[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

COSTAS ANTONI, ALIAS COSTOURIS AND OTHERS,

Appellants,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeals Nos.* 3460–3462).

Evidence in criminal cases—Possession of narcotics (cannabis sativa)—Ingredients of the offence—There must be proof that the matter possessed was cannabis in the sense of section 2 *of the Narcotic Drugs Law,* 1967 (*Law No.* 3 *of* 1967)*—In the instant case the prosecution sought to effect such proof by means of a certificate not admissible in evidence under section* 12 *of the Evidence Law, Cap.* 9*—Thus, the existence of a vital ingredient of the offence charged was not proved—Admission (express or implied) by the defence, immaterial—Conviction must be quashed—And in the circumstances a new trial ordered.*

Canabis—Definition—Section 2 *of the said Law No.* 3 *of* 1967.

"Analyst" in section 12 (2) (*ii*) *of the Evidence Law, Cap.* 9*—As from January,* 1972, *the title "Analyst" should be substituted by the title "Senior Analyst"—See the Order published in the Official Gazette on July* 28, 1972 (*Third Supplement, Not.* 138) *made under section* 3 *of the Change of Titles Law, Cap.* 40.

"Senior Analyst"—See immediately hereabove.

New trial—Principles upon which it is ordered—Conviction for possession of narcotics—Set aside because of failure to prove a vital ingredient of the offence viz. *that the matter possessed was cannabis sativa—What has been attempted to be done in this case did not satisfy the requirements of section* 12 *of the Evidence Law, Cap.* 9, supra*—New trial ordered in the light of the relevant considerations including the conduct of the defence regarding the proof of such ingredient.*

Narcotic Drugs—Possession—Ingredients of the offence—Proof—Section 12 *of the Evidence Law, Cap.* 9*—See further* supra.

Criminal Procedure—Appeal—New trial—Principles applicable.

Words and Phrases—"Analyst", "Senior Analyst"—Cannabis sativa.

The facts as well as the relevant statutory and other provisions are set out in the judgment of the Court quashing the Appellant's conviction for possession of narcotic drugs (cannabis sativa) and ordering a new trial to be held.

Cases referred to:

Petrides v. *The Republic*, 1964 C.L.R. 413, at p. 431.

Appeal against conviction.

Appeal against conviction by Costas Antoni, alias Costouris and two others who were convicted on the 29th May, 1973, at the Assize Court of Nicosia (Criminal Case No. 724/73) of the offence of possessing narcotic drugs contrary to sections 3, 6 and 24 of the Narcotic Drugs Law, 1967 (Law 3/67) and regulation 5 of the Narcotic Drugs Regulations, 1967, and Appellant No. 3 was also convicted of the offence of providing the other Appellants with narcotic drugs contrary to regulation 4(1) of the Narcotic Drugs Regulations, 1967, and were sentenced by Ioannides, P.D.C., Evangelides and Pierides, Ag. D.J.J. as follows: For the offence of possessing narcotic drugs Appellant 1 was sentenced to 2½ years' imprisonment and Appellants 2 and 3 were sentenced to 2 years' imprisonment each; Appellant 3 was also sentenced to a concurrent term of imprisonment for 2 years for the offence of providing narcotic drugs.

V. Dervish with *D. Papachrysostomou*, for Appellant No. 1.

L. Georghiadou (*Mrs.*), for Appellant No. 2.

V. Dervish and *S. Katri*, for Appellant No. 3.

A. Evangelou, Counsel of the Republic, with *G. Constantinou* (*Miss*), for the Respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:–

TRIANTAFYLLIDES, P.: The three Appellants, who were tried together before the Assize Court in Nicosia and whose appeals were heard together, were convicted of the offence of possessing, unlawfully a narcotic drug, namely 285 grams of cannabis sativa; Appellant 3 was also convicted of the offence of providing the other Appellants with the said quantity of cannabis.

The first Appellant (accused 1) was sentenced to two and a half years' imprisonment as from the 29th May, 1973, and the other two Appellants (accused 2 and 3) were sentenced each to two years' imprisonment as from the same date; the third Appellant (accused 3) was sentenced, also, to a concurrent term of two years' imprisonment for the additional offence on which he was separately found guilty, as mentioned above.

At the end of the case before the Assize Court, in the course of the final addresses of counsel, there was raised the issue that it had not been proved according to law that what had been found in the possession of the Appellants was cannabis in the sense of the definition in the relevant legislation. The basis for this argument was that all the evidence that had been adduced in this respect was a certificate dated 23rd January, 1973, signed by Mr. John Lovarides, a Government Analyst, wherein he stated that the 285 grams of vegetable matter which had been delivered to him had been analysed and found to be the flowering tops of cannabis from which the resin had not been extracted. It was submitted that, as by an Order which was published in the official Gazette of the 28th July, 1972 (Third Supplement, Not. 138), under section 3 of the Change of Titles Law, Cap. 40, it has been retrospectively provided that the title "Analyst" should, as from the 1st January, 1972, be substituted by the title " Senior Analyst", and as on the basis of evidence adduced before the Assize Court Mr. Lovarides was an " Analyst, 1st grade", and not the " Senior Analyst", he was not the officer designated, as a scientific expert, by section 12 of the Evidence Law, Cap. 9, and, therefore, the nature of the vegetable matter in question could not have been proved before the Assize Court, under the said section 12, by the production of the said certificate; this could only have been done if the said certificate was signed by the Senior Analyst, who is another person, according to the evidence adduced.

This objection before the Assize Court was not taken at the close of the case for the prosecution nor was any objection taken as regards the admissibility of the certificate at the time when it was produced. It is, also, to be clearly derived from the record that Mr. Lovarides was asked to be available to give evidence at the trial and was placed at the disposal of the defence, but the defence stated that he was not required; so his certificate was produced without Mr. Lovarides giving evidence about it. It does not appear that, at any stage during the trial, it was disputed, actually, that the 285 grams of vegetable matter

concerned was cannabis in the sense of the relevant definition in section 2 of the Narcotic Drugs Law, 1967 (Law 3/67); but in a criminal trial an admission cannot be substituted in the place of proof of an essential ingredient of the offence involved; nor can such proof be dispensed with due to conduct of the defence which might be taken to amount to an implied admission.

As the issue in question was raised on appeal by the notices of appeal of all three Appellants and as it was argued before us, we have had to examine, even at this late stage of the present criminal proceedings, whether in fact there was duly proved, according to law, one of the essential ingredients of the offences in respect of which the Appellants were convicted.

The aforesaid definition is to be found in section 2 of Law 3/67 and it reads as follows:-

> " ' Cannabis' (except where used in the expression 'cannabis resin') means the flowering or fruiting tops of any plant of the genus cannabis from which the resin has not been extracted, by what ever name they may be designated".

So, it is clear that in order that the Appellants could be lawfully convicted it was not sufficient to establish merely that the vegetable matter concerned was cannabis, but it had to be proved that it was cannabis as defined above. This proof was contained in the aforementioned certificate of Mr. Lovarides; thus the vital issue before us is whether or not that certificate was properly received in evidence and treated as amounting to the requisite proof. It was put in under section 12 of Cap. 9 which reads as follows:-

> " (1) Any document purporting to be a certificate or report under the hand of any scientific expert on any matter or thing which has been submitted to him for examination, analysis or report shall be admissible in any criminal proceeding as evidence of the facts stated therein without proof of the signature or appointment of such scientific expert, unless the Court, acting *ex proprio motu* or at the request of a party to the proceeding, requires any such scientific expert to be called as a witness.
>
> (2) In this section the expression ' scientific expert' refers to -

(a) the officers from time to time holding the following appointments in the public service of the Colony or acting in such appointments:-

(i) Senior Specialist (Pathologist);

(ii) Analyst;

(iii) Inspector of Mines;

(b) any officer or person declared by the Governor, by order made with the advice and assistance of the Chief Justice and published in the Gazette, to be a scientific expert for the purposes of this section".

Due to the already mentioned Notification under Cap. 40, the term " Analyst" in section 12, above, has to be read as being " Senior Analyst".

The trial Court dealt in its judgment with the matter in question as follows:-

> " The third question which we have to consider is whether the certificate produced in Court as *exhibit* 5 in which it was stated that 285 grams found in the car is cannabis sativa, is admissible as evidence in accordance with section 12 of the Evidence Law. The learned counsel for accused 2 submitted that this *exhibit* was not signed by the 'analyst' provided for by the said section, because for the word 'analyst' in section 12 (2) (a) we should now read the word ' Senior Analyst' on account of changes in the designation of officers in the office of the Government Analyst. We do not agree with this view, 'analyst' in the said section means 'the Government Analyst' and in accordance with the Interpretation Law, section 2, ' Analyst' means the 'Analyst to the Government' and includes any Assistant or other Analyst employed by the Government. In accordance with the evidence, the person who signed *exhibit* 5 was prior to the change in the designations an Assistant Analyst and later as from 1st January, 1972, was appointed as an Analyst First Grade.
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> We are, therefore, satisfied that the said *exhibit* was properly admitted as evidence before us".

It is very useful, in interpreting section 12, and in examining whether or not the above reasoning of the trial Court is right, to trace the history of such section:

It was first introduced by the Criminal Evidence and Procedure (Amendment) Law, 1933 (Law 37/33) as section 5B of the then in force Criminal Evidence and Procedure Law, 1929 (Law 12/29); it read as follows:-

"Whenever a preliminary inquiry on a charge brought against any person for an offence not triable summarily is being held before a Magisterial Court, any document purporting to be a report under the hand of the Government Analyst or the Government Bacteriologist upon any matter or thing relating to such offence and duly submitted to him by the Police for examination or analysis and report, shall be receivable in evidence when tendered by the prosecution and shall be evidence of all that is stated therein both at such preliminary inquiry and at the Assize Court if such person is committed for trial:

Provided -

(a) that, notwithstanding anything in any enactment contained, the prosecution may, without notice to the accused, call the Government Analyst or the Government Bacteriologist who has signed such report, as the case may be, to give evidence at the trial of the offence before the Assize Court, and

(b) that, at the request of the Assize Court or at a written request by or on behalf of the accused notified to the prosecution not less than seven days before the trial in the Assize Court, the prosecution shall call the Government Analyst or the Government Bacteriologist, as the case may be, to give evidence before the Assize Court".

It is to be noted that in section 5B there was not mentioned the "Analyst" but the "Government Analyst"; the other expert mentioned therein was the "Government Bacteriologist".

There then followed the enactment of the Evidence Law, 1946 (Law 14/46) and section 5B, above, was replaced by section 12 of the new Law. The experts named therein were "the Government Analyst or the Government Bacteriologist or the Government Pathologist" or "any person purporting to act on their behalf or on behalf of any of them"; the new section 12 read as follows:-

" 12. Whenever a preliminary inquiry on a charge brought against any person is being held before a Court, any document purporting to be a report under the hand of the government analyst or the government bacteriologist or the government pathologist or of any person purporting to act on their behalf or on behalf of any of them upon any matter or thing relating to such offence and submitted by the Police to such analyst, bacteriologist, pathologist or person for examination or analysis and report, shall be admissible as evidence when tendered by the prosecution and shall be evidence of all that is stated therein both at such preliminary inquiry and at the Assize Court if the person charged is committed for trial:

Provided that -

(a) notwithstanding anything in any enactment contained, the prosecution may, without notice to the accused, call the person who has signed such report to give evidence at the trial of the offence before the Assize Court; and

(b) at the request of the Assize Court or at a written request by or on behalf of the accused, notified to the prosecution not less than seven days before the trial in the Assize Court, the prosecution shall call the person who has signed such report to give evidence before the Assize Court".

Section 12 of Law 14/46 became later section 12 of the Evidence Law, Cap. 15, in the 1949 Revised Edition of the Laws of Cyprus.

By the Evidence (Amendment) Law, 1955 (Law 36/55) the "inspector of mines" was added to the experts referred to in section 12, and by the Evidence (Amendment) Law, 1957 (Law 6/57) section 12 of Cap. 15 was repealed and replaced by a new section 12 which is the same as the at present in force section 12 in Cap. 9 of the 1959 Revised Edition of the Laws of Cyprus.

It is to be noted that from the new section 12 there was omitted the provision relating to the admissibility in evidence of certificates by any person purporting to act on behalf of any of the scientific experts expressly named therein and there was introduced a different description of such scientific experts, namely that they are the officers from time to time holding the

appointments in the public service (or acting therein) of Senior Specialist (Pathologist), Analyst and Inspector of Mines.

The Interpretation Law, to which the trial Court has referred in the relevant part of its judgment, was first enacted in 1901 (Law 10/1901) but it did not then contain any definition concerning the " Government Analyst". Such definition was introduced when the Interpretation Law, 1935 (Law 26/35)—now Cap. 1—was enacted and it reads as follows:-

> " ' Government Analyst' means the Analyst to the Government and includes any assistant or other analyst employed by the Government".

Of course, in view of the Order made, as aforesaid, under Cap. 40 the term " Analyst" in the above definition must now read " Senior Analyst".

In our view when one reads the above definition in conjunction with the wording of subsection (2) of section 12 of Cap. 9, as well as with the said Order under Cap. 40, the conclusion to be reached is that the " Senior Analyst" referred to in section 12(2) of Cap. 9 is the " Senior Analyst to the Government", who is only one of the persons mentioned in such definition. This conclusion is, also, the only one consistent with the individualizing words "from time to time holding the following appointments in the public service ... or acting in such appointments" in section 12(2) of Cap. 9. As Mr. Lovarides was admittedly not the " Senior Analyst to the Government" it follows that his certificate, by which it was attempted to prove that the vegetable matter concerned in these proceedings was cannabis in the sense of Law 3/67, was not admissible under section 12 of Cap. 9, and as there is no other proper evidence to that effect, we have to find that the existence of a vital ingredient of the commission of the offences of which the Appellants were convicted was not proved according to law and, so, the only course open to us is to set aside the convictions of all Appellants.

There remains for us to decide the question of whether we should, in the exercise of our relevant powers, order a new trial of all or any of the Appellants.

In the light of all relevant considerations, including the conduct of the defence regarding the proof of the nature of the vegetable matter involved in these proceedings (as it has been

explained earlier on in this judgment), and the principles set out in case-law such as *Petrides* v. *The Republic*, 1964 C.L.R. 413, we have decided to order a new trial of all Appellants, in the interests of justice.

We have not lost sight of the fact that all Appellants have spent already quite some time in prison, serving their sentences, and so, in this respect, we can usefully quote the following paragraph from the judgment in the *Petrides* case (at p. 431):-

> " It goes without saying that should they, or any of them, be found guilty again, any time spent in prison between their first and second convictions may properly be taken into account as regards assessing sentence; otherwise, the new trial Court should be free to assess sentence in a manner compatible with the gravity of the crime without being hindered in any way by the sentences imposed at the first trial".

We have decided, as in the *Petrides* case, that all Appellants are to remain in custody until their trial by a differently constituted Assize Court in Nicosia, and it is hoped that arrangements will be made for that trial to take place as early as possible.

In concluding this judgment we might draw attention to the possibility of making use of the powers under section 12 (2) (b) for the purpose of adding to the list of scientific experts officials like Mr. Lovarides, in order to relieve the Senior Analyst from dealing personally with a great multitude of cases. This is a matter for which the appropriate authorities may take, if they deem it fit, appropriate action.

In the result, these appeals are allowed, the convictions of the Appellants are set aside and a new trial is ordered.

Appeals allowed. Convictions set aside. New trial ordered.