NASOS ISAIAS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 2833)

Trial in Criminal Cases—Material Irregularities—Amounting to substantial miscarriage of justice within section 145 (1) (*b*) *of the Criminal Procedure Law, Cap.* 155—*Irregularities by the prosecution at the trial prejudicial to the defence—Conviction quashed on appeal on that ground—Section* 145 (1), (*b*) (supra).

Criminal Procedure—Appeal against conviction—Non-support of conviction by prosecution counsel on appeal—Responsibility still with the Court of Appeal to decide whether conviction can stand—Grounds on which the Appellate Court may interfere with conviction resulting from a proper trial by a competent Court.

Criminal Procedure—Appeal—Re-trial—Considerations which tipped the scales against ordering re-trial in the present case after the Court of Appeal set aside the conviction for serious irregularities by the prosecution at the trial before the trial court.

Criminal Procedure—Appeal—Record of proceedings—Allegations of defect in the record—Steps to be taken early in proceedings and before the hearing of appeal—To enable matter to be considered by the other side and the Court concerned—Fresh material not appearing on the record—How far can be put in before the Appellate Court—The Courts of Justice Law, 1960 (*Law of the Republic No.* 14 *of* 1960) *section* 25 (3)—*Powers of the Court of Appeal, under section* 146 (*a*) *of the Criminal Procedure Law, Cap.* 155, *to call upon the trial Court to furnish any information it may think necessary beyond that furnished by the record and the file of the proceedings.*

Miscarriage of justice—See above.

Irregularities—Serious irregularities by the prosecution at the trial amounting to a substantial miscarriage of justice—See above.

Re-trial—Considerations which just refrained the Court of Appeal from ordering a new trial—See above.

Criminal Appeal—Record of proceedings—Defects of, etc.—See above.

Criminal Procedure—Nolle prosequi—The Criminal Procedure Law Cap. 155, section 154—It would seem that the powers of the Attorney-General to enter a nolle prosequi can only be used at any stage "before judgment"—And this should be understood to mean before judgment at the trial Court—And not at the Court of Appeal.

Nolle prosequi—See immediately above.

Bail—Section 157 of the Criminal Procedure Law, Cap. 155—Refusal by the trial Court to grant bail after conviction and sentence—Appeal against that refusal—Appeal abandoned—The Supreme Court however thought fit to remind in this respect the provisions in section 157 of Cap. 155 (supra) and, also, the last part of the decision in Yannoulatos v. The Police XVII C.L.R. 67, at p. 69.

Criminal Procedure—Bail after conviction and sentence—Refusal to grant bail by the trial Court—Appeal—See immediately above.

Cases referred to :

Yannoulatos v. *The Police*, *XVII C.L.R.* 67, *at p.* 69.

Appeal against conviction and sentence.

Appeal against conviction and sentence imposed on the appellant who was convicted on the 10th August, 1966, at the District Court of Nicosia (sitting at Morphou) (Criminal Case No. 1473/66) on one count of the offence of indecent assault on a female, contrary to sections 151 and 35 of the Criminal Code, Cap. 154, and was sentenced by Pitsillides, D.J., to 12 months' imprisonment.

G. Ladas, with *A. Pantelides*, for the appellant.

K. Talarides, Counsel of the Republic, for the respondents.

The following ruling was delivered on the 4th October, 1966, by :

VASSILIADES, AG. P.: The Court is unanimously of the opinion that the appellant should now be allowed to proceed with the merits of the appeal, upon the grounds in the notice as supplemented on the 22nd September, and as amended today.

The objection taken by Mr. Talarides, to the statements made by the two counsel for the appellant in their affidavit of the 1st October, regarding the record, may, we think, be more conveniently considered, if during the hearing of the appeal it will appear that there is substance in such omissions, which may affect the outcome of the appeal. In such case, we shall bear in mind the powers of the Court under section 146 (*a*) of the Criminal Procedure Law (Cap. 155) which provides that this Court, at any stage of an appeal, may call upon the trial Court to furnish any information the Supreme Court may think necessary beyond that which is furnished by the file of proceedings.

In this connection, however, we would observe and, if necessary, direct that when an appellant alleges any defect in the record of proceedings and applies for correction, it is desirable that such a step should be taken early in the proceedings, and before the hearing of the appeal, so as to enable the matter to be considered both by the other side and by the court concerned. The Registrar who prepared the record, and the Judge whose notes and rulings the record purports to contain, should have a sufficient opportunity to consider the allegations regarding defects of the record, so as to take in time, any steps which may appear to them proper and reasonable in the circumstances, in order to assist this Court to deal with the appeal.

Order in terms.

The following judgment was delivered on the 12th October, 1966, by :

VASSILIADES, AG. P.: The sudden and unexpected development with which the Court was confronted, at this stage of the hearing of the present appeal, made it necessary for us to consider at short notice and within narrow limits of time, the matters arising from such development.

On this fourth day of the hearing of the appeal, when we were here to listen to learned counsel for the prosecution in answer to the long and able argument put forward on behalf of the appellant, we were surprised with Mr. Talarides' statement that he cannot support the conviction. Having examined and compared, he said, the evidence of the main witnesses for the prosecution with their statements to the Police during the investigation of the case, he now finds himself unable to address the Court in support of the con-

viction. He found such radical and fundamental differences and discrepancies in their versions that make it impossible for him to support a conviction based upon such evidence. Mr. Talarides went even further. Conscious of his duty to the Court he felt himself bound to say that material defects in the evidence of some prosecution witnesses were not disclosed, or were even, apparently, concealed from the trial Court. And learned counsel for the Republic suggested putting before this Court the statements in question, now in his possession.

To an enquiry from the Court how did he propose putting in at this stage of the proceedings, this fresh material, Mr. Talarides referred to the powers of the Court under section 25 (3) of the Courts of Justice Law, 1960. And to a further enquiry whether this was a step in exercise of the Attorney-General's powers of putting an end to the prosecution by a *nolle prosequi* under Section 154 of the Criminal Procedure Law (Cap. 155) learned counsel submitted that such powers can only be used at any stage "before judgment"; and this should be understood to mean before judgment at the trial Court. *Nolle prosequi* under section 154, cannot be made use of by the Attorney-General in order to put an end to proceedings after conviction counsel submitted.

We have not heard full argument on the point, and, in the circumstances of this case, we do not think that we should call for one now. We are inclined to accept the submission of learned counsel for the Republic, and to agree with him that the present proceeding cannot be terminated under section 154 of our Criminal Procedure Law.

We, however, still have to consider whether the statement of learned counsel for the Republic, that he cannot support the conviction, is sufficient for us, under any circumstances, to allow an appeal of this nature, and quash a conviction.

Having given the matter careful consideration, we take the view that the responsibility is still left with this Court to decide in such circumstances, whether a conviction can stand even without the support of counsel handling the prosecution case on appeal. We think that if in the opinion of this Court the evidence on record, and the other matters upon which the trial Court based the conviction, is sufficient to support it, this Court will not interfere. A conviction resulting from a proper trial by the competent

Court, can only be quashed if this Court is positively satisfied that there are sufficient reasons for setting aside the conviction.

Considering the matter before us at this stage of the present appeal, in the light of the able argument of counsel for the appellant, we reached the conclusion that the conviction cannot stand. The main reasons which led us to this conclusion were material irregularities going to the root of the trial, which, to our mind, amounted to a substantial miscarriage of justice within the provisions of Section 145 (1) (*b*) of the Criminal Procedure Law, Cap. 155.

The first irregularity was that the prosecution, although challenged on the first day of the trial (27th May, 1966), refused to specify the particular day or days of the offence stating that " it was not possible for the prosecution to fix a definite date. Prosecution could fix only a period of about 20 days but that period does not cover the whole story ". Thereupon the trial Court directed the charge to be amended to read as follows :—

> " The accused between 1.9.65 and 17.2.66, at Morphou, in the District of Nicosia, did unlawfully and indecently assault Effimia Panayiotou Erioti of Morphou, a female."

When the evidence was called, however, immediately after this statement by the prosecution, it was all directed to what the prosecution allege to have taken place in the early afternoon of the 16th February, 1966.

From this it would appear that (*a*) either the prosecution tried deliberately to prejudice the defence and mislead the Court, or (*b*) that the statements of the witnesses in the possession of the Police did not specify the date of the offence as the 16th February, 1966, and that, therefore, there were material inconsistencies in the evidence of the witnesses before the Court as compared with their statements to the police. On either view this would, in our opinion, be a material irregularity at the trial, prejudicing the defence which, in the circumstances must be regarded as going to the root of the trial.

The failure of the prosecution to specify the date of the offence as it eventually emerged from the evidence of the witnesses before the Court, that is to say, on the one specific day in February, resulted also in the wrongful admission of evidence, highly prejudicial to the accused.

The other serious irregularity was the obvious obliteration and alteration of the date of the offence on the formal charge dated 28th February, 1966 (Exhibit No. 7). If the original specific date in the charge was the "16th" February, 1966, and not any other day in February, why did not the prosecution either in the charge-sheet which was filed in Court on the 14th April, 1966, or when challenged on the first day of the trial (27th May, 1966) fix the 16th February as the date of the offence, but made the statement quoted earlier in this judgment. We are of the view that this is also a material irregularity prejudicing the defence in this case, to the extent of going to the root of the conviction.

We find it unnecessary to enter into more detail ; but we cannot omit saying in unambiguous terms, that it has been made to appear at this stage of the proceedings, that the prosecution at the trial Court was improperly and unsatisfactorily conducted. We hope that the appropriate authority will investigate into this serious matter ; and take such steps as may appear appropriate in the circumstances, to prevent repetition in future.

We now come to the question whether in the circumstances of this case, we should make an order for re-trial. We gave this matter anxious consideration. On the one hand, we have to bear in mind the nature of the offence, and the force with which such conduct disturbs public feeling in the community ; and on the other hand, we must give full consideration to the damage which a re-trial would cause to the victim in the case ; a little girl of eight. In this connection, we have also to consider the consequences of a new trial on the parents and other members of the family of the girl ; and, the effect of such a proceeding on the members of the family of the appellant, especially his wife and children of school age.

After giving to all these matters full and anxious consideration, we found the scales of justice leaning against a new trial. We must say, however, that it is with great reluctance that we found ourselves driven to a decision which leaves a case of this nature, without a verdict from a competent court, into the guilt or otherwise of the person involved.

In the result we must allow the appeal and set aside the conviction. We do not wish to close this case without

thanking counsel on both sides, for assisting this Court to deal with the grave matters which have arisen in this appeal.

And now a word about the other appeal in these proceedings (Appeal No. 2834) from the trial Court's refusal to grant bail after conviction and sentence for imprisonment. At the opening of the case before us learned counsel for the appellant proposed dropping that appeal ; but we thought that as it appeared to present a novel proceeding in our practices, we should call for argument in due course, so as to have the matter decided.

In view of the developments, however, which brought the main appeal to a conclusion, we do not think that we should hear more in this case. We shall treat the appeal against the trial Court's refusal to grant bail after sentence of imprisonment, as abandoned ; and shall dismiss it accordingly. But before doing so, we would like to draw attention to the provisions of section 157 of the Criminal Procedure Law (Cap. 155) which may bear on the matter ; also to the last part of the Judgment in *Yannoulatos* v. *The Police* (Criminal Appeal No. 1766 reported in 17 C.L.R. p. 67, at p. 69) which deals with the same point under the law as it stood at that time (1943).

In conclusion, the appeal against conviction is allowed ; the conviction is set aside ; and the appellant must be discharged. Judgment and Order accordingly.

Appeal allowed. Conviction set aside.