

1982 July 6

[A. LOIZOU, SAVVIDES AND STYLIANIDES, JJ.]

MUNICIPALITY OF LARNACA,

Appellant,

v.

PETROS MADELLAS,

Respondent.

(Criminal Appeal No. 4300).

Abuse of the process of the Court—Prosecution for possession of a kiosk without a certificate of approval, contrary to sections 10(1) and 20(1)(2) and (3) of the Streets and Buildings Regulation Law, Cap. 96—Does not amount to an abuse of the process of the Court because, inter alia, a removal order, made against the person who erected the kiosk, in a prosecution under a different Law by a different Authority, has not been enforced.

Streets and Buildings Regulation Law, Cap. 96—Offences thereunder—Discretionary power of the Court to make a demolition order—To be exercised in a manner which will not frustrate the very purpose for which the law exists—Conviction for possessing a kiosk without a certificate of approval, contrary to sections 10(1) and 20(1)(2) and (3) of the Law—Sentence of absolute discharge—Trial Judge exercised his discretion wrongly in not making a demolition order in the circumstances of this case—Demolition order made by the Supreme Court upon appeal by the prosecuting Authority.

The respondent pleaded guilty to a charge of possessing a kiosk without having been issued with a certificate of approval in respect thereof, contrary to sections 10(1) and 20(1)(2)(3) of the Streets and Buildings Regulation Law, Cap. 96. In respect of this kiosk a prosecution under the Foreshore Protection Law, Cap. 59, was instituted in 1976 by the District Officer of Larnaca against a certain Antonis Kyriakides who was convicted on a charge of having erected same on the foreshore and a removal order of the said structure was made against him in

addition to a fine of £5.000.- The removal order has not been enforced. The trial Judge after stating* that to make a demolition order will amount an abuse of the process of the Court because, inter alia, the kiosk in question was erected by the said Antonis Kyriakides in 1976 and not by accused and no proceedings were taken against him and because these proceedings were not instituted against the accused bona fide, declined to make a demolition order, and discharged the accused absolutely.

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Upon appeal by the Municipality, the appropriate Authority under Cap. 96:

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Held, (1) that the institution of the present proceedings in no way constitutes an abuse of the process of the Court inasmuch as this is a prosecution against another person than Antonis Kyriakides under a different law, and by a different Authority, namely, the Municipality of Larnaca as the appropriate Authority carrying out its statutory duties under Cap. 96; that, moreover, this Court does not intend to investigate the reasons that led to the non enforcement of the removal order made against Antonis Kyriakides or the withdrawal of a criminal case against him; that what is of paramount importance in the present case is the compliance with the law by this respondent.

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(2) That in the exercise of their discretion whether to make a demolition or other similar orders Courts should be guided by the principle that such discretion should be exercised in a manner which will not frustrate the very purpose for which the law exists and for which the power to make such orders is contained in the laws so that under no circumstances a would-be offender or an offender should feel that he can, or can continue to, enjoy the spoils of his illegality by paying only the premium of a monetary sentence; that having considered carefully the present case in its totality, including the fact that the said kiosk stands on public land, this Court has come to the conclusion that the learned trial Judge has exercised his discretion wrongly in not making a demolition order as this is neither a case where the infringement was a mere technicality or of minor significance nor there exists any abuse of the process of the Court as this Court has already indicated; that, therefore, the appeal must

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* See extracts from his judgment at pp. 180-81 post.

be allowed; that bearing, however, in mind all the circumstances and the stand of counsel for the appellant Municipality on the matter, who made it clear that the purpose of this appeal was primarily the question of the non-making of a demolition order, this Court does not intend to interfere with the absolute discharge given to the respondent, but it feels that in addition thereto a demolition order should have been and is hereby made against him under section 20 of Cap. 96, and the respondent is ordered to demolish the aforesaid kiosk within two months from to-day, unless a certificate of approval is obtained in the meantime.

Appeal allowed.

Cases referred to:

- Hunter v. Chief Constable of West Midlands and Another* [1981] 3 All E.R. 727;
- Stavrinides v. Improvement Board of Pallouriotissa*, 1962 C.L.R. p. 80;
- Constantis v. District Officer Famagusta*, 1962 C.L.R. p. 96;
- Salamis Holdings v. Municipality Famagusta* (1974) 3 C.L.R. p. 344;
- Vine Products Board v. Touttoulla* (1982) 2 C.L.R. 112.

Appeal against sentence.

Appeal by Larnaca Municipality against the sentence passed on Petros Madellas who was convicted on the 23rd February, 1982 at the District Court of Larnaca (Criminal Case No. 4125 /81) on one count of the offence of possessing a kiosk without having been issued with a final approval contrary to sections 10(1) and 20(1)(2)(3) of the Streets and Buildings Regulation Law, Cap. 96 and was discharged absolutely by Miltiadou, Ag. D.J.

- Chr. Theodoulou*, for the appellant.
- C.L. Clerides* with *M. Nicolatos*, for the respondent.

A. LOIZOU J. gave the following judgment of the Court. This is an appeal by the Municipality of Larnaca as the appropriate authority under the Streets and Buildings Regulation Law, Cap. 96 (hereinafter to be referred to as the Law), against the sentence of absolute discharge imposed on the respondent who had been found guilty on his own plea to a charge of possessing a kiosk without having been issued with a certificate of approval in

respect thereof by the appropriate authority, contrary to sections 10(1) and 20(1)(2)(3) of the Law.

In respect of this kiosk a prosecution under the Foreshore Protection Law, Cap. 59, was instituted in 1976 by the District Officer of Larnaca against a certain Antonis Kyriakides who was convicted on a charge of having erected same on the foreshore and a removal order of the said structure was made against him in addition to a fine of £5.000.- but that order was not enforced. In 1981 the present proceedings against the respondent were instituted by the appellant Municipality; the charge contained originally two counts to which the respondent pleaded not guilty, namely, a count of building the said premises without a building permit and a count of suffering the construction of same without a building permit. These two counts were, however, withdrawn upon the addition of a third count to which the appellant pleaded guilty and the sentence, subject-matter of this appeal, was imposed on him.

In exercising his discretion under section 20(3)(a) of the law, the learned trial Judge referred to the case of *Hunter v. Chief Constable of West Midlands and Another* [1981] 3 All E.R., p. 727, which was a case about abuse of the process of the High Court and the inherent power which any Court of Justice possesses to prevent misuse of its procedures in a way which although not inconsistent with the literal application of its procedural rules would, nevertheless, be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute among right thinking people.

Regarding the discretionary powers of the Court under the aforesaid section, he also referred to the cases of *Stavrinides v. Improvement Board of Pallouriotissa*, 1962 C.L.R. p. 80; *Constantis v. District Officer Famagusta*, 1962 C.L.R. p. 96; *Salamis Holdings v. Municipality Famagusta* (1974) 3 C.L.R. p. 344; and concluded his reasoning for non making the demolition order as follows:-

“I have carefully considered what was submitted by both counsel and I am convinced that to make the order applied for by the Prosecuting Authority, will amount to an abuse of the process of the Court and I, therefore, in the light

of what I stated hereinabove and in the exercise of my discretion I refuse to make the said order.

Having in mind that:

- 5 (a) The said kiosk was erected by a certain Antonis Kyriakides in the year 1976 and not by the accused and that no proceedings whatsoever were taken against him since then.
- 10 (b) Case No. 3223/81 was pending in the District Court of Larnaca against the accused and the said Antonis Kyriakides, in respect of the same charges with which the accused was originally charged and which were thereafter withdrawn and the accused was acquitted and discharged, and
- 15 (c) Finally on all the circumstances of this case I am convinced that these proceedings were not instituted against the accused bona fide and for the purpose of attaining the ends of justice and in consequence I discharge the accused absolutely and I make no order as to the payment of costs".

20 With respect to the learned trial Judge, we find ourselves impelled to take a very different view of the whole matter. The institution of the present proceedings in no way constitutes an abuse of the process of the Court inasmuch as this is a prosecution against another person than Antonis Kyriakides

25 under a different law, and by a different Authority, namely, the Municipality of Larnaca as the appropriate Authority carrying out its statutory duties under the aforesaid law. Moreover, we do not intend to investigate the reasons that led to the non enforcement of the removal order made against Antonis

30 Kyriakides or the withdrawal of Criminal Case 3223/81. What is of paramount importance in the present case is the compliance with the law by this appellant.

We had the opportunity of reviewing recently in the case of *The Vine Products Board v. Demetra Touttoulia*

35 (1982) 2 C.L.R. 112, the principles governing the exercise of the judicial discretion in the making of demolition or other similar orders and we referred therein to the caselaw of this Court and we concluded by saying that "in the exercise

of their discretion Courts should be guided by the principle that such discretion should be exercised in a manner which will not frustrate the very purpose for which the law exists and for which the power to make such orders is contained in the laws so that under no circumstances a would-be offender or an offender should feel that he can, or can continue to, enjoy the spoils of his illegality by paying only the premium of a monetary sentence or even of imprisonment, which in the present case was neither but an absolute discharge". 5

Having considered carefully the present case in its totality, including the fact that the said kiosk stands on public land, we have come to the conclusion that the learned trial Judge has exercised his discretion wrongly in not making a demolition order as this is neither a case where the infringement was a mere technicality or of minor significance, nor there exists any abuse of the process of the Court as we have already indicated. We, therefore, allow the appeal. 10 15

Bearing, however, in mind all the circumstances and the stand of counsel for the appellant Municipality on the matter, who made it clear that the purpose of this appeal was primarily the question of the non making of a demolition order, we do not intend to interfere with the absolute discharge given to the respondent, but we feel that in addition thereto a demolition order should have been and is hereby made against him under section 20 of the law, and the respondent is ordered to demolish the aforesaid kiosk within two months from to-day, unless a certificate of approval is obtained in the meantime. 20 25

In the result the appeal is allowed on the above terms.

Appeal allowed.