1929.
Nov. 14.

POLICE
v.
VASSILI.

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

POLICE

v.

LOIZO VASSILI AND OTHERS.

Criminal Procedure—Malicious injury to property—Defence claim of right—Conviction—No right of appeal—Application to Supreme Court to enquire into judgment on ground of illegality—Alleged error in point of law—Meaning of "illegal"—C.C.C., Sections 9, 312—*Law* 1 *of* 1886, *Section* 46.

To a charge of malicious injury to property defendants pleaded that they acted under claim of right. The Magisterial Court convicted them, and made an order for binding over, compensation, and costs. The defendants applied to the Supreme Court to enquire into the judgment on the ground that it was "illegal" within the meaning of Law 1 of 1886, Section 46.

Held, that the facts charged constituting an offence, and the decision being one to which the Court might properly come on one view of the state of mind of the defendants in committing those acts, the judgment was not an illegal one.

Application by defendants to have judgment of Magisterial Court of Nicosia (No. 6455/29) enquired into by Supreme Court.

Triantafyllides for applicants.

N. Paschalis, Acting Attorney-General, for the Crown.

Triantafyllides: The Judge wrongly inferred malice solely from the fact that defendants intentionally destroyed what they knew to be the property of another. I refer to two unreported cases, *Police* v. *Katerina Philippou* (1918) and *Police* v. *Archimandrites Chrysanthos* (1921).

Paschalis: "Illegal" cannot be given a sense wide enough to cover every error in point of law, as defendants must contend. "Illegal" means "repugnant to some provision of the law" and here was no such repugnancy.

The judgment of the Court was delivered by the Chief Justice.

JUDGMENT:—

BELCHER, C.J.: This is an application made under Law 1 of 1886, Section 46, to enquire into the conviction of the applicants by the Magisterial Court of Nicosia on a charge of malicious injury to a metal water receptacle or "deposit" as it is called in the notes. The accused were sentenced merely to be bound over and pay compensation and costs, so that there could be no appeal under Section 45. If the physical acts alleged were done by the accused, and

it was not denied that they did the acts and did them intentionally to the property of another person, then an offence was constituted unless the acts were done in the exercise of an honest claim of right and without intention to defraud, in which case Clause 9 of the Code excuses the doer. That is matter of excuse lying on the defendant to prove ; it need not be traversed in the information. In this case the Court below found that on the particular facts proved defendants had not established their right to rely on Clause 9. Its decision may have been wrong. It has been argued by counsel that the evidence showed a claim of right and that there was no evidence of more than such damage being done as was necessary to establish it and that the Court gave a reason for its judgment (*i.e.*, that the defendants deliberately set out to destroy complainant's property) which was not at all material : and that in these circumstances the judgment ought to be held " illegal " within the meaning of sub-section 1 of Section 46 of Law 1 of 1886, and thus that it is within the power of this Court to enquire into it and if necessary quash the conviction. What, therefore, we have to decide is, was the judgment of the Magisterial Court " illegal." " Illegality " is one of three grounds mentioned in Section 46 (1) as empowering the Supreme Court to enquire into a Magisterial judgment (whether otherwise appealable or not) : the other two are want of jurisdiction and excess of powers. In one sense every judgment given without jurisdiction or in excess of powers is illegal, so if the word " illegal " here has a meaning, and we must try to give it one, it is something narrower than that. For the applicants it is argued that it means " based on a wrong view of the law." In support of this we were referred to two prior decisions of this Court, neither, unfortunately, reported. In neither of them was the point argued of what " illegal " means, but counsel submits that in each the reason for enquiring into the judgment must have been that the Supreme Court considered it was illegal, and that in each the facts have an analogy to those in this case which we should follow. In the first case (*Police* v. *Katerina Philippou* (1), the grounds for the application were (so far as now material) that the applicant was convicted of what was not an offence by law. The application was dismissed, no reasons being recorded. In the second (*Police* v. *Archimandrites Chrysanthos* (2), the application was granted and the conviction quashed because the facts alleged by the Crown disclosed no offence. Whatever these cases establish, neither supports the proposition that any error whatsoever in decision will make the judgment " illegal." Indeed, the latter case provides an illustration of

(1) (1918) C.J.'s notebook, pp. 161, 169.

(2) (1921) C.J.'s notebook, p. 71.

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a class of judgments which may well be what the legislature had in mind when it used the word "illegal," namely, judgments where the facts alleged by the Crown could not in any case constitute the offence charged, and where consequently any conviction must necessarily be bad. Such an interpretation of "illegal" puts judgments affected by illegality in the same class with those affected by lack of jurisdiction or excess of judicial power—all of them must necessarily be reversed on appeal if appealable at all. But to read "illegal" as meaning "erroneous" so as to cover every case in which a point of law could be taken would be, instead of taking it as *ejusdem generis* with the other classes between which it is placed in the section, to introduce a wholly different and enormously wider class of cases and give the applicant a virtual right of appeal in every case except perhaps where only facts were in issue. If the legislature meant this they could have said it in far fewer words by a very slight alteration to Section 45. By no straining of language do we think the word "illegal" can be used of a judgment given in a case where the magistrate had jurisdiction and did not exceed his powers, and where the facts alleged would constitute an offence if proved.

Application dismissed.