[ZEKIA, P., VASSILIADES, MUNIR, JJ.]

NEDI CHARALAMBOUS,

Appellant,

v.

MUNICIPALITY OF NICOSIA,

Respondent.

(*Criminal Appeal No.* 2765)

Streets and Buildings Regulation Law, Cap. 96—*Erecting a building, contrary to the provisions of the Law—Addition of a new count under section* 85 *of the Criminal Procedure Law, Cap.* 155 *and conviction and sentence, including a demolition order, thereon—Appeal against—Appeal succeeded and conviction and sentence set aside as a nullity on the ground that the procedure provided in the said section could not be adopted in the circumstances of this case, without prejudice to the accused in her defence.*

Criminal Procedure—Charge—Amendment of charge at the conclusion of trial by adding a new count and convicting and sentencing accused thereon—The Criminal Procedure Law, Cap. 155, *section* 85 (4).

Trial in criminal cases—Criminal Procedure—Charge—Amendment of charge at the conclusion of the trial by adding new count—The Criminal Procedure Law, Cap. 155, *section* 85 (4).

Section 85 (4) of the Criminal Procedure Law, Cap. 155 reads as follows :—

" If at the conclusion of the trial the Court is of opinion that it has been established by evidence that the accused has committed an offence or offences not contained in the charge or information and of which he cannot be convicted without amending the charge or information, and upon his conviction for which he would not be liable to a greater punishment than he would be liable to if he were convicted on the charge or information, and that the accused would not be prejudiced thereby in his defence, the Court may direct a count or counts to be added to the charge or information charging the accused with such offence or offences, and the Court shall give their judgment thereon as if such count or counts had formed a part of the original charge or information."

The charge preferred against the appellant in the first instance contained six counts for offences under the Streets and Buildings Regulations Law, Cap. 96. At an early stage of the pro-

ceedings the trial Court sustained a submission made by appellant's counsel with the consent of respondent's counsel, that the last three counts concerning a different building should be tried separately and thus the trial proceeded on the first three counts.

At the conclusion of the case the trial Judge, after acquitting the appellant on the first three counts on which she was tried, acting under section 85 (4) of the Criminal Procedure Law (*supra*) directed a new count to be added charging the appellant with the offence of suffering the erection of a building without a permit from the appropriate authority, contrary to sections 3 (1) (*b*) and 20 of the Streets and Buildings Regulation Law, Cap. 96. Appellant was convicted on such new count and was sentenced to pay a fine of £20, £45 costs of prosecution, and she was further ordered to demolish the buildings in question.

On appeal against conviction and sentence :

Held, (1) in the present case, mere comparison of the particulars of the offence of the added count 3A, with those of the counts on which the appellant was tried and acquitted, shows substantial differences where the appellant has had no opportunity of presenting her aspect of the case, and making her defence. We, therefore, think that the view taken by the learned trial Judge that " the accused has not been prejudiced with her defence ", cannot be justified. In view of the possibility of future proceedings on a similar count, we do not think that we should go further into the matter ; or deal with the other grounds of appeal.

(2) On the ground that the procedure provided in section 85 (4) could not be adopted in the circumstances of this case, without prejudice to the accused in her defence, we are unanimously of the opinion that the appeal must succeed and the conviction and sentence imposed on the added count, including the demolition order, and the order for costs, must be set aside.

(3) It should be added, however, that as the appellant has not been tried on the added count, neither her conviction thereon in the District Court, nor her discharge in this appeal, can prejudice or in any way affect future proceedings for the offence described in the added count 3A. Such conviction and sentence (including the demolition order and the order for costs) are set aside as a nullity.

Appeal allowed. Conviction, sentence and order made on the added count, set aside.

Cases referred to :

Kallis v. *The Police* 23 C.L.R. 16 ;

Chrysostomou v. *The Police* 24 C.L.R. 192 ;

Appeal against conviction and sentence.

Appeal against the conviction and sentence imposed on the appellant who was convicted on the 18th March, 1965, at the District Court of Nicosia (Criminal Case No. 7908/64) on one count of the offence of suffering the erection of a building without a permit from the appropriate authority contrary to sections 3 (1) (*b*) and 20 of the Streets and Buildings Regulation Law, Cap. 96, and was sentenced by Georghiou, D.J. to pay a fine of £20 and £45 costs of prosecution and she was further ordered to demolish the building in question.

L. Demetriades, for the appellant.

K. Michaelides, for the respondent.

The facts sufficiently appear in the Judgment of the Court delivered by :

VASSILIADES, J.: This is an appeal from the conviction and sentence in a prosecution in the District Court of Nicosia, by the Municipality of the town against the appellant, for erecting a building contrary to the provisions of the Streets and Buildings Regulation Law, Cap. 96. The Court sentenced appellant to a fine of £20 and made an order against her for the demolition of the building and for the payment of £45 costs of prosecution.

The facts of the case appear in the judgment of the learned trial Judge who, apparently, went very thoroughly into this strongly contested case. As far as material to the present appeal the facts are shortly as follows :—

The appellant (accused in the case before the District Court), a married woman, was the owner of immovable property within the Municipal area of Nicosia town. In or about the year 1956 a new road connecting the town with the airport, was constructed by the appropriate Government authority, passing through the property of the appellant.

The main building standing on the property in question, remained on the southern part of the road ; while a small plot with some out-buildings thereon, remained on the

northern side of the new road. The part required for the road was expropriated against payment of compensation ; the remaining parts, now known as plots 577 (on the southern side) and 578 (on the northern side) are still the property of the appellant. The latter plot, less than 1/10th of an evlek (according to the judgment of the trial Court ; page 19B) with the outbuildings thereon, appears to have been originally covered by the acquisition, but it was later returned to the appellant as surplus (περίσσευμα κατόπιν καταναγκαστικῆς ἀποκτήσεως Page 19E) and was registered in her name accordingly in December, 1961.

Three years later, in December, 1964, the Inspector of Buildings of the Municipal Corporation of Nicosia, visiting the area, noticed, according to his evidence (P.W. 1 page 4D) that some building-operations were going on on this small piece of land, quite close to the road. On further investigation it appeared that appellant's husband, who was managing his wife's property, was in the course of putting up a new building in the place of the old outbuildings, without having obtained the required permits under the Streets and Buildings Regulation Law. And, a few days later, on the 18th December, 1964, the Municipality of Nicosia instituted the present proceedings (Case No. 7908/64) against the appellant.

The charge contained six counts, all of them under the provisions of the Streets and Buildings Regulation Law, Cap. 96. We need not go into detail regarding these counts because none of them matters at this stage of the proceedings. We made reference to the number of counts to show how carefully counsel conducting the prosecution on behalf of the Municipality handled the matter. The appellant, appearing through counsel, entered a plea of ' not guilty ' to all the counts in the charge. And early in the proceedings counsel for the appellant submitted that the last three counts concerning a different building, should be tried separately ; counsel for the prosecution agreeing to the proposal, the Court made an order accordingly (p. 3G). The case thus proceeded on the first three counts (p. 4A).

After a strongly contested trial, the Judge read his considered judgment on the 15th March, 1965 (p. 18 of the record). In view of the result of this appeal, we do not wish to go further into the judgment than to express appreciation for the thorough and careful manner in which the learned trial Judge went into the matters before him. His conclusion was that the appellant should be acquitted on the three counts on which she was tried—and in fact

he acquitted and discharged her accordingly—but towards the end of his judgment, the judge added a new count on the charge-sheet, purporting to do so under the provisions of section 85 of the Criminal Procedure Law (Cap. 155) and convicted the appellant on such new count.

The first ground upon which this appeal is taken is that the learned trial Judge " erred in directing a new count " to be added on the charge and convicting and sentencing " the accused on such count ".

Counsel for the appellant, elaborating on this ground, submitted that the provisions of section 85 are not applicable in the circumstances, without prejudice to the accused ; and therefore should not have been applied. The appellant was prejudiced in her defence to the new count, it was submitted on her behalf, in that she never had the opportunity of making a defence to the count in question which may well have been different to the defence she had successfully put up to the counts on which she was acquitted.

Learned Counsel for the prosecution on the other hand, submitted that this was a case where the trial Judge could properly act as he did, under the provisions of section 85. And in support of his submission referred to *Chrysostomou* v. *The Police*, 24, C.L.R. p. 192, at p. 194 ; and to *Kallis* v. *The Police* 23 C.L.R. p. 16.

In the latter case, regarding prejudice to the appellant, the judgment of the Court of Appeal at p. 19 of the report reads :—

> " On the question of prejudice to the appellant in his defence through the course adopted, it is evident from the judgment that the judge applied his mind to this aspect of the matter and came to the conclusion that no such prejudice would arise. We see no sufficient reason to hold that the learned judge was wrong in that, in all the circumstances of the case, and indeed no suggestion has been put before us as to how any real prejudice could have been occasioned."

On this same question of prejudice, the judgment in the former case, *Chrysostomou* v. *The Police* (*supra*) at p. 196 of the report, reads :—

> " As to the last requirement that there must not be any possibility that the accused might be prejudiced in his defence by the addition of the new count, although made a ground of the appeal, counsel failed to point to us how and in what respect could the

appellant be prejudiced and we are, indeed, at a loss to see how in such a clear case with such simple and clear facts could the accused possibly be prejudiced in his defence."

In the present case, mere comparison of the particulars of the offence of the added count 3A, with those of the counts on which the appellant was tried and acquitted, shows substantial differences where the appellant has had no opportunity of presenting her aspect of the case, and making her defence. We, therefore, think that the view taken by the learned trial Judge that " the accused has not been prejudiced with her defence ", cannot be justified. In view of the possibility of future proceedings on a similar count, we do not think that we should go further into the matter ; or deal with the other grounds of appeal.

On the ground that the procedure provided in section 85 (4) could not be adopted in the circumstances of this case, without prejudice to the accused in her defence, we are unanimously of the opinion that the appeal must succeed and the conviction and sentence imposed on the added count, including the demolition order, and the order for costs, must be set aside.

It should be added, however, that as the appellant has not been tried on the added count, neither her conviction thereon in the District Court, nor her discharge in this appeal, can prejudice or in any way affect future proceedings for the offence described in the added count 3A. Such conviction and sentence (including the demolition order and the order for costs) are set aside as a nullity.

In the result the appeal is allowed and the conviction, sentence and orders made on the added count 3A, are set aside.

Appeal allowed. Conviction, sentence and orders made on the added count, set aside.