1985 March 6

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

SAVVAS STYLIANOU KOURTIS,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 4591).

Finidngs of fact and conclusions drawn therefrom—Road traffic—Collision—Appellant's version rejected—Testimony of the driver of one of the vehicles involved believed—A passage in the judgment to the effect that if the appellant's version had been correct, the brake marks would not have been continuous—In the circumstances such passage does not indicate that the trial Judge drew conclusions from his personal knowledge without expert evidence—Said passage used as a reason or illustration in support of the valuation of the rest of the evidence.

Criminal Procedure Law, Cap. 155 ss. 75 and 76—Joint trial—One of the accused, i.e. the appellant, gave evidence incriminating ex-accused 2—Ex-accused 2 entitled to cross-examine the appellant—The order of cross-examination is prescribed by s. 76—S.75 does not empower the trial Judge to change such order—The trial Judge ought not to allow the prosecution to cross-examine the appellant before his cross-examination by ex-accused 2.

Criminal Procedure Law, Cap. 155—The proviso to s. 145(1)(b)—This is a proper case for its application, as the change in the order of cros-examination contrary to s. 76, did not lead to any substantial miscarriage of Justice.

In the afternoon of 21.9.83 a motor lorry was driven on the old Limassol-Nicosia road towards Nicosia followed by appellant's motor car which at the same time was

followed by another motor car, driven by ex-accused 2. At a particular moment the driver of the motor lorry tried to turn right in order to enter a side street. The lorry was then hit at its right side by the car of the appellant and on its left side by that of ex-accused 2.

Appellant and ex accused 1 were tried together. They were both found guilty for driving without due care and attention contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law 86/72.

After the case for the prosecution was concluded appellant elected to give evidence on oath whereas ex-accused 2 did not so elect. Appellant was cross-examined first by the prosecution and then by his co-accused (ex accused 2).

The trial Court accepted the version given by the driver of the motor lorry who inter alia said that whilst he was at a distance of 90—100 feet from the side road he heard a screeching noise which he described as continuous and without interruption and then saw appellant's car with its wheels rubbing on the asphalt after they had been locked through the application of brakes.

The trial Judge did not accept the version of the appellant that his car was first hit by the car of ex-accused 2 and that it was then that it was pushed and hit on the lorry. A passage in the reasoning he gave reads as follows: "If the allegation of the first accused that he was pushed forward from the knock of the car of the second accused was correct, the brake-marks would not be continuous, they would be interrupted by 1-1.5 meters as his allegation is".

Held, dismissing the appeal:

(1) There are no reasons justifying interference with the trial Judge's findings of fact and the conclusions he drew therefrom. The passage hereinabove quoted does not indicate that the trial Judge drew inferences from his personal knowledge in the absence of expert evidence on the subject. The said passage was merely used as an illustration or reason reinforcing the Judge's evaluation of the evidence adduced. Looking at the very nature of the brake-marks

left by the appellant's car, this Court has no difficulty to say that this was one of those instances where the Judge's common sense was rightly invoked in support of his valuation of the rest of the evidence *(Constantinou* v. *The Police* (1972) 2 C.L.R. 89 and *HjiGeorghiou* v. *The Police* (1972) 2 C.L.R. 86 distinguished. *Mylordis* v. *The Police* (1981) 2 C.L.R. 219 cited with approval.

(2) Section 76 of the Criminal Procedure Law, Cap. 155 reads as follows: "Where, during or upon a joint trial, one of the accused gives evidence under s. 74(c) of the Criminal Procedure Law, Cap. 155 and in so doing incriminates his co-accused, such co-accused shall be entitled to cross-examine him and such cross-examination shall take place before cross-examination by the prosecution". Evidence incriminating a co-accused means evidence which supports the case of the prosecution in all material respects or which undermines the defence of the co-accused. As in this case the appellant by his testimony incriminated ex accused 2, the trial Judge was right in allowing the latter to cross-examine the former.

But as regards the order in which such cross-examination had to be made, that is expressly provided for in section 76 of the Law hereinabove set out, and a departure therefrom, in the circumstances, would be outside the ambit of the provisions of section 75 of the Law which empowers trial Judges to regulate the procedure at the joint trial of persons only in a manner which is not inconsistent with the provisions of the Law.

(3) As however, the change in the order of cross-examination has not prejudiced the appellant in any way or caused an injustice to him, no substantial miscarriage of Justice has actually occurred. It follows that this is a proper case for the application of the proviso to s. 145(1) (b) of Cap. 155.

Appeal dismissed.

Cases referred to:

Constantinou v. *The Police* (1972) 2 C.L.R. 89;

HadjiGeorghiou v. *The Police* (1972) 2 C.L.R. 86;

Mylordis v. *The Police* (1981) 2 C.L.R. 219;

R. v. *Stannard and Others* [1964] 1 All E.R. 34;

Murdock v. *Taylor* [1965] A.C. 574;

R. v. *Hilton* [1971] 3 All E.R. 541;

Georghiades v. *The Police* (1981) 2 C.L.R. 155;

R. v. *Haddy,* 29 Cr. App. Rep. 182;

Stirland v. *D.P.P.,* 30 Cr. App. Rep. 40.

Appeal against conviction.

Appeal against conviction by Savvas Stylianou Kourtis who was convicted on the 9th November, 1984 at the District Court of Nicosia (Criminal Case No. 505/84) on one count of the offence of driving without due care and attention contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972 (Law No. 86/72) and was sentenced by N. Nicolaou, D.J. to pay £15.- fine.

G. Korfiotis, for the appellant.

Cl. Antoniades, Senior Counsel of the Republic, for the respondents.

A. Loizou J. gave the following judgment of the Court. This is an appeal against the conviction of the appellant by the District Court of Nicosia for a charge of driving motorcar HK 700 on a road without due care and attention, contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972 (Law No. 86 of 1972).

At the trial of the appellant there was a second accused tried together with him on a similar count, who though also found guilty, has not appealed against his conviction.

The learned trial Judge after summing up the testimony of the various witnesses called by both sides made definite findings which he set out in his judgment in a meticulous way in separate and numbered paragraphs. This has made the task of this Court easier as at a glance we would see, and I am sure counsel has also found it equally helpful,

the detailed circumstances of the collision and the causes that were the subject of the counts against the appellant and ex-accused 2. By this observation, however, we should not be taken as prescribing to Judges or that we are not commending for their attention a particular style of judgment writing. That is not our purpose.

In the afternoon of the 21st September 1983, a motor-lorry under registration No. HV 814 was driven on the old Limassol-Nicosia, road to the direction of Nicosia loaded with soil for delivery at "Pyramos" brick and tile factory which is by a right turn bend off this road. At the same time this vehicle was followed by the appellant behind which there was motor-car under registration HK 801 driven at the time by ex-accused 2. At a particular moment the driver of the motor-lorry tried to turn right in order to enter into a side track-road. It was then hit at its right side by the car of the appellant and on its left right, by that of ex-accused 2. The points of impact and the brakemarks left on the road as well as other particulars were marked on a plan prepared by a Police Constable, in fact the accident investigator who arrived at the scene shortly after the collision. The brake-marks left by the car of the appellant stopped where the wheels of the car came to a stand still which it was indicative that he stopped at that moment. They were totally on the right half side of the road facing as one proceeds to Nicosia.

It was accepted by the learned trial Judge that from a distance of 130-140 feet before reaching the side-road the lorry driver indicated with his trafficator and extended also his arm giving a signal of his intention to turn right and that whilst he was at a distance of 90 - 100 feet from the bend he heard a screeching noise on the road which he described as continuous and without interruption, he saw the motor-car of the appellant following him with its wheels rubbing on the asphalt after its wheels had locked through the application of brakes. Ex-accused 2, did not apply brakes when he saw the stop-lights of the appellant nor did he change gear whilst his speed was 70 miles per hour. The appellant took at some stage to his right without giving any signal about it for the purpose of overtaking the lorry.

The learned trial Judge accepted the evidence of the Police Traffic Investigator as regards the points of impact in relation to the motor-lorry. He did not accept the allegation of the appellant that his vehicle was hit first by the car of ex-accused 2 and that it was then that it was pushed and hit on the lorry. The learned trial Judge then made the following finding: "The brake-marks reach and or end exactly up to a point below the wheels of the car of the first accused which are exactly at the point it hit on the lorry. If the allegation of the first accused that he was pushed forward from the knock of the car of the second accused was correct, the brake-marks would not be continuous, they would be interrupted by 1 - 1½ meters as his allegation is. The lorry-driver mentioned that the noise of the brakes of the motor-car was continuous without interruption. I do not accept the position expressed by the passenger in the car of accused 2 as regards the collision of the car of accused 2 with the car of accused 1, that it occurred before it collided with the lorry because at a point he mentioned that the car of accused 1 went on rubbing, whereas on another occasion he mentioned that it stopped at a certain distance from the lorry, and they hit it from behind without escaping my attention that this witness is a relative of both sides, who at the stage of cross-examination it transpired that in the past there arose a dispute between him and accused 2, whether he would give evidence before the Ecclesiastical Court for his divorce."

We find it convenient whilst at this point to say that we have not been persuaded that there are any reasons justifying our interference with the finding of fact and the conclusions drawn thereon by the learned trial Judge. Connected, however, with this part of the appellant's case is the passage from the reasoning of the learned trial Judge hereinabove set out verbatim where he makes a comment that the brake-marks would not have been continuous but interrupted if the allegation of the appellant that his car stopped before it was pushed forward after it was hit by the car of ex-accused 2.

It was argued that the trial Judge drew inferences and/or

accepted as proved facts and/or conclusions regarding the brakemarks of the vehicle of the appellant on the asphalt contrary to the evidence before him and/or not proved and/or for the evaluation of which there was needed expert evidence. In support of this proposition we were referred to the case of *Constantinou* v. *The Police* (1972) 2 C.L.R. 89 where reference is made to the case of *HadjiGeorghiou* v. *The Police* reported in the same volume at p. 86.

We are afraid we cannot subscribe to this argument as the approach of the learned trial Judge, obviously as expressed is nothing more than an illustration or reason reenforcing his evaluation of the evidence adduced and not a matter of drawing inferences himself from his personal knowledge in the absence of testimony by an expert witness on the subject. The two cases just referred to are clearly distinguishable. If any authority is needed for the proposition we just expounded, same can be found in the case of *Mylordis* v. *The Police* (1981) 2 C.L.R. 219 in which it was held that it was reasonably open to the trial Judge in that case to find that want of precaution on the part of the appellant had been established by the evidence before him even though expert evidence was not adduced to explain the significance of the brakemarks left by the car of the appellant as regards the speed at which his car was travelling at the material time. A fortiori in the present case there was no question of explaining the significance of the brakemarks as regards the speed at which the car was travelling at the time, but looking at the very nature of the brakemarks caused by the car of the appellant and the observation made by the trial Judge we have no difficulty in saying that this was one of those instances that the Judge's common sense has been rightly invoked in supporting his valuation of the rest of the evidence and in particular his finding as to whether the car of the appellant had come to a stand-still before it was hit and pushed forward causing thereby its running into the lorry in front of it.

The second point raised in this appeal relates to the right of a co-accused to cross-examine the other who elected to give evidence on oath and the order in which such

cross-examination has to be made in relation to the cross-examination by the prosecution.

The factual aspect relevant to this issue, as it emanates from the record is briefly this. At the conclusion of the case for the prosecution counsel for the appellant and of ex-accused 2, submitted to the Court that no prima facie case had been made out against their respective clients, sufficiently to require them to make a defence. The learned trial Judge did not sustain these submissions and called upon the two accused to make their defence. The appellant on being informed of his rights elected to give evidence on oath. His version obviously incriminated ex-accused 2 inasmuch as, to put it briefly he claimed that his vehicle had been hit from behind and as a result he was pushed and hit with his car the lorry in front of him, although he, himself on seeing the lorry turning to the right, applied his brakes and brought his car to a stand-still at a short distance from the lorry.

The test which is applied in order to determine whether one accused has given evidence against a co-accused is an objective one and not subjective. Evidence incriminating a co-accused means evidence which supports the prosecution's case in all material respects, or which undermines the defence of the co-accused (see *Archbold, Criminal Pleading Evidence and Practice* 40th edition paragraph 569 a; *Criminal Procedure In Cyprus,* Loizou and Pikis p. 116 et seq.; *R.* v. *Stannard and Others* [1964] 1 All E.R. 34; *Murdock* v. *Taylor* [1965] A.C. 574.

At the conclusion of the cross-examination of the appellant by the prosecution an objection was taken to counsel for ex-accused 2, cross-examining him. The learned trial Judge referred to the provisions of section 76 and the Criminal Procedure Law and said that as he had not been given the impression that there would be an objection to the intimation he had made that he would allow the prosecution to cross-examine first and then allow ex-accused 2 to do so, he allowed the prosecution to cross-examine first.

We shall not dwelve further into the matter as rules of procedure in criminal trials cannot be relaxed or modified

by consent of the parties. That being so we shall proceed to examine the issues raised on the basis of the relevant provisions of the Law and the powers of a Judge to regulate the procedure at the hearing, where more persons than one are tried together, in any way which may appear desirable and which is not inconsistent with the provisions of the Criminal Procedure Law as it is provided by section 75.

Section 76, of the same Law provides as follows:

> "76. Where, during or upon a joint trial, one of the accused gives evidence under section 74(c) of this Law and, in so doing, incriminates one of his co-accused, such co-accused shall be entitled to cross-examine him and such cross-examination shall take place before cross-examination by the prosecution."

On the totality of the material before the learned trial Judge he was fully justified to allow ex-accused 2 to cross-examine the appellant as he was indeed by his testimony incriminating him. We need not therefore refer to the instance when an accused person in a criminal trial has a right to cross-examine a co-accused who gives evidence on oath and when he has not incriminated him. (See *R.* v. *Hilton* [1971] 3 All E.R. 541 and *R.* v. *Stannard* [1964] 1 All E.R. 34.)

As regards the order in which such cross-examination had to be made, that is expressly provided for in section 76 of the Law hereinabove set out, and a departure therefrom, in the circumstances, would be outside the ambit of the provisions of section 75 of the Law which empowers trial Judges to regulate the procedure at the joint trial of persons only in a manner which is not inconsistent with the provisions of the Law.

The change, however, in the order of cross-examination directed by the learned trial Judge in this case though it conflicts and is inconsistent with the order prescribed by section 76 it has in no way prejudiced in our view or caused any injustice to the appellant. It is an irregularity which cannot reasonably be considered to have denied to the appellant a chance of acquittal which was fairly open to him.

This brings us to the application of the proviso to section 145(1)(b) of our Criminal Procedure Law, which is a reproduction of the proviso to section 4(1) of the English Criminal Appeal Act of 1907 in respect of which it has been said that probably upon no other section there have been so many cases decided as upon it. Under the proviso this Court notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, can dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. An extensive analysis of the subject with reference to both English and Cyprus authorities is to be found in Criminal Procedure in Cyprus by Loizou and Pikis where at p. 199 it stated:

> "It is evident on an examination of the authorities that there are no hard and fast rules other than the general principles to which we have already referred as to the application of the proviso and the matter is very much one of discretion, the exercise of which will depend on the evaluation of the impact of a mistake or an irregularity on the verdict of the Court. The implications of an irregularity will depend on the totality of the circumstances of a case."

Furthermore reference may be made to the more recent case on the extent of the application of the proviso, namely *Georghiades* v. *The Police* (1981) 2 C.L.R. 155 and the authorities therein cited and where a useful comparison is made with the power of this Court to order a retrial under section 145(1)(d) of Cap. 155. As regards the question whether a substantial miscarriage of justice has actually occurred the test adopted in *R.* v. *Haddy*, 29 Cr. App. Rep. 182, cited with approval by the House of Lords in *Stirland* v. *Director of Public Procecutions*, 30 Cr. App. Rep. 40, is still good Law and it is whether on the whole facts and with a correct direction the only reasonable and proper verdict would have been one of guilty.

On the facts and circumstances of the case including the nature of the irregularity complained of, we have come to the conclusion that this is a proper case for the application of the proviso. Although the point raised by this ground

of appeal could be decided in favour of the appellant the appeal cannot be allowed as no substantial miscarriage of justice has actually occurred, as the irregularity cannot be said to have brought about the verdict the appellant being technically only in the right.

For all the above reasons the appeal is therefore dismissed.

Appeal dismissed.