[BOURKE, C.J. and ZEKIA, J.]

1. ANDREAS ANTONIOU, of Nikitari,
2. IOANNIS HIMONIDES, of Pedoulas now of Nicosia,
3. MICHAEL IOANNOU, of Kyperounda now of Nicosia

Appellants,

v.

THE QUEEN

Respondent.

(Criminal Appeal Nos. 2156, 2157, and 2158)

1958
March 24, 28

ANDREAS ANTONIOU AND OTHERS v. THE QUEEN

Taking part in a riot, Criminal Code, section 69—Evidence of good character—Document wrongly received in evidence—Judicial notice—Possibility of prejudice.

Evidence of good character, important where defence is mistaken identity.

Apellant No. 2 being charged with taking part in a riot called evidence as to his good character to support his defence of mistaken identity. The evidence as to character included a certificate of good character wrongly admitted in evidence. In his judgment the trial Judge, after accepting the prosecution evidence as satisfactory, erroneously took judicial notice of certain facts in connection with the certificate and added that such a certificate "destroys any possible doubt that I might have had concerning his (the appellant's) guilt". The other evidence as to the appellant's character was not considered.

Held: (1) Although the trial Judge accepted the evidence for the prosecution as to the appellant's guilt yet in view of the language used and the circumstances of the case it was impossible to exclude the possibility that the appellant suffered prejudice. *R.* v. *Sutcliffe* (*Unreported*—"*The Times*" newspaper, 29.1.58) *distinguished.*

(2) Evidence of character, although not sufficient ground for disbelieving solid evidence of facts, may be of great importance where the defence of mistaken identity is raised.

Appeal of appellant 2 allowed.

(NOTE: The appeals of appellants 1 and 3 were dismissed on the facts)

Cases referred to :

(1) *R.* v. *Sutcliffe* (*Unreported. "The Times"* newspaper, 29.1.58).

(2) *R.* v. *Broadhurst,* 13 Cr. App. R. 125.

Appeals against conviction and sentence.

The appellants, Andreas Antoniou of Nikitari (1), Ioannis Himonides of Pedhoulas now of Nicosia (2) and Michael Ioannou of Kyperounda now of Nicosia (3), were convicted by the Special Court sitting in Nicosia (Case No. 71/58) on the 24th February, 1958, of taking part in a riot, contrary to section 69 of the Criminal Code, and were sentenced by Special Justice Ellison to imprisonment for 8 months, 3 months and 3 months respectively. In addition appellant No. 3 was convicted of assaulting a peace officer in the due execution of his duty, contrary to section 238 (a) of the Criminal Code and was sentenced to 6 months' imprisonment, the sentences to run concurrently.

M. Triantafyllides and *S. Georghiades* for appellants 1 and 2.

C. Pilavachi for appellant 3.

Sir James Henry, Q.C., Attorney-General for the Crown.

The judgment of the Court was delivered by :

BOURKE, C.J. : These three appeals have been consolidated. They arise out of charges brought as the result of a riot that took place on 10th December, 1957, in the neighbourhood of the Pancyprian Gymnasium in Nicosia in the course of which members of the Security Forces were stoned by a large crowd of persons of whom the majority were youths attending school. The charges were laid on the 25th January, 1958, and the appellants were convicted by the Special Court on the 24th February of the offence of taking part in a riot, contrary to section 69 of the Criminal Code ; in addition the third appellant was convicted of the offence of assaulting a peace officer in the due execution of his duty, contrary to section 238 (a) of the Criminal Code.

As regards the first appellant, we find no substance in the ground of appeal against his conviction, that is, that it was unsafe to find him guilty on the evidence of a single witness who had not known him previously. A Police witness (P.W. 2) testified that he saw this appellant, who was in the front

of the crowd, throwing stones at him. Tear gas shells were thrown and the rioters ran away followed by the witness and other members of the Forces. The appellant having run a few paces put up his hands and surrendered to arrest. The appellant made a statement from the dock in which he made the case that he was innocently upon the scene. It is evident from the judgment that the learned Justice rejected this explanation and believed the prosecution witness whom he considered to be "correct", by which he obviously meant from the context that he was satisfied that there was no mistake. This appellant was sentenced to eight months' imprisonment. He was treated more severely than the other accused because, as appears from the remarks of the Justice when he came to sentence, he considered that the appellant, who was not a schoolboy, had exercised a bad influence. As the evidence disclosed, he was in the van of the mob throwing stones at the Police. It is a ground of appeal that the sentence was excessive. We do not consider that it is manifestly excessive so as to justify interference by this Court. The appeal of this appellant fails and is dismissed.

As to the third appellant it is argued that he could not lawfully be convicted of the offence of assaulting a peace officer in the due execution of his duty. In respect of the first offence this appellant was sentenced to three months' imprisonment and for the assault to six months' imprisonment, the terms to run concurrently. The evidence established that the appellant was one of the rioters and that he threw a stone and hit and injured a Police Officer on the head. Quite plainly the offences were distinct and separate. The sentences were not excessive. The appeal of this appellant is dismissed.

The appeal of the second appellant, who is 16 years of age, presents most unusual features and has given us cause for anxious consideration. We are obliged to the learned Attorney-General for appearing in person and giving this Court the benefit of his argument on behalf of the Crown. The evidence led by the prosecution against this appellant was that of a single witness, namely, Corporal Marsh of the Military Police, who testified that he saw the appellant in front of the crowd and he threw two stones at his car.

According to the witness he got out and chased the appellant about 20 yards to catch him. The appellant ran into a house. He was arrested by the witness who said in evidence that he was positive in his identification and had not lost sight of the appellant among the crowd. The appellant gave evidence and said that as a result of what the headmaster told him he left the Gymnasium school with others and went to his home about 300 metres away. He met one Achilleas Kranidiotis, who lived in the same building, outside the house and they had a conversation on the verandah. Then the appellant went in and left his books and was coming out again to go to his aunt's house when he was arrested by a member of the Military Police who put him in a jeep and took him to the Police Station. He denied that he took part in any riot or threw any stone.

The appellant called three witnesses in his defence. The first was Achilleas Kranidiotis, a man of 75 years, who bore out the appellant's story as to the conversation on the verandah when the appellant came home from school with his books; the witness said that he (the witness) then went away to a coffee shop. The next witness was Efstathios Oxinos, a student of the Nicosia Commercial College, who testified that from his house, which was opposite that of the appellant, he saw the latter coming home with his books and talking to an old man on the verandah. The old man then left and the appellant went inside. Hardly a minute had passed when the appellant opened the door coming out and the witness saw a soldier catch him at the doorstep.

The third defence witness, Socratis Evangelides, was called with a view to putting the character of the appellant in issue. He was not cross-examined. His evidence was that he was the Secretary of the Schools Committee in Nicosia and he knew the appellant who came from a good family and his uncle was Assistant Commissioner of Nicosia. The appellant, according to the witness, was of excellent character and gave no trouble to his school. The witness was then allowed to produce in evidence (the prosecution took no objection) a certificate (exhibit 12) which read as follows:—

"Pancyprian Gymnasium,

Nicosia.

Nicosia, 21st February, 1958.

246/N. 1060

CERTIFICATE OF CONDUCT AND CHARACTER

This is to certify that Ioannis Iacovou Himonides, student in the fifth class of the Practical Department of the Pancyprian Gymnasium, during the school-year 1957—58, under registration number 1510, has shown up to the present day excellent conduct and very good character.

(Sgd.) K. Spyridakis.

Headmaster."

This certificate, as no one disputes, was not admissible evidence: if it was desired to establish the appellant's good character through the headmaster, he should have been called as a witness and examined upon oath. The complaint of the appellant on this appeal may be shortly stated as amounting to this, that having admitted the certificate in evidence, wrongly as it happens, the learned Justice so far from taking it on its face as being in the appellant's favour, or even disregarding it altogether and according it no weight, so allowed it to bias and prejudice his mind when he came to judgment as to deny the appellant a fair trial and to preclude a detached and dispassionate judicial weighing and examination of the whole evidence.

At the outset of the judgment, and this is stressed by the Attorney-General as a ground for sustaining the conviction, the learned Justice expressed a general view of the evidence affecting all the accused in the following words—

"I find, and I will say straight away, I find the evidence of these prosecution witnesses entirely satisfactory and convincing with regard to all five of these accused. I have considered the evidence in detail, both the prosecution evidence and what the defence has called, particularly evidence given by accused themselves. I have compared the evidence with what learned counsel have put to me by way of explanation and to show that evidence of prosecution witnesses is unreliable. But in my view the

prosecution witnesses are correct beyond all reasonable doubt.".

The Justice then went on to deal with the evidence separately in regard to each accused. The following is the relevant passage when he came to consider the evidence relating to the appellant (accused No. 3) and arrived at a verdict—

"Now accused 3, the evidence concerning him was given by Cpl. Marsh, R.M.P., who says the accused was throwing stones at the vehicle that he was in, that he did not lose sight of him at all until he arrested him, and that he saw the accused throw two stones.

This accused has given evidence himself, denying the whole matter, and he says that he was not there at all, that when he was arrested he was coming out of his house where he was living, to which he had gone taking his school books, and then he was going out to see his aunt. He has called in his support an elderly man who lives in the same house and a young student who lives in the house opposite.

Now his case is remarkable also for the third witness who was called by the defence, who put in a certificate which was given by the Headmaster of the school which the accused attends in and around which the riot was going on that morning. And when I heard what school it was, I put quite directly to the defence whether such a certificate of character would be an assistance to the Court in having doubt concerning the guilt of the accused. But the defence was quite insistent that this evidence was helpful to the defence. I must say, (and I gave a broad hint on the point) that a certificate to the effect that a student of the Pancyprian Gymnasium is an orderly and well-behaved student, given by that Headmaster, destroys any possible doubt that I might have had concerning his guilt, but in a sense contrary to what was intended by the defence. If I thought there was doubt as to the evidence given by Cpl. Marsh (which in fact I do not), I would think such a certificate from that particular person was a confirmation of that evidence beyond any doubt whatsoever. It is a notorious fact as to the nature

of that particular school and the part played by that particular Headmaster in its attitude to law and order, particularly during the Emergency. The best defence or mitigation for any young boy or girl attending that school would be that they have little chance of being straight and loyal in a school which has a disloyal atmosphere created by the teachers. I find accused 3 guilty."

Now no one disputes, and could not well dispute, that there was no such "notorious fact" of which judicial notice could properly be taken or that the remarks under criticism made by the Justice were at the least singularly unfortunate. What is argued for the Crown is that at worst there was a misreception of evidence, viz. the headmaster's certificate, and whether it was admitted or not the result, a finding of guilt, must reasonably have been the same because, it is submitted, the learned Justice had made it clear that he accepted the evidence of the prosecution witness Corporal Marsh and had no doubt as to his veracity or reliability. The references to the certificate suggesting that it could be regarded as damaging to the appellant and his case were therefore only hypothetical—it would only have been allowed to operate to the appellant's detriment if there had been any doubt in the trial Justice's mind, which, as he makes evident, would have been destroyed as a benefit to the appellant by the production of such a certificate coming from a source that the Justice regarded, though admittedly without legal justification, as being tained so as to have the opposite effect to that which was intended by the defence. In the circumstances the comment concerning the certificate was really extraneous or superfluous and did not affect the verdict which should not be disturbed.

It may seem that there is some attraction in this argument, but we are concerned as to whether it is not too subtle or ingenious to serve as a sufficiently broad basis for the doing of justice to the appellant or of satisfying that there is the appearance of justice having been done. Reference has been made in support to the case of *Regina v. Sutcliffe*, as reported in "*The Times*" newspaper for 29th January, 1958, and decided by the Court of Criminal Appeal in England, as an instance where a conviction was not upset though in the summing-up to the jury the Judge had employed some

"dangerously infelicitous language" touching upon character. The appellant in that case had not put his character in issue; he was a man of bad character having many convictions on his record, and it was accepted that if the passages in the summing-up of which he complained did amount to an intimation that he was of bad character there would no doubt be ground for complaint. We quote the following, which we take as being substantially accurate, from the report of the judgment as given in the source indicated—

"The passage which had given the Court some anxiety was that part where the Deputy Chairman said: "But it is perfectly right to consider his background as affecting his credibility, as to whether he is a person to be believed... Is he a solid, respectable citizen, a person you can normally depend upon or is he something very different?" Taken alone it might be said with some force that it was a strong hint to the jury that the person whose evidence they were considering was not a respectable citizen but something very different, which might mean a criminal.

There was no disguising the fact that the language was unfortunate. It must, however, be read in its context, that was, with the sentence immediately preceding and following it, and with due regard to the whole of the summing-up and the particular circumstances of the case. Express warnings in the preceding and the following sentences ought to have been sufficient to convey to the jury that the unlikelihood of the story which the appellant had told about himself could be considered by them when asking themselves whether he could be relied on as telling the truth.

It was vital to the jury to decide whether he was a truthful man. The case against him largely depended upon whether the jury, notwithstanding his denials, believed the police evidence about statements which they said he had made. The jury were not left to think that the appellant had to convince them of the truth of his evidence if he was to be acquitted, and the Deputy Chairman had quite correctly stated the law with regard to the burden of proof.

While, therefore, the Court thought that the language

used in the paragraph principally complained of was dangerously infelicitous, their Lordships' final conclusion was that with the warning which went before and followed it and in the setting of the whole summing-up it did not amount to a misdirection vitiating the conviction.".

In the instant case the appellant, as he was entitled to do, set out to put his character in issue and the Justice was the judge of fact. Evidence of character has some value (see *R.* v. *Broadhurst* 13 Cr. App. R. 125), and we adopt the following propositions taken from Kenny, 16th edn at p. 426:

> "The probative value of evidence of character must not be overrated. It is not sufficient ground for disbelieving solid evidence of facts. Were it so, no one would be convicted; for every criminal had a good character until he lost it. But it may be of great importance where mistaken identity is the defence...."

The defence in this case was mistaken identity. There was the evidence of a single witness identifying the appellant as taking part in the riot and against that the evidence of the appellant himself supported by the testimony of two witnesses and the evidence of Socratis Evangelides, the Secretary of the Schools Committee of Nicosia, speaking of his own knowledge to good character, which was not challenged. No reasons were given by the trial Court for rejecting the evidence of the appellant and his two witnesses to the facts. As has been seen, in the particular part of the judgment dealing with the case against the appellant there is simply a brief reference to the nature of the evidence of the appellant and to the fact that he called two witnesses to support his story. The only reference to the testimony of Mr. Evangelides goes to the certificate that he was allowed to produce. There was no prosecution witness to contradict this deponent to character and so the passage from the general part of the judgment quoted above does not appear, having regard to its terms, to apply to him. In any case there would appear to be no reason for disbelieving this unchallenged and independent testimony and it would seem to have been either overlooked or perhaps regarded as of no account through the effect that the certificate, wrongly admitted in evidence, had upon the mind of the Justice

through the wrong appreciation of what constituted notorious facts that could properly be noticed by the Court.

It seems inescapable that when he came to judgment and to estimate the value and weight of the evidence in the case of this appellant, the learned Justice had formed the view that the appellant, as a boy attending the Pancyprian Gymnasium and relying upon a certificate to good character given by a man such as he plainly considered the headmaster of that school to be, was a person of such a disposition as to be likely to take part in activities detrimental to the maintenance of law and order; likely, in short, to have taken part in the riot the subject matter of the charge. Indeed in the judgment it is revealed in parenthesis that a "broad hint on the point" was given to the defence at the time that it was sought to put the document in evidence. The "point" referred to is explained by the words following indicating that such a certificate "to the effect that a student of the Pancyprian Gymnasium is an orderly and well-behaved student, given by that headmaster, destroys any possible doubt that I might have had concerning his (the appellant's) guilt". We do not agree that the situation is saved from the point of view of the prosecution by the words immediately following as to the absence of doubt in accepting Corporal Marsh's evidence, because it is at least doubtful whether the whole evidence was not seen through a cloud of prejudice. In the view of this Court this is not a case, as in *Sutcliffe* (*supra*), in which it can fairly be said that it is an instance of merely "dangerously infelicitous language" in a satisfactory setting and hedged about with warnings rendering it harmless in effect. In the circumstances of the present case it is impossible to be satisfied that the appellant did not suffer real prejudice. It is enough to say that in our opinion it would be unsafe to allow this conviction to stand.

The appeal of the second appellant is allowed and the conviction and sentence are set aside.

Appeal of appellant No. 2 allowed.

Appeal of appellants Nos. 1 & 3 dismissed on the facts.