witness No. 3, Theophanis Xenophontos, said the same as regards the one ewe the accused had given to him. Accused himself clearly stated in his evidence that he was in charge of the sheep, simply because he was allowed by complainant to do so. This arrangement therefore gave the accused no interest in the animals in question but only a licence or permission to look after them and get the produce thereof for a limited period only, which depended upon the moment the complainant would have demanded repayment of her money advanced, as stated in the bond itself. Complainant might have rightly protested against the accused for having been fraudulently deprived of the 12 sheep in question by pledging them to witnesses Nos. 2 and 3, and taken all the sheep back from him, including perhaps the 12 sheep in question, in case it is proved that Xenophon Christodoulou, etc., were not acting *bona fide* with the accused. Accused himself, at least, stated that he had clearly told witnesses Nos. 2 and 3 that

he had pledged the animals to the complainant Despinou Nicola. If this is true, neither Xenophon nor his son Theophanis were acting *bona fide* in the case, as the defendants in the above case were. But this does not concern of course this Court at present. In any event there is no doubt that the complainant protested in due course against the accused's act by reporting him to the Police, who are responsible for bringing the present case so far as the offence the accused has been charged with is concerned. Are the circumstances of this case not the same as those in the case of *Babcock and others* v. *Lawson and another*? In my view they are so. In that case the special property the plaintiffs had in the goods was wholly divested for the simple reason that the goods had been bought by the defendants as *bona fide* purchasers for value. In the present case the persons who got the 13 ewes were not *bona fide* pledgees or purchasers, inasmuch as they knew that the sheep with the accused had already been pledged to Despinou Nicola, as stated by the accused in his evidence, a point on which he was not cross-examined, as I have already stated.

In a later case, again, of the *North Western Bank* v. *Poynter, Son, and Macdonalds* (1) decided by the Court of Appeal in the year 1895, where the pawnee returned a bill of lading (which was pledged to him) to the pledgor, making the holder his agent to sell the goods comprised therein, it was held by the Court of Appeal that the pawnee had the right to hand back to the pledgor the property pledged for a special purpose without in the least affecting his security and without extinguishing the contract. Lord Herschell in delivering judgment in the case in question said *inter alia* the following :

" Now in Erskine's Institutes it is said :

' In a pledge of movables the creditor who quits the possession of the subject loses the real right he had upon it.' Well as a general proposition that may be perfectly true. It is to be observed that in the present case this is really something more than a pledge. In the paragraph, from which I have quoted those words, it is pointed out that a pledge gives only a right of detention of the goods, and gives no right to sell. But where, as in the present case, the delivery of the goods is accompanied by a grant of an absolute right of sale to the pledgee, he is certainly something more than an ordinary pledgee. He has a right which a mere pledge does not convey. But the general proposition that the parting with possession puts an end to the pledge is one which, I suppose, no one would quarrel. But it does not touch the question whether a delivery of possession for a particular purpose on the part of the pledgee

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to the pledgor is a parting with possession any more than a delivery under the same circumstances and for the same purpose to a third person."

The above is an extract, as I have stated, from the Lord Chancellor's judgment which in my view has a direct bearing upon the present case. From the evidence before us I find that the property pledged to the complainant Despinou Nicola was transferred by the pledgor to her (being the pledgee) by getting documents of ownership (*i.e.*, *teskeres*) of the animals issued in her name. In the eye of the law she thus became more than a pledgee, namely, a legal owner, inasmuch as such a *teskere* for animals is described as a document of ownership in Article 2 of the Ottoman law appearing in volume 4, p. 3,266 of the "Οθωμανικοὶ Κώδικες" edited by Nicolaides. The object of the law in question is to prevent thefts of animals. The first part of the said Article so far as the point before us is concerned reads: "Whereas this permit (*i.e.*, the *teskeres*) will serve as a document of ownership of the animal, the purchaser, before paying its value, must, upon request, get and keep it." Consequently, the complainant, being a legal owner of the animals, had an absolute right to sell or in any other way dispose of the animals, subject of course to her returning the balance of the proceeds, if any, after satisfying her own claim first with interest, to the pledgor. That such was the intention of the parties to the contract becomes quite evident from what accused himself stated in evidence, as appearing on p. 6 of the Record. He stated the following: "I asked witness No. 1 (namely the pledgee) to sell the ewes and pass the proceeds against my debt." Does this not clearly show that accused, having the *teskeres* of the animals issued in complainant's name, looked upon her as being the only person who had the power to sell them? Does this not further show that the accused, having thus transferred the *teskeres* into complainant's name, realized not incorrectly that he had been entirely divested of his property in the animals in question, and that consequently he had no power himself to sell the animals, the documents of ownership being no longer in his name? Therefore, in the present case, in view of what I have explained, the complainant was something more than an ordinary pledgee. She had a right which a mere pledge does not convey. Of course no one would question the general proposition that the parting with possession puts an end to the pledge, but, as Lord Herschell pointed out, it does not touch the question with which I am dealing, that is to say, whether the delivery of possession of the animals on the part of the pledgee to the pledgor for a particular purpose, namely, for the purpose of having them looked after by the pledgor, is a parting with possession any more than a delivery under the same circumstances and for the same purpose to a third person.

In the case *Reeves* v. *Capper and another* (1) one Captain Wilson was Messrs. Capper's servant and employed his own chronometer for the purpose of navigating their ship. Being in need of money he obtained an advancement of £100 from Messrs. Capper, the defendants, and to secure the repayment of this amount to the defendants he pledged his chronometer to them by an agreement in writing as follows:

"In consideration of your advancing £100 I hereby make over to you as your property, *until that sum be repaid*, my chronometer, you allowing me the use for the voyage." Captain Wilson, however, pledged the chronometer later to the plaintiffs upon obtaining an advancement. The Court of Appeal held that the property in the chronometer belonged to Messrs. Capper, namely, to the defendants. Findell, Chief Justice, in delivering judgment said *inter alia* the following:

"The chronometer was delivered to Messrs. Capper, and it was delivered for a valuable consideration, and this distinguishes the present case from those in which it has been held that a verbal gift of chattels unaccompanied with delivery of possession passes no property to the donee: (*Reed* v. *Blades*, *Irons* v. *Smallpiece*).

Further the chronometer was delivered under a written agreement, which proves with precision and accuracy the object of the delivery and the nature of the interest to be passed. At the moment therefore of the delivery to Messrs. Capper the property vested in Messrs. Capper for the purpose and upon the condition mentioned in the written agreement, which condition has never been performed by repayment of the money." Then the learned Chief Justice goes on to say as follows:

"We think that the delivery of the chronometer to Captain Wilson under the terms of the agreement itself was not a parting with the possession, but the possession of Captain Wilson was still the possession of Messrs. Capper. The terms of the agreement were that 'they would allow him the use of it for the voyage:' words that gave him no interest in the chronometer, but only a licence or permission to use it for a limited time, whilst he continued as their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper, . . . and could give no more right to the bailee [namely the plaintiffs] than Captain Wilson had himself."

Now applying all this to the present case, the animals were delivered by the accused to the complainant Despinou under a written agreement, namely, the bond which proves clearly

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the object for which they were delivered and the nature of the interest to be passed. At the moment of the delivery of the animals to Despinou Nicola the property vested in her for the purpose and upon the condition mentioned in the bond, which condition has never been performed by repayment of the £113. 4*s*. 7*cp*. advanced by complainant to the accused. It is clear from the evidence that complainant gave the animals back to the accused to look after them, as she herself stated. The accused himself, on the other hand, in his evidence stated that he was allowed by the pledgee, the complainant, to keep the ewes in his custody and get the produce, being thus remunerated for looking after the sheep. Accused not only admitted this in his evidence but also he admitted what complainant said in evidence, namely, that she had given the animals back to him to look after them, because he never cross-examined her on this point. It is true that this part of the transaction is not mentioned in the document, but it is quite clear that then and there it was so agreed between the parties, and the accused never denied the existence of such an agreement. On the contrary, he admits everything and the only reason that prompted him to do what he had done, was that he was starving, both he and his family, as he could not get any produce from the animals at the time and was, consequently, bound to pledge to witnesses Nos. 3 and 4 the produce of the 13 sheep, and not the animals themselves, as he himself states in evidence, though, as I have already mentioned, the witnesses in question contradict him and entirely deny his version. That being so, the arrangement made between the parties to the contract did not give the accused (pledgor) any interest in the animals pledged, but only a licence or permission to keep them in his custody for a particular purpose, that is to say, in order to look after them as an agent or servant of the complainant for a limited time, namely up to the time of the expiration of the bond, when the pledgee under the agreement is entitled to sell the animals in full satisfaction of her claim plus interest *thereon*. As the money advanced is payable on demand the bond would expire at any short time in the discretion of the creditor.

In a more recent case *In Re David Allester Ltd.* (1) a limited Company had pledged bills of lading with a Bank to secure an overdraft. When it was time to sell the goods, the Company obtained the bills of lading from the Bank for realization on the terms stated in a letter of trust given by the Company to the Bank, to wit, that the Company received the bills of lading given by it to the Bank, and undertook to hold the goods when received and the proceeds when sold as the Bank's trustees and to remit the entire net proceeds

(1) (1922) 2 Ch. 216.

as realized. It was held on appeal that the letter of trust merely recorded the terms on which the Company was authorized to realize the goods on the Bank's behalf, and that the Bank's previous rights as pledgee remained unaffected by this convenient mode of realization. Astbury, J., in delivering judgment in the above case stated *inter alia* the following:

"The pledge rights of the Bank were complete on the deposit of the bills of lading and other documents of title. These letters of trust are mere records of trust authorities given by the Bank and accepted by the Company, stating the terms on which the pledgors were authorized to realize the goods on the pledgee's behalf. The Bank's pledge and its rights as pledgee do not arise under these documents at all but under the original pledge. (See *Ex-parte Hubbard* (1).) The Bank as pledgee had a right to realize the goods in question from time to time, and it was more convenient to them to allow the realization to be made by experts, in this case by the pledgors. They were clearly entitled to do this by handing over the bills of lading and other documents of title for realization on their behalf, without in any way affecting their pledge rights." (See *North Western Bank* v. *Poynter* with which I have already dealt). The principles enunciated in the above case by Astbury, J., equally apply to the case under consideration of this Court. The complainant pledgee being in possession of the accused's sheep under the contract of pledge, would, naturally, in any event, employ some one as her agent or bailee (*e.g.*, a shepherd) to tend the animals. Instead of employing any one else, *e.g.*, a stranger, she entrusted them to the pledgor, namely, to the accused. She said distinctly in her evidence, as I have already pointed out, that she gave the animals back to the accused to look after. The accused himself in his evidence also on being cross-examined stated that, after pledging the animals to the complainant Despinou, she allowed him to keep them in his custody and get the produce. Complainant herself says that accused had *teskeres* of the animals issued in her name, and that after she got the *teskeres* so issued in her name, she gave the animals back to the accused to look after. But was the accused to do it without any remuneration? Certainly not, because accused himself stated in evidence that the complainant, *i.e.*, witness No. 1, allowed him to keep the animals in his custody, and he got the produce. Consequently, the remuneration was the produce accused was going to get from the sheep. He said, however, that the reason he was starving at the time was because there was not yet any produce then from the sheep. So the pledge rights of the complainant were

(1) 17 Q.B.D. at pp. 690 and 697.

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complete upon the delivery of the animals to her by the pledgor, *i.e.*, the accused. The complainant, as pledgee, had a right to deal with the animals in question as she wanted to, and, indeed, it was more convenient to her to allow them to be kept in the custody of an expert, in this case of the pledgor, in order that he, being a professional shepherd, should look after them, etc. Complainant Despinou Nicola was fully entitled to do this by handing over the animals to the accused pledgor for the purposes mentioned without in any way affecting her pledge rights.

Dealing now, as I have already intimated, with the bond, which came to my hands after I had prepared the above part of my judgment basing myself upon the facts as appearing on the record, I notice that the bond in question is but a promissory note in customary form: It is good for £113. 4*s*. 7*cp*. advanced by complainant to accused on the 1st March, 1932, being the date of the bond, with interest thereon at 10%, etc.

The latter part of this bond reads:

" In security of my creditor I, this 1st day of March, 1932, pledge 44 ewes, one ram, with their 25 lambs, the respective *teskeres* of ownership whereof I transfer into the name of my creditor. The said sheep my creditor *is entitled to sell* either directly of through the Court, at the time of expiration up to full payment of my debt due to her with interest thereon."

From this latter extract of the bond it is quite clear that the complainant pledgee was given by her pledgor, the accused, an absolute power to sell the property pledged to her in full satisfaction of her claim with interest thereon. Thus, as I have stated in dealing with the case of *North Western Bank* v. *Poynter, Son and Macdonalds*, basing myself upon the evidence alone, this transaction is really something more than a pledge. A pledge gives only a right of detention of the goods, and gives no right to sell. Where, as in the present case, the delivery of the goods is accompanied by a grant of an absolute right of sale to the pledgee, the transaction is certainly something more than a pledge. In the circumstances the delivery of possession of the animals by the complainant to the accused, namely, the pledgor, is not a parting with possession any more than a delivery under the same circumstances and for the same purpose to a third person, *e.g.*, to an ordinary shepherd. In my view therefore the possession of the animals by the accused is the possession of the complainant Despinou for whom and on whose behalf he kept custody of them for the particular purpose mentioned. The accused having parted with the 13 ewes, which together with the other sheep were entrusted to him by the complainant, the pledgee, for the purpose of being looked after and kept in safe custody

by him, committed an offence within the meaning of Section 260 (*b*) of the Cyprus Criminal Code, 1928, inasmuch as the complainant Despinou, being the pledgee, had a special property in the animals in question, and was therefore an owner of all the animals, including the 13 ewes parted with by the accused, within the meaning of Section 245, sub-section (2) (iii) of the Cyprus Criminal Code, 1928, which reads :

" The expression ' owner ' includes any part owner, or person having possession or control of, or a *special property* in, anything capable of being stolen." But a mere glance at the *teskeres* in the Court below shows even that the complainant Despinou was more than a pledgee, with an absolute right of sale of the animals in question. For the purpose obviously of defeating any attempt on the part of the pledgor to part with any of the sheep pledged, the documents of ownership, namely, the *teskeres*, were issued in the name of the complainant Despinou, and so she is described in them as " purchaser " of the animals and the accused as the " vendor." Thus in the eye of the law she is but the absolute owner of the animals in question, and, that being so, nothing in any event and in any circumstances whatsoever could defeat her proprietary rights.

Upon all that I have explained at some length, my own view is that accused was quite rightly convicted by the Court below on counts 1 and 3 on the information, and, in the circumstances, I am clearly of the opinion that this application for leave to appeal should be dismissed.

FUAD, J., concurred with the judgment of the Chief Justice.

Appeal allowed ; conviction quashed.