

1981 April 22

[TRIANTAFYLIDIS, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

AGIS GEORGHIOU GEORGHIADES,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No. 4169*).

5 *Criminal Law—Reckless and negligent acts—Navigating a vessel
in a manner so rash or negligent as to cause harm to a person—
Section 236(b) of the Criminal Code, Cap. 154—Degree of negli-
gence required same as that required for offence under section
210 of the Criminal Code—Appellant found guilty of offence
under section 236(b) due to an error of the trial Judge regarding
degree of negligence required to establish the commission of
the offence thereunder—Conviction set aside—Proviso to section
145(1)(b) of the Criminal Procedure Law, Cap. 155 cannot be
10 applied—But a proper case for a new trial—Section 145(1)(d)
of Cap. 155.*

*Criminal Procedure—Appeal—Substantial miscarriage of justice—
Principles applicable—Proviso to section 145(1)(b) of the Criminal
Procedure Law, Cap. 155.*

15 *Criminal Procedure—Appeal—New trial—Section 145(1)(d) of
the Criminal Procedure Law, Cap. 155.*

20 At about 10 a.m. on August 5, 1979, the appellant was navi-
gating a speed-boat just outside the limits of the protected
for swimmers area of the sea in front of the Nautical Club of
Limassol. As he was steering the speed-boat round a buoy
he fell off the boat which, while being completely out of control,
entered the aforementioned protected area where it wounded
fatally a young girl and, also, very seriously a young boy who,
at the time, were both in the sea, very near the shore. He
25 was charged of the offence of causing death by want of precau-

tion, contrary to section 210* of the Criminal Code, Cap. 154 and of the offence of navigating a vessel in a manner so rash or negligent as to cause harm to a boy, contrary to section 236(b)** of the Code.

The trial Judge acquitted the appellant of the offence of causing death having found that it had not been shown to his satisfaction that he was guilty of negligence of the degree required for the commission of the offence contrary to the said section 210. The appellant was, however, found guilty of the offence under section 236(b); and though the trial Judge did not say so expressly it was obvious that he was of the view that a lesser degree of negligence than that required for the purposes of section 210 was sufficient to establish guilt in respect of section 236(b).

Upon appeal against conviction:

Held, that the same degree of negligence is required both in respect of the offence under section 210 and of the offence under section 236(b) (see *Rayas v. The Police*, 19 C.L.R. 308 at p. 312); that, therefore, the appellant was found guilty of the offence under section 236(b) due to an error of the trial Judge as regards the degree of negligence required to establish the commission of the offence under the said section; accordingly the conviction of the appellant on the relevant count must be set aside.

Held, further (1) that, notwithstanding the above error of law, this appeal cannot be dismissed on the ground that no substantial miscarriage of justice has actually occurred, by applying, in this connection, the proviso to section 145(1)(b) of the Criminal Procedure Law, Cap. 155, because, in the light

* Section 210 runs as follows:

"210. Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence, unintentionally causes the death of another person is guilty of a misdemeanour and is liable to imprisonment for two years, or to a fine not exceeding three hundred pounds".

** Section 236(b) runs as follows:

"236. Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person—

(a)
(b) navigates, or takes part in the navigation or working of, any vessel;
is guilty of a misdemeanour".

of the proper application of such proviso, this was not the proper course in the present instance (see, *inter alia*, *Vouniotis v. The Republic* (1975) 2 C.L.R. 34).

5 (2) That, in the light of the relevant principles governing retrial (see, *inter alia*, *Pierides v. The Republic* (1971) 2 C.L.R. 263) this was not a case in which to simply acquit and discharge the appellant as regards the offence under section 236(b) of Cap. 154, but that it was necessary, in the interests of justice, to order, under section 145(1)(d) of Cap. 155, a retrial of the
10 appellant, before necessarily another Judge of the District Court of Limassol, in relation to the count charging him with the offence under section 236(b) of Cap. 154.

Appeal allowed.

Retrial ordered.

15 Cases referred to:

McLeod v. The Police (1973) 2 C.L.R. 63 at p. 66;

Andrews v. Director of Public Prosecutions [1937] 2 All E.R. 552 at p. 556;

R. v. Lowe [1973] 1 All E.R. 805 at p. 808;

20 *R. v. Stone* [1977] 2 All E.R. 341 at p. 347;

R. v. Sheppard [1980] 1 All E.R. 899 at p. 904;

Rayas v. The Police, 19 C.L.R. 308 at p. 312;

Vouniotis v. The Republic (1975) 2 C.L.R. 34;

Khadar v. The Republic (1978) 2 C.L.R. 132;

25 *Zisimides v. The Republic* (1978) 2 C.L.R. 382;

Pierides v. The Republic (1971) 2 C.L.R. 263;

Anastassiades v. The Republic (1977) 2 C.L.R. 97;

Kouppis v. The Republic (1977) 2 C.L.R. 361;

30 *Au Pui—Kuen v. Attorney-General of Hong Kong* [1979] 1 All E.R. 769;

Reid v. The Queen [1979] 2 All E.R. 904.

Appeal against conviction.

Appeal against conviction by Agis Georghiou Georghiades who was convicted on the 20th September, 1980 at the District
35 Court of Limassol (Criminal Case No. 16551/79) on one count

of the offence of navigating a vessel in a rash or negligent manner, contrary to section 236(b) of the Criminal Code Cap. 154 and on one count of the offence of failing to furnish particulars of the vessel for record purposes contrary to regulations 4 and 15 of the Emergency Powers (Control of Small Vessels) Regulations, 1955 and was sentenced by Korfiotis, D.J. to pay £50.- fine on the first count and £3.- fine on the second count. 5

Y. Agapiou with *P. Pavlou*, for the appellant.

A. M. Angelides, Senior Counsel of the Republic, for the respondents. 10

Cur. adv. vult.

TRIANAFYLLIDES P. read the following judgment of the Court. The appellant was convicted, by the District Court of Limassol, on September 20, 1980, of the offence of navigating, on August 5, 1979, a vessel in a manner so rash or negligent as to cause harm to a nine and a half years old boy, contrary to section 236(b) of the Criminal Code, Cap. 154, and was sentenced to pay a fine of C£50 plus C£70 costs. He was, at the same time, sentenced to pay a fine of C£3 in respect of the offence of failing to furnish particulars of the said vessel for record purposes, contrary to regulations 4 and 13 of the Emergency Powers (Control of Small Vessels) Regulations, 1955. 15 20

On the other hand, he was acquitted of the offence of having caused, at the same time and place, the death of a seven and a half years old girl by want of precaution not amounting to culpable negligence, contrary to section 210 of Cap. 154. 25

The salient facts of this case, as they appear from the judgment of the trial Court, are as follows:-

At about 10 a.m. on August 5, 1979, the appellant was navigating a speed-boat just outside the limits of the protected for swimmers area of the sea in front of the Nautical Club of Limassol. As he was steering the speed-boat round a buoy he fell off the boat which, while being completely out of control, entered the aforementioned protected area where it wounded fatally a young girl and, also, very seriously a young boy who, at the time, were both in the sea, very near the shore. 30 35

The trial Judge, in acquitting the appellant as regards the charge related to the death of the girl, found that, in the circum-

stances of this case, as they had been established by the evidence adduced before him, it had not been shown to his satisfaction that the appellant was guilty of negligence of the degree required for the commission of the offence contrary to section 210 of
 5 Cap. 154, which reads as follows:

“210. Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence, unintentionally causes the death of another person is guilty of a misdemeanour and is liable to imprisonment
 10 for two years, or to a fine not exceeding three hundred pounds”.

The trial Judge referred, in relation to the mode of the application of section 210, above, to *McLeod v. The Police*, (1973) 2 C.L.R. 63, 66, where there was followed, in relation to the
 15 question of the required degree of negligence, the approach which was adopted by Lord Atkin in *Andrews v. Director of Public Prosecutions*, [1937] 2 All E.R. 552, 556.

The said approach was followed, too, in, *inter alia*, *R. v. Lowe*, [1973] 1 All E.R. 805, 808, *R. v. Stone*, [1977] 2 All E.R. 341,
 20 347 and *R. v. Sheppard*, [1980] 1 All E.R. 899, 904 and had, also, been relied on earlier in *Rayas v. The Police*, 19 C.L.R. 308.

Having acquitted the appellant on the count regarding the offence contrary to section 210 of Cap. 154, the trial Judge proceeded to find the appellant guilty of the offence under section
 25 236(b) of Cap. 154, which reads as follows:

“236. Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person—
 (a)
 (b) navigates, or takes part in the navigation or working
 30 of, any vessel;

 is guilty of a misdemeanour”.

Though the trial Judge did not say so expressly, it is obvious that he was of the view that a lesser degree of negligence than that required for the purposes of section 210, above, was sufficient to establish guilt in respect of section 236(b).
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From the *Rayas* case, *supra* (at p. 312), it appears that the same degree of negligence is required both in respect of the offence under section 210 (at that time the present section 210 was section 204 of the Criminal Code, Cap. 13, in the 1949 Edition of the Statute Laws of Cyprus) and of the offence under section 236(b) (at that time the present section 236(b) was section 230(b) of the said Cap. 13). 5

We are inclined to agree with the above view which, as a matter of fact, has been shared without reservation by learned counsel appearing before us for both sides in the present case. 10

It follows, in the light of the foregoing, that the appellant was found guilty of the offence under section 236(b) due to an error of the trial Judge as regards the degree of negligence required to establish the commission of the offence under the said section and, therefore, the conviction of the appellant on the relevant count has to be set aside, together, of course, with the sentence of C£50 which was passed upon him in relation thereto, and, also, the order that he should pay the amount of C£70 as costs of the trial. 15

We have examined, before reaching the above conclusion, whether, notwithstanding the aforementioned error of law of the trial Judge, we could have dismissed this appeal on the ground that no substantial miscarriage of justice has actually occurred, by applying, in this connection, the proviso to section 145(1)(b) of the Criminal Procedure Law, Cap. 155; we formed the view, however, in the light of the proper application of such proviso, as explained in, *inter alia*, *Vouniotis v. The Republic*, (1975) 2 C.L.R. 34, *Khadar v. The Republic*, (1978) 2 C.L.R. 132 and *Zisimides v. The Republic*, (1978) 2 C.L.R. 382, that this was not the proper course in the present instance. 20
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On the other hand, we are of the opinion, in the light of the relevant principles which have been expounded in, *inter alia*, *Pierides v. The Republic*, (1971) 2 C.L.R. 263, *Anastassiades v. The Republic*, (1977) 2 C.L.R. 97 and *Kouppis v. The Republic*, (1977) 2 C.L.R. 361, as well as in *Au Pui-Kuen v. Attorney-General of Hong Kong*, [1979] 1 All E.R. 769 and *Reid v. The Queen*, [1979] 2 All E.R. 904, that this is not a case in which we should simply acquit and discharge the appellant as regards the offence under section 236(b) of Cap. 154, but that it is neces- 35

sary, in the interests of justice, that we should order, under section 145(1)(d) of Cap. 155, a retrial of the appellant, before necessarily another Judge of the District Court of Limassol, in relation to the count charging him with the offence under
5 section 236(b) of Cap. 154.

In the result this appeal is allowed accordingly.

Appeal allowed.
Retrial ordered.