1980 February 25

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

GEORGHIOS KATSIAMALIS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3961).

Findings of trial Court—Based on credibility of witnesses—Appeal—Court of Appeal entitled, and duty bound, to intervene when of opinion that such findings were not reasonably open to the trial Court, even if it was impressed by the demeanour of the witnesses.

Criminal Law—Verdict—Safety—Evidence—Cogency—Conviction for unlawful carrying and using of a pistol—Eyewitnesses—Discrepancies of a material nature in their evidence—Appellant could not be convicted on such evidence without, at least, a lurking doubt being entertained in relation to the safety of the verdict.

Criminal Law—Alibi—False alibi—Whether it establishes guilt.

The appellant was convicted by the Assize Court of Nicosia on three counts of the offences of unlawfully carrying a pistol, of unlawfully using such pistol by firing it and of unlawfully possessing ammunition. The case of the Prosecution was that the appellant on 31.5.78 at about 11 p.m. at Germanou Patron Street, Nicosia, fired a shot in the air, using a pistol. The conviction was based on findings of the trial Court as regards the credibility of three main eyewitnesses* ("witness Xenophontos", "witness Paplomatas" and "witness HjiThomas") whose evidence was believed by the trial Court. Witness Xenophontos was definitely the most disinterested and impartial of all eyewitnesses. Witness Paplomatas was found by the trial Court to be an accomplice. The appellant put up an alibi which was rejected by the trial

* See a summary of their evidence at pp. 110-112 *post*.

Court. A police-man who was very near the scene of the crime was never called as a witness.

Held, (1) that though this Court does not interfere on appeal with findings of a trial Court based on the credibility of witnesses when it is satisfied that such findings were reasonably open to the trial Court, it is entitled, and duty bound, to intervene when it is of the opinion that findings as to credibility were not reasonably open to the trial Court, even if the trial Court was impressed by the demeanour of the witnesses as in this case.

(2) That the evidence of witness Paplomatas is worthless in every respect, unreliable and, irrespective of his demeanour, it could not have been safely relied on to convict the appellant; that it is contradicted, on more than one material point, by the evidence of witness Xenophontos, which was treated as reliable testimony by the trial Court and the two versions cannot be reconciled; that the evidence of witness HjiThomas is, likewise, contradicted on material points by the evidence of witness Xenophontos and, in the circumstances, it was not evidence which could be safely acted upon.

(3) That though certain discrepancies in the evidence of prosecution witnesses may not lead this Court to the conclusion that the trial Court was wrong in accepting them as credible witnesses, in this case the discrepancies are of such a nature that it cannot be said that the appellant could be convicted on the evidence of the three eyewitnesses without, at least, a lurking doubt being entertained in relation to the safety of the verdict; that this was a matter of cogency of the evidence and the evidence for the prosecution, as regards the commission by the appellant of the offences in question, cannot be found cogent enough to warrant his conviction; and that, accordingly, the appeal must be allowed and the conviction and sentence passed on the appellant must be set aside.

(4) *On the issue arising from the placing of the appellant as present at the scene of the crime by witness Xenophontos, who was believed by the trial Court, and the rejection of his alibi*: That a false alibi does not prove that a prosecution case is true; that in the special circumstances of the present case, it would not be proper to hold, against the appellant, that the fact that his alibi was not found to be believable by the trial Court is

sufficient to warrant his conviction, either alone or in conjunction with any other evidence.

Appeal allowed.

Cases referred to:

Lambrou v. *Republic*, 1962 C.L.R. 295 at p. 297;

Soulis v. *Police* (1973) 2 C.L.R. 68 at p. 70;

Constantinides v. *Republic* (1978) 2 C.L.R. 337 at p. 378;

Fasouliotis v. *Police* (1979) 2 C.L.R. 180 at p. 185;

Djemal v. *Republic* (1966) 2 C.L.R. 21;

R. v. *Turnbull and Others* [1976] 3 W.L.R. 445 at p. 449.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Georghios Katsiamalis who was convicted on the 18th October, 1978 at the Assize Court of Nicosia (Criminal Case No. 18537/78) on two counts of the offences of unlawfully carrying a pistol and using a pistol without a permit, contrary to sections 4(1)(2)(a) and 28 of the Firearms Law, 1974 (Law No. 38/74) (as amended by Law 27/78) and on one count of the offence of unlawfully possessing ammunition, contrary to sections 4(4)(d), 5(a)(b) of the Explosive Substances Law, Cap. 54 (as amended by Law 27/78) and was sentenced by Stavrinakis, P.D.C., Boyadjis, S.D.J. and Laoutas, D.J. to six years' imprisonment on each of the first two counts and to one year's imprisonment on the third count, all sentences to run concurrently.

E. Vrahimi (*Mrs.*), for the appellant.

V. Aristodemou, Counsel of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant was convicted by an Assize Court in Nicosia, on October 18, 1978, of three offences, namely of unlawfully carrying a pistol, of unlawfully using such pistol by firing it and of unlawfully possessing ammunition. He was sentenced to six years' imprisonment in respect of the first two offences and to one year's imprisonment for the last offence, all sentences to run concurrently.

The case for the prosecution is summarized as follows by the trial Court in its judgment:

"The case of the Prosecution is, that the accused, on 31.5.78

at about 11 p.m. at Germanou Patron Street, Nicosia, fired a shot in the air, using a Browning pistol, No. 84644. Following the shooting, the accused placed the pistol under the left arm of a certain Paplomatas and asked him to get rid of it. Paplomatas then placed the pistol, first in a nearby bar, and later in the car of his partner Frangis. The latter, on finding the pistol in his car, threw it in the fields and after he had the opportunity to discuss the matter with Paplomatas, removed the pistol to another place until it was handed over to the Police on 5.6.78. The pistol is before the Court as an *exhibit*, including 6 rounds of ammunition, two of which are expended, having been used by a Firearm Expert to ascertain the serviceability thereof."

The case for the defence is, also, summarized in the judgment as follows:

"The case of the Defence is that the accused was not at the scene of the alleged crime on the night of 31.5.78 because in the morning of that date he left Nicosia driving his brother's motorbus Reg. No. CX403, carrying Gymnasium students on a two-day excursion with an overnight stop at Platres, returning to Nicosia in the afternoon of the following day, the 1st of June, 1978."

At the conclusion of its judgment the trial Court held that the appellant, on the night of May 31, 1978, did carry a pistol (which is *exhibit* 2 in these proceedings) loaded with seven rounds of ammunition, that he fired a shot in the air and that he, then, gave the pistol to prosecution witness No. 2 (P.W.2) Paplomatas; it was, later, discovered by the police on June 5, 1978.

The main witnesses against the appellant are three eye witnesses: The first is Xenophontos, P.W.1, whose evidence is summarized as follows by the trial Court in its judgment:

"That on 31.5.78, at about 11 p.m., he was outside 'Blue Beret' bar at Germanou Patron Street, Nicosia, together with Angelos Koushiappis and Angelos Hjithomas, leaning on a car and chatting;

that whilst there, the accused who was in a merry mood, approached them, saying 'I am Katsiamalis' and asked them to join him for a drink;

that at that moment a bottle was thrown from his bar into the street, upon which he turned his back and started walking towards his bar in order to enquire into the throwing of the bottle;

that after he had taken 3-5 paces he heard, from a short distance behind him, the sound of a shot. He turned back and saw the accused in the same position as he was before, with his right hand in his pocket."

He was found by the trial Court to be a witness of truth; and he is definitely the most disinterested and impartial of all the eyewitnesses who have given evidence in this case.

The second eyewitness is the already mentioned P.W. 2 Paplomatas, whose evidence is summarized as follows in the judgment:-

"That on 31.5.78, at about 11 p.m.—12 midnight, he was at Germanou Patron Street;

that whilst there, he saw Angelos Koushiappis, Angelos Hjithomas and Chryssilios Xenophontos, walking, and after they passed him by about 10 meters, he heard a shot;

that he then proceeded towards the direction the shot came from and saw accused with two other men; the accused had his right arm raised, holding a pistol;

that the accused then embraced him, placing the pistol under his left arm, saying, 'Take it and go away';

that from there, he took the pistol and hid it in the arm-chair of a nearby bar; he later took it away and put it in the car of his partner Frangis; he then drove to his village. Eventually, the pistol, after it was found by Frangis, was delivered to the Police and the witness identified the said pistol with the one he saw in accused's hands on the night of 31.5.78."

This witness was found by the trial Court to be an accomplice, whose evidence needed corroboration, because he is the one who helped, according to his own version, to take away the pistol from the scene of the crime. This witness had given, initially, a statement to the police which he admitted himself that it was containing lies and he said that he gave false information in an

effort to extricate, and not to incriminate, his friend Frangis, who was a co-accused of the appellant at the trial and who was, eventually, acquitted by the trial Court.

He, also, admitted that, allegedly due to confusion, he gave to the police information that the offences took place on May 30, 1978, and, as a result, the appellant's first statement to the police was obtained from him, on June 5, 1978, on the basis that the alleged offences had taken place on May 30, 1978, and not, as mentioned in the information, on May 31, 1978.

The third eyewitness is P.W.3 HjiThomas, whose evidence is summarized as follows by the trial Court in its judgment:

> "That on the night of the 31st of May he was with Koushiappis and Chryssilios at Germanou Patron Street, leaning on a car, and whilst there he saw the accused approaching them;
>
> that he then heard a bottle being thrown into the streets upon which Chryssilios walked away towards his bar;
>
> that he then saw the accused, taking a few steps towards the centre of the road, who, then, withdrew from his waist a pistol, raised it in the air with his right arm and fired a shot;
>
> that immediately after the shot was fired, he (the witness) walked away and went home."

The evidence of this witness tallies, to a large extent, with the evidence of Paplomatas. They were both believed by the trial Court.

We are aware that in this case we are facing the problem that the conviction of the appellant is based on findings of the trial Court as regards the credibility of the three main eyewitnesses.

Such findings were based on, *inter alia*, the demeanour of these witnesses as observed by the trial Court, which we have not the means, or the possibility, to assess by merely perusing the record before us.

Concerning the approach of an appellate Court in relation to findings such as these it is useful to refer, *inter alia*, to the following cases:

Lambrou v. *The Republic*, 1962 C.L.R. 295, where Vassiliades J.—as he then was—said the following (at p. 297):-

> "...that this Court will not upset the findings of the trial Court, unless it can be shown on the record, that such findings could not be made on the evidence. In this case, we take unanimously the view that, on the evidence before them, it was open to the trial Court to make the findings of facts upon which they convicted the appellant."

Soulis v. *The Police*, (1973) 2 C.L.R. 68, where the following were stated (at p. 70):-

> "This is, indeed, one of those cases in which it could be said that, had we had to decide the matter on paper only, we might have thought that it was not safe to rely on the evidence of the aforementioned prosecution witnesses; but, we are sitting here as an appellate tribunal, considering the correctness of a finding of fact by a trial Judge who had the advantage of observing the demeanour of the witnesses concerned and, in the light of the circumstances of this case, we are not prepared to hold that we have been satisfied that he erred in relying on the above evidence for the prosecution."

Constantinides v. *The Republic*, (1978) 2 C.L.R. 337, where the following were stated (at p. 378):-

> "We have carefully considered the evidence of Zainah and Marouan as a whole and notwithstanding the fact that there are, indeed, certain weaknesses as regards a number of points in their evidence, we do not consider these points to be of such a really material nature as to lead us to the conclusion that the trial Court was wrong in accepting them as credible witnesses."

Fasouliotis v. *The Police*, (1979) 2 C.L.R. 180, where it was stressed (at p. 185) that—

> "It is well settled that this Court does not interfere on appeal with findings of a trial Court based on the credibility of witnesses when it is satisfied that such findings were reasonably open to the trial Court; and it is up to the party challenging such findings to satisfy this Court, on appeal, that they are erroneous (see, *inter alia*, *Charalambides* v.

HjiSoteriou & Son and others, (1975) 1 C.L.R. 269, 277, *Achillides* v. *Michaelides*, (1977) 3 J.S.C. 299, 307-309*, and *Petrou* v. *Petrou*, (1978) 1 C.L.R. 257, 266, 267)."

It emerges, however, clearly from the above dicta that this Court is entitled, and duty bound, to intervene when it is of the opinion that findings as to credibility were not reasonably open to the trial Court, even if the trial Court was impressed by the demeanour of the witnesses; and the present case is one of those cases.

We find that the evidence of P.W. 2 Paplomatas is worthless in every respect, unreliable and, irrespective of his demeanour, it could not have been safely relied on to convict the appellant. It is contradicted, on more than one material point, by the evidence of P.W. 1 Xenophontos, which was treated as reliable testimony by the trial Court; and the two versions cannot be reconciled.

The evidence of P.W. 3 HjiThomas is, likewise, contradicted on material points by the evidence of P.W. 1 Xenophontos and, in the circumstances, it was not evidence which could be safely acted upon.

We have already quoted a passage from the *Constantinides* case (*supra*, at p. 378) as regards weaknesses and discrepancies in the prosecution evidence.

In this case, however, the discrepancies are of such a material nature that we cannot say that the appellant could be convicted on the evidence of the three eyewitnesses without, at least, a lurking doubt being entertained in relation to the safety of the verdict.

As it has been put in *Djemal* v. *The Republic*, (1966) 2 C.L.R. 21, by Vassiliades J., as he then was, this is a matter of cogency of the evidence and we do not find the evidence for the prosecution as regards the commission by the appellant of the offences in question cogent enough to warrant his conviction.

A factor which has made us feel even more strongly that it was unsafe, in this case, to rely on the aforementioned testimony in order to convict the appellant is the fact that though a police-

* To be reported in (1977) 1 C.L.R. 172.

man was very near the scene he was never called as a witness; he is identified by P.W. 2 Paplomatas as being a certain "P.C. Stavris", who has a car No. GM 313, and, as was stated by Paplomatas, this policeman was in an arcade very near the scene of the crime, at a distance of not more than fifteen to twenty feet; and, actually, witness Paplomatas expressed in his evidence surprise that this policeman did not intervene when, allegedly, the appellant fired a shot.

There remains the issue that the appellant is placed as present at the scene of the crime by P.W. 1 Xenophontos, who was believed by the trial Court, and yet the appellant has put up an alibi which the trial Court did not accept as true.

In our opinion, in the special circumstances of the present case, it would not be proper to hold, against the appellant, that the fact that his alibi was not found to be believable by the trial Court is sufficient to warrant his conviction, either alone or in conjunction with any other evidence.

In this connection, the following are stated by Gooderson on Alibi (1977) (at p. 31):-

> "The jury must be satisfied that the inference to be drawn from the fabrication is one of guilt, and not of panic of an innocent man,[1] or of a man of bad character trying to lie himself out of tight corner.[2]
>
> A false alibi does not prove that the prosecution case is true.[3] In *R.* v. *Hanratty*, Gorman J. explained to the jury that even though they thought that his alibi was deliberately false it did not establish his guilt.[4] In *R.* v. *Wattam*, the defendant had given three inconsistent alibis, but his conviction was quashed as the jury had not been directed that telling lies to the police was not enough to prove guilt.[5]

1. *People v. Nowakowski* (1927), 224 N.Y.S. 670, 673; *Comm. v. Webster* (1850), 5 Cush. 295, 316 (Mass.). See also *R. v. Turnbull et al.* [1976] 3 W.L.R. 445, 449.
2. Devlin Report, para. 476.
3. *State v. Manning* (1902), 52 A. 1033 (Vt.); *Sawyers et al. v. State* (1885), 15 Lea 694 (Tenn.); *People v. Croes* (1941), 34 N.E. 2d 320, 322 (C.As.N.Y.).
4. Lord Russell, Deadman's Hill, p. 147.
5. [1952], 36 Cr. App. R. 72, 76; *Mawaz Khan v. R.* [1967] 1 A.C. 454, 462 (P.C.) Cf. *R. v. Jones* 1971 3 C.C.C. 2d 153, 160 (Ont. C.A.), where the latter case is used, without justification, to support a conclusion that a lying alibi is enough for conviction, without more.

A false alibi may amount to corroboration of a complainant who requires corroboration under some rule of law or practice,[1] or of an accomplice.[2] It must be proved false by some evidence other than that of the witness who needs corroboration.[3]"

Also, it is useful to refer, in this respect, as regards the significance of a false alibi, how alibi evidence should be approached and how the onus of proof as regards alibi should be examined, to Archbold's Pleading, Evidence and Practice in Criminal Cases, 40th ed., p. 850, para. 1349.

Lastly, the following were stated, on this point, in *R.* v. *Turnbull and others*, [1976] 3 W.L.R. 445, 449, by Lord Widgery C.J.:

"Care should be taken by the Judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

That case is referred to as laying down the modern approach to the issue of alibi by Gooderson, *supra*, at p. 248.

1 *People v Deitsch* (1923), 142 N E 670, 671 (C As N Y.) See Professor J D Heydon (1973), 89 L Q R 552, for a discussion of Lies in general as Corroboration

2. *Reed v State* (1932), 53 S W. 2d 50 (Tex.).

3 In two English alibi cases, corroboration came in one from an alibi withdrawn at the trial, in the other from a denial of opportunity proved by the father of the complainant: *Credland v Knowler* [1951], 35 Cr App R 48, *R v Knight* [1966], 50 Cr. App R 122

For all the foregoing reasons we find that in this case the appeal should be allowed and the conviction and sentence passed on the appellant should be set aside.

Appeal allowed. Conviction and sentence set aside.