

1987 January 26

[TRIANTAFYLIDIS P LORIS & STYLIANIDES, JJ]

THE ATTORNEY—GENERAL OF THE REPUBLIC,
Appellant,

v

ANDREAS PAVLOU PIERIS,
Respondent
(Criminal Appeal No 4765)

Stealing by agent—The Criminal Code, Cap 154 section 270(b)—The said section creates an offence, i e the offence of stealing by agent—The relevant charge need not refer to any other section of the Law

Criminal procedure—Alteration of charge under s 84(4) of the Criminal Procedure Law, Cap 155—Non-attendance of a prosecution witness, if required, for further cross examination—Such non-attendance cannot prejudice the accused—It cannot but be taken against the prosecution

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The respondent was acquitted of a charge of stealing by agent, contrary to section 270(b) of Cap 154, on the ground that the said section does not create an offence, but simply empowers the Court to impose more severe sentence than the one imposed for ordinary stealing

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It should be noted that the trial Judge considered the question whether to order an amendment of the charge, but decided not to do so, because of a risk that the complainant, who lives abroad, would not attend and give evidence, a fact, which would prejudicially affect the accused in his defence

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As a result the Attorney-General filed the present appeal

Held, allowing the appeal (1) It is clear from the case-law of this Court that s 270(b) creates an offence, namely the offence of stealing by agent. The reference of any other section in the statement of the offence for a charge under the said section is not necessary

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(2) It is not necessary to determine whether the trial Judge rightly or wrongly exercised his discretion in relation to the question of amendment, but this Court is constrained to say that the non attendance of a witness for the prosecution, if required after alteration under s 84(4) of the Criminal Procedure Law, Cap 155, for further cross examination, cannot prejudice the accused, as such failure cannot but be taken against the prosecution

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Appeal allowed
Retrial ordered

Cases referred to:

Soteriou v. The Republic, 1962 C.L.R. 188;

Iacovou and Others v. The Republic (1976) 2 C.L.R. 114,

Azinas and Another v. The Police (1981) 2 C.L.R. 9,

5 *Savva «Pambos» v. The Police* (1986) 2 C.L.R. 30,

Rossides v. The Republic (1983) 2 C.L.R. 391.

Appeal against acquittal.

10 Appeal by the Attorney-General of the Republic against the judgment of the District Court of Limassol (Artemis, S.D.J.) given on the 3rd July, 1986 (Criminal Case No. 917/86) whereby respondent was acquitted of the offence of stealing by agent contrary to section 270(b) of the Criminal Code, Cap. 154.

A.M. Angelides, Senior Counsel of the Republic, for the appellant.

15 *Chr. Pourgourides*, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, P.: The judgment of the Court will be delivered by Mr. Justice Stylianides.

20 STYLIANIDES J.: This appeal taken by the Attorney-General is directed against the acquittal of the accused by a District Judge of Limassol.

The accused was charged with the offence of stealing by agent, contrary to section 270(b) of the Criminal Code, Cap 154.

25 Six witnesses for the prosecution gave evidence before the trial Court.

At the close of the case for the prosecution learned counsel for the defence submitted under section 74(1)(b) that a prima facie case had not been made out against the accused sufficiently to require him to make a defence.

30 The prosecutor addressed the Court to the contrary.

The trial Judge ruled that section 270(b), under which the accused was charged, does not create an offence; it only

enumerates cases describing the stolen property which, when existing, empower the Court to impose more severe punishment than the one imposed for ordinary stealing. After referring to section 270(c), he expressed the opinion that the accused should be charged under other sections of the Criminal Code; on his own motion, he invited argument whether the Court should proceed and amend the charge-sheet in view of the fact that the complainant is resident abroad and she might be required to attend the Court again for this trial for further cross-examination. After hearing addresses on the issue raised, the trial Judge delivered judgment whereby the accused was acquitted.

This judgment starts as follows: «In the previous interim decision the Court decided that the case cannot proceed and the accused to be called upon to make his defence on the charge-sheet, as it stands, unless it is amended». He decided not to «order amendment of the charge-sheet» as the accused would be prejudiced by the fact that the complainant lives abroad and notwithstanding the statement by the officer appearing for the prosecution that everything would be done to secure her presence, if requested. If she did not attend, «this would prejudicially affect the accused in his defence» and thereafter proceeded and acquitted the accused.

The appeal is founded on two grounds:-

- (a) That the Court erred in finding that s.270(b) does not create an offence; and,
- (b) The Court wrongly decided that he could not have amended the count.

Section 270 comes under Part 6 of the Criminal Code, Cap.154, «Offences Relating to Property», and particularly under subhead «Stealing».

Section 255 defines «stealing». The first and material part for this case reads as follows:-

- «(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof».

It is clear from the case-law of this Court that s 270(b) creates an offence, the offence of stealing by agent, and the reference of any other section in the statement of the offence for a charge under this subsection is not necessary - (*Soteriou v The Republic*, 1962
5 C L R 188, at pp 194-195)

In *Michalakis Andreou Iacovou and Others v The Republic*, (1976) 2 C L R 114, at p 122, Trantafyllides, P, said -

«In the first place, it is quite clear, on the basis of previous
10 decisions of this Court, one of which is that in *Soteriou v The Republic*, 1962 C L R 188, 194, that section 268 is not merely a punishment prescribing section, but one creating a separate offence. In this respect Vassiliades J, as he then was, said in the *Soteriou* case the following (at pp 194, 195) -

‘As regards the first part of the submission, to the effect that
15 sections 262 and 267 of our Code, merely provide for punishment, one may observe at once, that both sections refer to the offence of stealing defined in section 255. But that cannot mean that without the definition-section, the offence of stealing is not provided for

20 Reading section 262, or section 267 in its context, one would only have to attach a meaning to the words ‘any person who steals’ in the former section, or the corresponding expressions in the latter and one would have both offence and punishment in the section. And surely the Courts
25 applying the law codified in the Cyprus Criminal Code, would be able to give a meaning to these words or expressions, even without section 255

Once, however, section 255 is there opening the part of
30 the Code covering ‘Offences Relating to Property’, as a definition-section, one does not have to look for the meaning, the Court applying the Code must give to these words and expressions, the meaning provided for them or amplified and settled, in the definition-section

35 The opening words in sections 267, 268 and 269 ‘If the offender is’ in the context where these sections occur, clearly mean in my view - If the person who steals within the meaning of section 255, is a person employed etc - Read in

this way, each of these sections fully covers the offence stated in the margin'».

In *Andreas Azinas and Another v. The Police*, (1981) 2 C.L.R. 9, Hadjianastassiou, J., said at p.70:-

«... the section which creates the offence, in the present case, is section 270(b), and therefore, the non-reference to section 257, and even if it was necessary for the proof of the present case, it was not necessary its reference in the statement of the offence.»

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On a submission of «no case» by the defence, pursuant to Section 74(1)(b), the trial Court must decide whether a prima facie case has been made out against the accused sufficiently to require him to make his defence - (*Charalambos Savva «Pambos» v. The Police*, (1986) 2 C.L.R. 30).

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The trial Judge, having wrongly decided that s.270(b) does not create an offence, indulged in considering whether or not to exercise his power for alteration of a defective charge. He departed from the proper course due to his misdirection as to the law. Thereafter he followed the wrong path. The judgment is tainted and cannot survive.

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We need not determine whether he rightly or wrongly exercised his discretion not to proceed to amendment of the charge, as it is unnecessary for the purposes of this appeal. We are constrained, however, to say that the non-attendance of a prosecution witness, if required, after alteration under s.84(4) for further cross-examination with reference to such alteration - (*Rossides v. The Republic*, (1983) 2 C.L.R. 391) - cannot prejudice the accused as the failure of the prosecution to secure the attendance of such a witness could not but be taken against the prosecution and not the accused.

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For the foregoing reasons the judgment of acquittal is set aside. A new trial of the accused is ordered before another Judge.

*Appeal allowed.
New trial ordered.*