1981 May 8

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

ANDREAS POURIS AND OTHERS,

Appellants,

v.

THE REPUBLIC,

Respondent.

(Criminal Appeals Nos. 4013-4019).

*Criminal Procedure—Charge or information—Amendment—Addition of new counts—Trial of appellants for premeditated murder—Addition of counts of using armed force against the Government and of carrying on war or a warlike undertaking, at stage of holding that no prima facie case has been made against accused for premeditated murder—Accused charged on added counts and after pleading not guilty they were allowed to recall and cross-examine witnesses with reference to the added counts. Trial Court not stating expressly in its relevant ruling what was the provision of Cap.*155 *on the strength of which the two new counts were added—But in the judgment at the end of the trial it was stated that the counts were added under s.*83*—Failure to refer to the specific section not a fatal irregularity—And failure to seek views of counsel before the addition not a material irregularity requiring this Court to set aside the conviction—Proviso to section* 145(1)*(b) of Cap.*155 *applicable—Notion of "defective charge" in the said section* 83(1)*—Open to trial Court, under such section, to amend the information by adding new counts after it had acquitted the appellants of premeditated murder—Its relevant discretionary powers not exercised erroneously even though the new counts charged the appellants with offences of a different nature—"At any stage of the trial" in the said section* 83(1)*—Provisions of s.*74(1) *(b) of Cap.*155 *to be read in conjunction with, and subject to, the provisions of section* 83(1)*—Sections* 107 *and* 108 *of Cap.* 155 *to be applied in conjunction with, and subject to, the provisions of s.*83(1)*—Course adopted not contrary to the provisions of Articles* 12.2, 113.2 *and* 152.1 *of the Constitution—Section* 153 *of Cap.* 155 *not applicable.*

Constitutional Law—Equality—Principle of equality—Article 28 of the Constitution—Whether trial of appellants for offences committed during the coup d'etat in July 1974 and the non-prosecution of other persons in relation to the same offences pursuant to a Government policy renders appellants victims of unequal treatment contrary to the above article.

The appellants were charged and tried on the basis of an information containing four separate counts in relation to the premeditated murders on 16th July 1974, at Ayios Tychonas village, in the Limassol District, of four persons, contrary to sections 203 and 204 of Cap. 154, as amended by section 5 of the Criminal Code (Amendment) Law, 1962 (Law 3/62).

After having heard the evidence of one hundred and twenty-three Prosecution witnesses the trial Court held that a prima facie case had not been made out against the accused sufficiently to require them to be called upon to make their defence on any of the four counts charging them with premeditated murders and went on to hold that the evidence adduced by the Prosecution disclosed a prima facie case against all the appellants for offences of using armed force against the Government of the Republic and of carrying on war or a warlike undertaking, contrary to sections 41 and 40, respectively, of the Criminal Code, Cap. 154. It thereupon directed that two counts (5 and 6) be added charging the accused of the aforementioned offences and called upon them to plead to the new added counts and to state whether they were ready to be tried on the information as altered. The appellants proceeded to plead not guilty to both the new added counts and the trial was resumed in the course of which the appellants applied and were allowed to recall for cross—examination 23 witnesses who had already given evidence before the Assize Court. After the recalling of the above-mentioned witnesses and cross-examination of same with reference to the added counts the appellants were called upon to defend themselves on the added counts and they did so after they had been addressed in terms of s.74(1)(c) of Cap.155. Though in the ruling of the trial Court it was not stated expressly what was the provision of Cap. 155 on the strength of which the two new counts were added in the judgment of the Court at the end of the trial it was stated that the two new counts were added pursuant to the provisions of section 83*.

* Section 83 is quoted in full at pp. 156-157 *post*.

The appellants appealed against their conviction on the added counts and the appeals were heard initially as regards only the issue of whether the new counts were rightly added to the information by the trial Court.

Held, (1) that the trial Court has duly and substantially complied with all the relevant requirements of section 84 of Cap.155; that the fact that in its ruling, by means of which the two new counts were added, the trial Court did not refer to the specific section of Cap.155 under which it had acted cannot by regarded as a fatal irregularity (see *Mehmet v. Police* (1970) 2 C.L.R.62 at p.68).

(2) That though it was advisable for the trial Court to seek the views of counsel for the parties before it, and in particular of counsel for the appellants, before adopting, on its own motion, the course of amending the information as it has done by the addition of the two new counts, 5 and 6, the failure to seek the views of counsel did not amount in the light especially of all relevant considerations in the present cases, to a material irregularity requiring this Court to set aside the convictions of the appellants in respect of the said two counts.

(3)That counsel for the appellants never objected at the trial to the addition of the two new counts after they had come to know about them through the relevant ruling of the trial Court; and, though, later all the appellants filed appeals against the decision of the trial Court to add the aforementioned two new counts these appeals were withdrawn; that, therefore, there has not, actually, occurred, in this connection, a substantial miscarriage of justice; and this is an instance in which the proviso to section 145(1)(b) of Cap.155 can be properly resorted to.

On the question whether on the basis of the wording of sub-section 1 of section 83 of Cap. 155, such sub-section was properly applicable on the present occasion:
(After dealing with the notion of a defective charge or information in section 83(1)—vide pp.162-166 post).

(1)That it was open to the trial Court, in the particular circumstances of the present case, to proceed to amend the information by adding the new counts, 5 and 6, under section 83(1) of Cap.155, after it had acquitted the appellants as regards

the four counts in the information on the basis of which their trial had commenced; that the trial Court did not exercise erroneously its relevant discretionary powers; that though it is true that the new counts charged the appellants with offences of a different nature, they were not offences unrelated to the pattern of conduct of the appellants in respect of which they had been initially charged with offences of premeditated murders.

(2) That the addition of the said two new counts, at the stage at which it was made, did not, in any way, prejudice adversely the rights of the appellants to defend themselves in respect thereof, nor did it cause to them any other injustice.

On the submission of Counsel for the appellants that after they had been acquitted on the initial counts it was no longer legally possible for the trial Court to resort to its powers under section 83(1) *of Cap.*155.

That this Court is not prepared to place such a restrictive interpretation on the said section as to exclude the course adopted by the trial Court in the present case; that the inclusion therein of the expression "at any stage of the trial" shows that the said section can be resorted to, in the manner in which this was done in the present case, namely at the stage at which the trial Court rules that no prima facie case has been made against an accused person sufficiently to require him to be called upon to make his defence on the information as it has been initially framed but before the trial has been finally concluded; and, in this respect, the provisions of section 74(1)(b) of Cap.155 have to be read in conjunction with, and subject to, the provisions of section 83(1) of the same Law.

Held, further, that the provisions of sections 107 and 108 of Cap.155, to the effect that an information has to be filed by the Attorney-General in an Assize Court, and that such information is to be framed by him, have to be applied in conjunction with, and subject to, the provisions of section 83(1) of Cap.155, and that, consequently, the said section 83(1) can be resorted to, also, at trials on information before an Assize Court.

On the submission of counsel for the appellants that the course adopted, was unconstitutional as offending against Articles 12.2, 113.2 *and* 152.1 *of the Constitution:*

That the scope of each Article is totally unrelated to, and does not exclude in any way, the amendment of an information or charge, under section 83(1) of Cap.155; and that, therefore, the addition of the new counts, 5 and 6, in the present instance, did not in any way offend against the provisions of any one of the said Articles of the Constitution. 5

On the contention of Counsel for the appellants that they are the victims of unequal treatment, contrary to Article 28 of the Constitution, because other persons who have committed offences during the coup d'etat in July 1974, such as those with which the appellants have been charged by means of the said new counts, have not been prosecuted in respect of those offences due to a policy that was adopted by the Government in relation to offences of the same nature: 10

That the trial Court, in the absence of any express statutory provision rendering the appellants immune from prosecution in respect of offences such as those to which the two counts relate, was perfectly entitled, in the course of the normal application of the law, to add new counts charging the appellants with the offences in question and was not bound to adapt the proper exercise of its relevant discretionary powers to a policy of the Government such as that which was relied on by the appellants. 15 20

Observations with regard to the applicability of section 153 of the Criminal Procedure Law, Cap. 155. 25

Appeals dismissed.

Cases referred to:

Attorney-General of the Republic v. Pouris and Others (1979) 2 C.L.R.15:

Mehmet v. Police (1970) 2 C.L.R.62 at p.68; 30

Kyriacou v. Police. 22 C.L.R 213 at p.216;

R. v. West [1948] 1 *K.B.* 709 at p.717:

R. v. Gregory [1972] 1 W.L.R.991 at p.995:

R. v. Smith and Others, 34 *Cr. App. R.*168 *at p.*176;

R. v. Radley, 58 Cr. App. R.394;

R.v. Martin [1962] 1 Q.B. 221 at p.227;

R. v. Hall, 52 Cr. App. R.528;

R. v. Johal and Ram, 56 Cr. App. R.348 at pp. 353-354;

5 *R. v. Harris*, 62 Cr. App. R.28;

R. v. Dossi [1918] 87 L.J. K.B. 1024;

HjiSolomou v. The Republic, 1964 C.L.R.170.

Appeal against ruling.

Appeal by Andreas Pouris and others against the ruling of the
10 Assize Court of Limassol (Criminal Case No. 22534/77) (Loris.
P.D.C., HadjiTsangaris, S.D.J. and Chrysostomis, D.J.) whereby two new counts were added to the information.

A. Eftychiou, for appellants 1 and 3.

M. Christophides, for appellants 2, 4, 6 and 7.

15 *P. Solomonides*, for appellant 5.

M. Kyprianou, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following decision of the Court.
20 All the appellants were convicted, by an Assize Court, of the offences of having used, between 15th July and 17th July 1974, in the District of Limassol, armed force against the Government of the Republic, contrary to section 41 of the Criminal Code, Cap. 154, and of having, at the same time and in the same
25 District, carried on war or a warlike undertaking, contrary to section 40 of Cap. 154.

They were all of them sentenced to long terms of imprisonment, ranging from fourteen years up to seventeen years.

Initially, they were charged and tried on the basis of an
30 information containing four separate counts in relation to the premeditated murders on 16th July 1974, at Ayios Tychonas village, in the Limassol District, of four persons, contrary to sections 203 and 204 of Cap. 154, as amended by section 5 of the Criminal Code (Amendment) Law, 1962 (Law 3/62).

After having heard the evidence of one hundred and twenty-three prosecution witnesses the trial Court held that a prima facie case had not been made out against the accused sufficiently to require them to be called upon to make their defence on any of the four counts charging them with premeditated murders and the trial Court went on to state the following in its relevant ruling: 5

"The evidence adduced by the Prosecution discloses though prima facie case against all the Accused for offences contrary to Sections 40 and 41 of our Criminal Code committed by all the Accused acting in concert on the 15th, 16th and 17th July, 1974, in various areas of the Limassol district. 10

These offences are not contained in the present Information, and the punishment thereof provided by the Law is lesser than the one provided for premeditated murder. 15

It was all along part of the case for the Prosecution that the Accused armed, without lawful authority, committed the aforesaid offences, which were in substance part and parcel of the original charges as providing motive, opportunity, etc. The Accused had adequate information of these offences and the Prosecution witnesses were cross-examined on behalf of the Accused on these lines. For all these reasons we hold the view that there is no possibility that any one of the Accused might be prejudiced in his defence by the addition of the new Counts. 20 25

We feel it our duty at this stage to say that we shall disregard for the purposes of the additional Counts the evidence in connection with the death of the late Panayiotis Vladimirou, i.e. the evidence of P.W. 65, P.W. 83, P.W. 114, P.W. 115 and P.W. 121. This evidence, as it stands, tends to point to probable murder, a distinct offence, of greater severity than the charges added. 30

Accordingly we do hereby direct that the following two Counts be added to read Counts 5 and 6:- 35

STATEMENT OF OFFENCE
Fifth Count

Use of armed force against the Government, contrary to Sections 41, 20 and 21, of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The Accused, together with other persons unknown, between the 15th and 17th July, 1974, both dates inclusive, in the District of Limassol, did endeavour by armed force or the show of armed force, to procure an alteration in the Government of the Republic.

STATEMENT OF OFFENCE
Sixth Count

Carrying on war or warlike undertaking, contrary to Sections 40, 20, and 21, of the Criminal Code, Cap. 154.

PARTICULARS OF OFFENCE

The Accused, together with other persons unknown, between the 15th and 17th July, 1974, both dates inclusive, in the District of Limassol, did, without lawful authority, carry on war or warlike undertaking, against a body of persons in the Republic supporting the Government thereof.

In the result, all Accused are hereby acquitted and discharged on Counts 1, 2, 3 and 4 of the Information and we call them upon to plead to the new Counts added, i.e. Counts 5 and 6, and to state whether they are ready to be tried on the Information as altered".

There followed proceedings on appeal before the Supreme Court as a result of which it was held, by majority, that there did not exist, under the law in force, a right of the Republic to appeal against the acquittal of the accused by the trial Court as regards the four counts for premeditated murders (see *The Attorney-General of the Republic v. Pouris and others*, (1979) 2 C.L.R. 15). Then, all the accused proceeded to plead not guilty to both the new added, as aforesaid, counts and their trial was resumed. Eventually, all of them were found guilty in respect of both the said counts.

The appellants have appealed against their convictions and the sentences passed upon them. These appeals were heard initially as regards only the issue of whether the new counts—5 and 6—were rightly added to the information by

the trial Court and, at this stage, we will give our decision on that issue.

It is not stated expressly in the ruling of the trial Court what is the provision of the Criminal Procedure Law, Cap. 155, on the strength of which the two new counts were added to the information. 5

However, in its judgment at the end of the trial the following were stated:

"On a submission of 'no case to answer', we gave our Ruling on 8/9/78 whereby:- 10

(a) All Accused were not called upon to defend themselves on any one of the original four counts of the Information.

(b) Two new counts were added (counts 5 and 6) pursuant to the provisions of Section 83 of our Criminal Procedure, Cap. 155, charging all Accused jointly with offences contrary to Sections 40 and 41 of the Criminal Code, Cap. 154; all Accused were asked to plead to the new counts added and to state whether they were ready to be tried on these counts, pursuant to the provisions of Section 84(1) of Cap. 155. 15 20

All Accused applied for some time with a view to considering their position as emerging in the light of the second leg of our Ruling; in the result, this case was adjourned to 11/9/78." 25

It is clear, therefore, that the trial Court proceeded to add two new counts by relying on section 83 of Cap. 155, which reads as follows:

"83. (1) Where, at any stage of a trial, it appears to the Court that the charge or information is defective, either in substance or in form, the Court may make such order for the alteration of the charge or information either by way of amendment of the charge or information or by the substitution or addition of a new count thereon as the Court thinks necessary to meet the circumstances of the case. 30 35

(2) Where a charge or information is so altered, a note of the order for the alteration shall be made on the charge or information and the charge or information shall be treated for the purpose of all proceedings in 5 connection therewith as having been filed in the altered form".

It is, also, useful to note the two following passages from the judgment of the trial Court:

"All Accused pleaded not guilty to counts 5 and 6 and, 10 exercising their rights under Section 84(4) of Cap. 155, they applied and they were allowed to recall for cross-examination 23 witnesses who had already given evidence before us.

. . . .

15 After the recalling of the above-mentioned witnesses and cross-examination of same reference to the added counts, and after a statement of Counsel that they would not be applying for the recalling of any other witnesses, all Accused were called upon to defend 20 themselves on counts 5 and 6 and they were addressed in terms of Section 74(1) (c) of Cap. 155.

Accused 1 elected and made a statement from the dock; he also called two witnesses in his defence. Accused 2 elected and made a statement from the dock; he called 25 five defence witnesses. Accused 3 elected to give evidence on oath; he did so testify and called three witnesses in his defence. Accused 4 elected and made a statement from the dock; he called two witnesses in his defence. Accused 5 and Accused 7 made a statement from the dock and called 30 no witnesses. Accused 6 elected and made a statement from the dock and called two defence witnesses."

Section 84 of Cap. 155, which is referred to in one of the two above quoted passages, reads as follows:

"84. (1) When a charge or information is altered as in 35 section 83 provided, the Court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such altered charge or information.

(2) If the accused declares that he is not ready. the Court shall consider the reasons he may give and, if proceeding immediately with the trial is not likely in the opinion of the Court to prejudice the accused in his defence or the prosecutor in his conduct of the case, the Court may proceed with the trial as if the altered charge or information had been the original one. 5

(3) If the altered charge or information is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor, the Court may either direct a new trial or adjourn the trial for such period as the Court may consider necessary. 10

(4) When a charge or information is altered by the Court after the commencement of the trial the evidence already given in the course of the trial may be used without being reheard but the parties shall be allowed to recall or re-summon any witness who may have been examined and examine or cross-examine such witness with reference to such alteration." 15 20

In the light of all the foregoing and from the material before us we are satisfied that the trial Court has duly and substantially complied with all the relevant requirements of section 84, above.

At some stage during the hearing of the present appeals it was submitted that it is possible that the trial Court has acted. also, on the strength of section 85 of Cap. 155, which reads as follows: 25

"85. (1) If part only of the charge or information is proved and the part so proved constitutes an offence. the accused may, without altering the charge or information, be convicted of the offence which he is proved to have committed. 30

(2) If a person is charged with an offence, he may, without altering the charge or information, be convicted of attempting to commit the offence. 35

(3) If a person is proved to have done any act with the intend to commit the offence with which he is

charged, and if it is an offence to do such an act with such an intent, he may, without amending the charge or information and not withstanding that he was not charged with such last-mentioned offence, be convicted of the same.

5 (4) If at the conclusion of the trial the Court is of opinion that it has been established by evidence that the accused has committed an offence or offences not contained in the charge or information and of which he cannot be convicted without amending the charge or information, 10 and upon his conviction for which he would not be liable to a greater punishment than he would be liable to if he were convicted on the charge or information, and that the accused would not be prejudiced thereby in his defence, the Court may direct a count or counts to be added to the 15 charge or information charging the accused with such offence or offences, and the Court shall give their judgment thereon as if such count or counts had formed a part of the original charge or information."

We are not, however, prepared to agree that it can be pro-20 perly said that the trial Court has applied in the present instance the provisions of section 85, above.

In our opinion it cannot be regarded as a fatal irregularity the fact that the trial Court in its aforementioned ruling, by means of which the two new counts were added, did not refer 25 to the specific section of Cap. 155 under which it had acted (see, in this respect, inter alia, *Mehmet v. The Police*, (1970) 2 C.L.R. 62, 68).

As regards the object of provisions such as sections 83, 84 and 85 of Cap. 155, Vassiliades P. stated the following in the 30 *Mehmet* case, supra (at pp. 68-69):

"As observed during the argument, by my brother Mr. Justice Josephides, the provisions in this part of the Criminal Procedure Law (sections 83, 84 and 85) were the result of statutory amendments to enable the Courts to do justice 35 in a case where technicalities might lead to acquittal notwithstanding proof of sufficient particulars to support a count; as happened in several cases prior to the amendment of the statute. Cases decided in other

jurisdictions where different considerations apply are, therefore, of no help here after the amendments introduced by these sections of our Criminal Procedure Law. As has been aptly said by Chief Justice Warren of the United States we should not become so obsessed with the techniques of the judicial machinery that we forget the purposes of a system of justice."

Useful reference may be made, also, in this respect, to "Criminal Procedure in Cyprus" by Loizou and Pikis (1975) at pp. 71 and 75.

As had already been observed earlier in *Kyriacou v. The Police*, 22 C.L.R. 213, 216, the aforementioned provisions of Cap. 155 are not to be found in the relevant legislation in England, where a corresponding, but not similar, provision is section 5(1) of the Indictments Act, 1915, which reads as follows:

"5.-(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court think fit."

In Archbold's Pleading, Evidence and Practice in Criminal Cases, 40th ed., p. 51, para. 50, it is observed that "Where no application for leave to amend the indictment has been made by either side, the judge, in exercising his discretion whether to direct an amendment or not should invite the parties and in particular the defence to express their views on the matter before deciding to do so."

In *R. v. West*, [1948] 1 K.B. 709, Humphreys J. said (at p. 717):

"No application for leave to amend had been made by either side. The learned judge was, in our opinion, entitled to exercise his discretion in directing the amendment, but he clearly should have invited the parties, and in particular the defence, to express their views on the matter before deciding to do so. That opportunity was not given. In fact,

the Crown did not desire any amendment and the defence would have strongly objected to the amendment if they had been given the opportunity of doing so. It was indeed made one of the grounds of appeal to this court. The amendment made, however, did not affect the ground on which this court has decided that these convictions must be quashed."

In *R. v. Gregory*, [1972] 1 W.L.R. 991, Edmund Davies L.J. observed (at p.995):

"It is highly regrettable that, by an oversight, this *normally most punctilious recorder omitted to canvass the* views of defending counsel before taking that step, as should have been done. No authority is required for that obvious proposition, though were any needed it is to be found in *Rex v. West* [1948] 1 K.B. 709."

In the *Gregory* case, supra, the appeal was not, however, allowed on the ground that the views of defending counsel had not been sought before the amendment of the indictment, but on the ground that such amendment was not justified in the circumstances of the case.

In the present instance we think that it was advisable for the trial Court to seek the views of counsel for the parties before it, and in particular of counsel for the appellants, before adopting, on its own motion, the course of amending the information as it has done by the addition of the two new counts, 5 and 6. *But the failure to seek the views of counsel did not amount, in* our opinion, in the light especially of all relevant considerations in the present cases, to a material irregularity requiring us to set aside the convictions of the appellants in respect of the said two counts.

It is to be noted, moreover, that counsel for the appellants never objected at the trial to the addition of the two new counts after they had come to know about them through the relevant ruling of the trial Court; and, though, later all the appellants filed appeals against the decision of the trial Court to add the aforementioned two new counts these appeals were withdrawn.

We are not, therefore, satisfied that there has, actually, occurred, in this connection, a substantial miscarriage of justice;

and this is an instance in which the proviso to section 145(1) (b) of Cap. 155 can be properly resorted to.

Lengthy arguments were advanced during the hearing of the present appeals as regards whether, on the basis of the wording of subsection (1) of section 83 of Cap. 155, such subsection was properly applicable on the present occasion. 5

It is convenient to deal now with the notion of a defective charge or information, which is to be found in subsection (1) of section 83, above.

The same notion is to be found in the aforementioned section 5(1) of the Indictments Act, 1915, in England, and, therefore, it is useful to refer, in this connection, to some of the relevant case-law in England, even though, as already pointed out, our sections 83 and 84 of Cap. 155 are different in other respects from section 5(1) of the Indictments Act, 1915. 10 15

In this respect it is pertinent to bear in mind what is considered to be, in England, the object of a provision such as section 5(1) of the Indictments Act, 1915; and such object is not different from that of sections 83 and 84 of Cap. 155.

In *R. v. Smith and others*, 34 Cr. App. R. 168, Humphreys J. stated the following (at p. 176): 20

"Now, the power to amend an indictment has been contained since 1915 in section 5(1) of the Indictments Act of that year. That enactment, as is generally known, was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases. Up to that time the powers of amendment had been very limited, and the section in question provides, and, as we think, was intended to provide, that in future the power should be very considerably extended." 25 30

In *R. v. Radley*, 58 Cr. App. R. 394, Widgery L.C.J., after referring to the *Smith* case, supra, said (at pp. 401-402):

".... and furthermore from the words used by Humphreys J. (supra) I take the point that, in view of the fact that justice lies at the back of all these considerations and that no amendment is to be made if it cannot be made without injustice, one ought to give a fairly 35

liberal meaning to the language of section 5. That is not being done in this Court for the first time. The tendency in the last ten years has been to relax the technicalities of criminal pleading, bearing in mind 5 that injustice to the defendant from any proposed amendment must be refuted."

As regards the notion of a defective indictment Humphreys J. stated the following in the *Smith* case, supra (at pp. 176-177):

"The argument for the appellants appeared to involve 10 the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore is bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably 15 in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person. There is the most ample power in such a case or in any case where the Court is of opinion that a person accused may be prejudiced or 20 embarrassed in his defence by any such amendment to direct that one person should be tried separately from others, or the trial may be postponed.'

In *R. v. Martin*, [1962] 1 Q.B. 221, Lord Parker C.J. said (at p. 227) :

25 "An indictment which charges offences which are not disclosed in the depositions and fails to charge an offence which is, lacks the most essential quality of an indictment. It makes an accusation of crime without cause when it should have made one with cause. This is what the indictment under considera- 30 tion in this appeal did before it was amended. In our opinion this indictment contained a latent defect which made it just as much defective within the meaning of section 5(1) as if the defect had been a patent one. "

The *Martin* case, supra, was followed in, inter alia, *R.* 35 *v. Hall*, 52 Cr. App. R. 528.

Also, in the *Radley* case, supra, Widgery L.C.J., after referring to the *Smith* case, supra, and to the *Martin* case, supra, said (at p. 401) :

"From those two pasages, I derive two conclusions, first of all, that the indictment may be defective if it fails to allege an offence disclosed by the depositions, or alternatively it alleges an offence not disclosed by the depositions ....." . 5

In Archbold, supra, p. 52, para. 53, there appears the following passage :

"(a) An indictment is defective not only when it is bad on the face of it, but also :

(i) when it does not accord with the evidence before the 10 committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein.

(ii) when for such reasons it does not accord with the 15 evidence given at the trial : *R. v. Hall* [1968] 52 Cr. App. R. 528; *R. v. Johal and Ram* (ante)."

As regards, generally, the principles applicable to amending an indictment, the following were stated in *R. v. Johal and Ram*, 56 Cr. R. 348, by Ashworth J. (at pp. 353-354) : 20

"The decision in HARDEN [1962] 46 Cr. App. R. 90; [1963] 1 Q.B. 8 was also relied on by Mr. Farrer. In that case, at the close of the case for the prosecution, application was made to amend the indictment : in respect of some counts leave was refused but in respect of others it 25 was granted. On appeal it was held that leave was rightly granted in respect of one count, but wrongly in respect of another. It is unnecessary to quote from the judgment in which the difference in nature between the two relevant amendments is emphasised. The effect of the decision is 30 that when amendment of a particular count is under consideration it may be a question of degree whether the proposed amendment is no more than the correction of a misdescription or on the other hand involves the substitution of a different charge. 35

In the headnote to the report of this case in the Criminal Appeal Reports it is stated at p. 91 : 'An amendment of a count of an indictment may not be made after arraignment

if the result is to substitute another offence for that originally charged.' As a statement of principle, to be applied generally. this is, in the judgment of this Court, too wide. No doubt in many cases in which, after arraignment, an amendment is sought for the purpose of substituting another offence for that originally charged, or for the purpose of adding a further charge, injustice would be caused to the accused by granting the amendment, but in some cases (of which the present case is an example) no such injustice would be caused and the amendment may properly be allowed.

Reference was also made to the decision HALL [1968] 52 Cr. App. R. 528, but there is no need to consider it in detail; it is an example of an amendment being properly allowed before arraignment when there was no injustice to the person accused.

In the judgment of this Court, there is no rule of law which precludes amendment of an indictment after arraignment, either be addition of a new count or otherwise. The words in section 5(1) of the Indictments Act 1915 'at any stage of the trial ' themselves suggest that there is no such rule; if the suggested rule had been intended as a limitation of the power to amend, it would have been a simple matter to include it in the subsection.

On the other hand this Court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraingment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."

As to the stage of the trial at which an indictment may be amended it is to be noted that in *R. v. Harris*, 62 Cr. App. R. 28, this was done at the close of the case for the prosecution, and in *R. v. Dossi*, [1918] 87 LJ KB 1024, the indictment was amended even after the jury had returned a verdict, in the following circumstances:

"The appellant, Severo Dossi, was charged on May 9, 1918, before the Deputy-Chairman of the London County Sessions, with indecent assault, and was convicted and

sentenced to nine months' imprisonment, and recommended for deportation.

The indictment on which the appellant was convicted charged him in two counts with indecently assaulting a child named Nora Elizabeth White, aged eleven, 'on March 19, 1918,' and with indecently assaulting a child named Rebecca Barnett, aged fourteen. The evidence of White referred to no specific date, but she alleged constant acts of indecency over a considerable period terminating at some date in March, 1918. A witness for the defence swore that he was with the appellant on March 19 during the material time, and that during that period no indecency with a child took place.

The jury retired for three-quarters of an hour, and on their return said they found the appellant 'with regard to the date March 19 not guilty. If the indictment covers other dates, guilty'. They also found him not guilty on the count referring to Rebecca Barnett.

On the application of the prosecution the deputy-chairman amended the indictment by substituting 'on some day in March' for the words 'on March 19, 1918', and the jury on again being questioned found the appellant guilty on the amended indictment."

Also, in the *Kyriacou* case, supra, an amendment of the charge was allowed at the conclusion of the case for the prosecution and after a submission had been made that the ingredients of the offence, with which the appellant in that case had been charged, had not been duly established.

In *Hji Solomou v. The Republic,* 1964 C.L.R. 170, at the close of the case for the prosecution, in a trial upon a charge for premeditated murder, counsel for the defence submitted that no case had been made out sufficiently to justify calling upon the accused in that case for his defence and the trial Court found that the evidence was more consistent with lack of premeditation and ordered the amendment of the information through the substitution, instead of the charge for premeditated murder, of a count charging only homicide; and the trial proceeded further on that basis.

In the light of all the foregoing we are of the opinion that it was open to the trial Court, in the particular circumstances of the present case, to proceed to amend the information by adding the new counts, 5 and 6, under section 83(1) of Cap. 155, after it had acquitted the appellants as regards the four counts in the information on the basis of which their trial had commenced.

We do not agree that the trial Court exercised erroneously its relevant discretionary powers: It is true that the new counts charged the appellants with offences of a different nature, but they were not offences unrelated to the pattern of conduct of the appellants in respect of which they had been initially charged with offences of premeditated murders. The said murders were allegedly committed by the appellants at Ayios Tychonas, in the District of Limassol, on 16th July 1974, in the course of the abortive coup d'etat which took place in Cyprus on 15th July 1974, and the new counts, 5 and 6, related again to conduct of the appellants in the District of Limassol between 15th July and 17th July 1974 in the course of the said coup d'etat.

We have perused carefully the voluminous record of the trial in the present case and we are satisfied that the addition of the said two new counts, at the stage at which it was made, did not, in any way, prejudice adversely the rights of the appellants to defend themselves in respect thereof, nor did it cause to them any other injustice.

It has been submitted that after the appellants had been acquitted on the initial counts, 1 to 4, it was no longer legally possible for the trial Court to resort to its powers under section 83(1) of Cap. 155. But we are not prepared to place such a restrictive interpretation on the said section as to exclude the course adopted by the trial Court in the present case.

We are of the opinion that the inclusion therein of the expression "at any stage of the trial" shows that the said section can be resorted to, in the manner in which this was done in the present case, namely at the stage at which the trial Court rules that no prima facie case has been made against an accused sufficiently to require him to be called upon to make his defence on the information as it has been initially framed but before the trial has been finally concluded; and, in this respect, we are of the view that the provisions of section 74(1) (b) of Cap. 155

have to be read in conjunction with, and subject to, the provisions of section 83 (1) of the same Law.

Likewise, we are of the opinion that the provisions of sections 107 and 108 of Cap. 155, to the effect that an information has to be filed by the Attorney-General in an Assize Court, and that 5 such information is to be framed by him, have to be applied in conjunction with, and subject to, the provisions of section 83(1) of Cap. 155, and that, consequently, the said section 83(1) can be resorted to, also, at trials on information before an Assize Court. 10

Regarding, next, the submission of counsel for the appellants that the course adopted, in the present instance, by trial Court, under the aforementioned section 83(1) of Cap. 155, was unconstitutional as offending against Articles 12.2, 113.2 and 152.1 of the Constitution, we think that it suffices to state that 15 the scope of each of such Articles is totally unrelated to, and does not exclude in any way, the amendment of an information of charge, under section 83(1) of Cap. 155; and, therefore, the addition of the new counts, 5 and 6, in the present instance, did not in any way offend against the provisions of any one of the 20 said Articles of the Constitution.

Nor can we accept as correct the contention of counsel for the appellants that they are the victims of unequel treatment, contrary to Article 28 of the Constitution, because other persons who have committed offences during the coup d' etat in July 1974, 25 such as those with which the appellants have been charged by means of the said new counts, have not been prosecuted in respect of those offences due to a policy that was adopted by the Government in relation to offences of this nature. The trial Court, in the absence of any express statutory provision rendering 30 the appellants immune from prosecution in respect of offences such as those to which the two counts relate, was perfectly entitled, in the course of the normal application of the law, to add new counts charging the appellants with the offences in questions and was not bound to adapt the proper exercise of 35 its relevant discretionary powers to a policy of the Government such as that which was relied on by the appellants.

Before concluding, this decision we would like to observe that we have been invited by counsel for the respondent to reject the submission of the appellants as regards the alleged impropriety 40

of the addition of the two new counts because since the appellants did not object at the trial to the addition of such counts they were now precluded from doing so on appeal in view of the provisions of section 153 of Cap. 155, which reads as follows :

5 "153 No judgment, finding, sentence or order of a trial Court shall be reversed or altered on appeal on account of any objection to any charge, information, summons or warrant for any alleged defect therein in any matter whether of substance or form unless such objection was raised before 10 the Court whose decision is appealed from, nor for any variance between such charge, information, summons or warrant and the evidence adduced in support thereof unless such objection was similarly raised and the trial Court, notwithstanding that it was shown that by such variance the 15 appellant had been deceived or misled, refused to adjourn the hearing of the case :

Provided that, if the appellant was not represented by an advocate at the hearing before the trial Court, the Supreme Court may allow any such objection to be raised. "

20 As it appears from the record before us, immediately after the appellants pleaded not guilty to the new counts counsel appearing for some of them applied for leave to withdraw from the case, but the trial Court refused to allow them to do so.

Then, one of the appellants, who was accused 7 at the trial, 25 stated that he did not want to be defended any longer by counsel and he would like to defend himself and he was permitted to do so. In view of this we think that, in the light of the proviso to section 153, above, the better course is to hold that the said section 153 is not applicable to the present proceedings, even if 30 it could be held that it was otherwise applicable.

For all the foregoing reasons the contention of the appellants that the new counts, 5 and 6 , were erroneously added to the information cannot be upheld and these appeals will now be heard in respect of the other grounds of appeals, as regards both the 35 convictions of the appellants and the sentences passed upon them.

Order accordingly.