[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

NEOPHYTOS ANASTASSI,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 3638).

Evidence—Identification—Mistaken identification—Need for care when identity is in issue—Conviction for stealing crops resting on evidence of a single eye-witness—Section 265(1) of the Criminal Code, Cap. 154—In the particular circumstances there did exist the possibility of a mistake having been made by the said witness as regards the identity of the thief—Conviction quashed.

Criminal Law—Silence of prisoner when charged by Police under caution—Taken into account by judge in convicting him—Conviction quashed.

Silence—Silence of prisoner when charged by Police under caution—Comment by judge—Conviction quashed.

The appellant complains against his conviction of the offence of stealing crops contrary to section 265(1) of the Criminal Code, Cap. 154.

The only evidence against him came from a single eye-witness who was a guard at the farm, and who, because of previous thefts from the plantations there, was keeping watch in the hothouse in order to catch the culprits. According to his testimony, he saw, just after sunset, the appellant entering the hothouse, taking some cucumbers and, then, running away. The witness called the appellant twice by name, and asked him to stop, but the appellant did not do so. It is significant that when the witness reached the main road, about five minutes after he witnessed the theft, he stated that he had to stand under a street lamp, in order to see what time it was, because, as he explained, he would otherwise have to bring his watch very close to his eyes in order to read the time.

The trial judge accepted the evidence of the guard as regards the identification of the appellant. And in convicting the appellant he appears to have taken into account the fact that, though his defence was an alibi, when he was formally charged by the police with the offence in question, and duly cautioned that he was not bound to say anything, he said only. "I do not admit", and he failed to put forward his alibi.

Held, 1. The matter of identification is of cardinal importance in criminal cases. One of the matters to be considered, as to whether a mistake had occurred, was the question of whether there was sufficient light for the identification that had been made. (See *Arthurs* v. *Attorney-General for Northern Ireland,* 55 Cr. App. R. 161 at p. 167).

2. The fact that five minutes after the offence the witness had to stand under a street-lamp, in order to see what time it was, shows that there might not have been, actually, sufficient light, in the hothouse, for a safe identification, five minutes earlier; and, thus, a doubt, in this respect, cannot be reasonably excluded.

3. The judge erred in law in taking into account the failure of the accused to put forward his alibi, when he was formally charged by the police. It is well-settled that an accused in a criminal case cannot be treated as obliged to give an explanation putting forward his defence, when he makes a statement to the police under caution (see, *inter alia, Davis,* 43 Cr. App. R. 215, *Ryan,* 50 Cr. App. R. 144, and *Hoare,* 50 Cr. App. R. 166).

Appeal allowed.

Cases referred to :

The People (A.-G.) v. *Dominic Casey (No. 2),* [1963] I.R. 33;

Arthurs v. *Attorney-General for Northern Ireland,* 55 Cr. App. R. 161 at pp. 167, 168, 169;

Davis, 43 Cr. App. R. 215;

Ryan, 50 Cr. App. R. 144;

Hoare, 50 Cr. App. R. 166.

Appeal against conviction.

Appeal against conviction by Neophytos Anastassi who was convicted on the 9th July, 1975 at the District Court of Paphos (Criminal Case No. 562/75) on one count of the offence of stealing crops contrary to section 265(1) of the Criminal Code, Cap. 154 and was sentenced by Hji Constantinou, S.D.J. to pay a fine of £15.-.

E. Korakides, for the appellant.

Gl. Michaelides, for the respondents.

The judgment of the Court was delivered by :-

TRIANTAFYLLIDES, P.: The appellant has appealed against his conviction of the offence of stealing crops, contrary to section 265(1) of the Criminal Code, Cap. 154, as a result of which he was sentenced to pay a fine of £15.

The appellant is a rural constable, 45 years old.

The offence was committed on January 16, 1975, when the appellant was seen, according to the evidence of a witness for the prosecution, stealing cucumbers from a hothouse in the "Achelia Government Farm", near Paphos.

The case against the appellant was based on the evidence of the said eye-witness, who was a guard at the farm, and who, because of previous thefts from the plantations there, was keeping watch in the hothouse in order to catch, if possible, the culprits. According to his testimony, he saw, just after sunset, the appellant entering the hothouse, taking some cucumbers and, then, running away. The witness said that he called the appellant twice by his name, and asked him to stop, but the appellant did not do so.

The house of the appellant is not far from the farm.

The guard said that, after the appellant had disappeared, he proceeded immediately to the main road, which is about 200 feet away, and, having been given a lift by a passing vehicle, he went and informed, at the nearby village of Yeroskipou, the Agricultural Officer, who is in charge of the farm, that the appellant had stolen cucumbers from the hothouse.

The trial judge accepted the evidence of the guard as regards the identification of the appellant.

This appeal has been argued mainly on the ground that on an examination as a whole of the evidence of the sole eye-witness it was unsafe to accept as reliable, beyond reasonable doubt, the identification by him of the appellant as the thief.

The matter of identification is of cardinal importance in criminal cases. It may be noted that in 1972 the Criminal Law Revision Committee in England stated, in this respect, the following (see New Law Journal, 1974, 803) :-

> "We have been much concerned by the danger of wrong convictions on account of mistaken identification of the accused and as to whether to make any recommendations with a view to lessening this danger. We regard mistaken identification as by far the greatest cause of actual or possible wrong convictions."

In the case of *The People (A - G)* v. *Dominic Casey (No. 2),* [1963] I.R. 33, which was decided by the Supreme Court of the Republic of Ireland (see New Law Journal, *supra*), Kingsmill Moore J., in delivering judgment, said that so great was the need for care when identity is in issue that a caution should be administered to the jury in all cases of visual identification, even where two or more witnesses had been positive in their evidence of identity.

The *Casey* case, *supra,* was referred to by the House of Lords in *Arthurs* v. *Attorney-General for Northern Ireland,* 55 Cr. App. R. 161; there the judgment in the *Casey* case was described by Lord Morris of Borth-y-Gest as an "interesting" one (see p. 168).

In the *Arthurs* case, which was, also, a case involving identification, the House of Lords refused to go so far as to say that as a matter of law a warning should be given to the jury, every time, about the danger of visual identification; but it is relevant to note that in dealing with the matter of identification Lord Morris stated, at first, in his judgment (at p. 168) that :-

"The rules and practices which have been evolved

in criminal cases have as their purpose that those only will be convicted who are proved to be guilty. It is the aim of all to strive to reduce to a minimum the risks of the conviction of one who is in fact innocent."

And then proceeded (at p. 169) to add the following :-

"In the present case the police constable knew the accused well. There was no dispute as to that. It was for the jury to decide not only whether the police constable was a truthful witness, but also whether the conditions which existed at the time when the police constable claimed to have seen and recognised the accused were such that a mistake might have been made."

Lord Morris had pointed out earlier on (at p. 167) that one of the matters to be considered, as to whether a mistake had occurred, was the question of whether there was sufficient light for the identification that had been made.

We are faced in this case with a similar problem : We have to decide whether or not, assuming that the guard, who allegedly identified the appellant, did genuinely believe that it was the appellant who was seen by him stealing the cucumbers, there did exist, in the particular circumstances, the possibility of a mistake having been made by the guard as regards the identity of the thief.

One particular feature of the evidence of the guard which we have specially noted is that though he said that there was sufficient light, after sunset, in the hothouse, to enable him to identify definitely the appellant, he has stated, too, that about five minutes later, when he reached the main road, he had to stand under a street lamp in order to see what time it was, because, as he explained, he would otherwise have to bring his watch very close to his eyes in order to read the time; this shows that there might not have been, actually, sufficient light, in the hothouse, for a safe identification, five minutes earlier; and, thus, a doubt, in this respect, cannot be reasonably excluded.

Another matter which appears to have been taken into account by the trial judge, in convicting the appellant,

was the fact that, though his defence was an alibi, when he was formally charged by the police with the offence in question, and duly cautioned that he was not bound to say anything, he said only "I do not admit", and he failed to put forward his alibi. In our view the judge erred in law in this connection, because it is well-settled that an accused in a criminal case cannot be treated as obliged to give an explanation putting forward his defence when he makes a statement to the police under caution (see, *inter alia, Davis,* 43 Cr. App. R. 215, *Ryan,* 50 Cr. App. R. 144, and *Hoare,* 50 Cr. App. R. 166).

In the light of all the foregoing we have decided that the better course is not to uphold the appellant's conviction; this appeal is, therefore, allowed accordingly.

Appeal allowed.