1987 February 20

[TRIANTAFYLLIDES P SAVVIDES STYLIANIDES JJ]

GEORGHIOS CHR LEONIDOU,

Appellant,

v

THE POLICE,

Respondent

(Criminal Appeal No 4846)

Criminal Procedure — Amending the charge or information by adding a new count thereto — The Criminal Procedure Law, Cap 155 — Sections 83(1), 84 and 85(1) and (4) — Acceptance by trial Court of submission that prosecution failed to make out a prima facie case and direction, without first seeking the views of counsel for the parties that a new count be added — In doing so trial Court relied on section 85(1) and (4) and not on section 83(1) — As at that stage the trial had not been concluded, the only section that could be invoked was section 83(1) — The wrong application of the law resulted in miscarriage of justice as the accused was deprived of the advantages envisaged by section 84, which would have been applicable, if the trial Court had applied section 83(1) — The necessary prerequisites of the application of section 85(4) — The aforesaid failure to seek the views of counsel constituted a non material irregularity

The appellant was originally charged with rape contrary to sections 144 and 145 of the Criminal Code, Cap 154 After the close of the case for the prosecution, counsel for the accused submitted that no prima facie case was made out against the accused The trial Court accepted the submission, but as in its opinion the evidence disclosed a prima facie case for assault occasioning actual bodily harm contrary to section 243 of Cap 154, it directed, without first obtaining the views of defending counsel, the amendment of the charge by the addition of a second count charging the said offence of assault In doing so the trial Court relied on section 85(1) and (4) of the Civil Procedure Law, Cap 155 and not section 83 and for this reason the Court refused to apply the procedure contemplated by section 84 and turned down an application by counsel for the accused for recalling of prosecution witnesses for further cross-examination The grounds given by the trial Court for not applying section 83 and applying section 85(1) and (4) are that section 83 is not applicable because the original charge was not defective, but the evidence was simply insufficient to establish the commission of the crime by the accused, and that

once the ruling on the submission of no prima facie case was in favour of the accused, the case must be considered as concluded and, therefore, the provisions of s 85 had to be followed

The accused was eventually found guilty on the new count Hence the present appeal

Held, allowing the appeal (1) 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 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 evidence given at the trial *R v Hall* [1968] 52 Cr App R 528, *R v Johal and Ram* [1972] 56 Cr App R 348 (A passage from Archbold's Criminal Pleading, Evidence and Practice, 40th Ed p 52 para 53 adopted)

(2) It was advisable for the trial Court to seek the views of counsel for the parties before adding the new count, but the failure to seek such views does not amount to a material irregularity *(Pouris and Others v The Republic* (1983) 2 C L R 148 at p 161, per Triantafyllides, P)

(3) The requisites which have to be established before section 85(4) can be applied are

(a) It must be established by evidence that the accused has committed an offence not contained in the charge or information

(b) The accused cannot be convicted without amending the charge or information

(c) The accused must not upon his conviction on the new offence be liable to a greater punishment than if he were convicted on the charge or information as it stood, in other words that the punishment provided by law for the added offence must not exceed that of the original offence

(d) That the accused would not be prejudiced by the amendment in his defence

(4) It is abundantly clear from the above authorities that the provisions of section 83 come into operation at any stage of the proceedings and in any case before the conclusion of the trial (vide Pouris case (supra)) When the trial is concluded and the Court has evaluated the evidence before it, coming both from the prosecution and the defence, it may, at the stage of making its findings on the facts, if it comes to the conclusion that part only of the charge or information has been proved, and the part so proved constitutes an offence, convict the accused, without altering the charge or information, of the offence which he is proved to have committed, under sub-section (1) of section 85, or if the Court is of the opinion that it has been established by

evidence that the accused has committed an offence or offences not contained in the charge or information it may direct that a new count be added to the charge or information charging the accused with such offence or offences and the Court may give its judgment thereupon as if the said count or counts had formed part of the original charge or information in accordance with subsection (4) of section 85 and subject to the requisites set out therein

(5) In the present case the trial had not been concluded and the only section which could be invoked at that stage of the proceedings was section 83(1) and not section 85(4) which is applicable in cases where the trial has been concluded The adoption of the procedure under section 85(1) and (4) deprived the appellant of the advantages of section 84 and in particular sub section (4) of section 84 The wrong application of the law has led to substantial miscarriage of justice

Appeal allowed
Conviction quashed

Cases referred to

Chrysostomou v The Police 24 C L R 192,

Foum and Others v The Republic (1980) 2 C L R 152

Panayides and Others v The Police (1985) 2 C L R 147

R v Hall [1968] 52 Cr App R 528

R. v Johal and Ram [1972] 56 Cr App R 348

Mehmet v The Police (1970) 2 C L R 62

HjiSolomou v The Republic 1964 C L R 170

Pouns and Others v The Republic (1983) 2 C L R 148,

R v Gregory [1972] 1 W L R 991

Appeal against conviction.

Appeal against conviction by Georghios Chr Leonidou who was convicted on the 31st January, 1987 at the District Court of Paphos (Criminal Case No 849/86) on one count of the offence of assault causing actual bodily harm contrary to section 243 of the Criminal Code Cap 154 and was sentenced by Anastassiou, S D J. to three months' imprisonment

Appellant appeared in person

S. Matsas, for the respondents

TRIANTAFYLLIDES P The judgment of the Court will be delivered by Mr Justice Savvides

SAVVIDES J The appellant was originally charged with rape under sections 144 and 145 of the Criminal Code Cap 154 In view of directions by the Attorney-General of the Republic in the exercise of the powers vested in him under para (b) of section 155 of the Criminal Procedure Law Cap 155 the case was tried summarily by a Senior Judge of the District Court

After the close of the case for the Prosecution the trial Court accepted a submission by counsel for the appellant that a prima facie case had not been made out against the appellant sufficiently to require him to be called upon to make his defence and went on to hold that the evidence adduced by the Prosecution disclosed a prima facie case against the appellant contrary to section 243 of the Criminal Code It thereupon acquitted the appellant on the count of rape and directed the amendment of the charge by the addition of a second count charging him with assault causing actual bodily harm, contrary to section 243 of Cap 154 According to his decision the trial Judge in so doing relied on the provisions of section 85(1) and (4) of Cap 155 and not on section 83 and for this reason he did not adopt the procedure contemplated by section 84 in cases of amendment of a defective charge under section 83

The appellant was charged accordingly but before he entered a plea his counsel voiced his objection to the addition of such a count contending that such amendment was made without counsel having been asked to express his views on the matter He further submitted that the decision was wrong as the provisions of section 85(1) and (4) relied upon by the Court were not applicable at that stage of the proceedings as the trial had not been concluded The provisions which were applicable, counsel submitted, were those under section 83 and the procedure to be followed that provided by section 84 The trial Judge rejected the objection raised and repeated that he adopted the formula of section 85(1) and (4) because he felt that that was the correct one

The appellant pleaded not guilty and was called upon for his defence

Counsel for the appellant asked leave from the court to recall the witnesses who gave evidence at the preliminary inquiry and in particular the complainant, for cross-examination in respect of the

new count The Count refused such leave on the ground that there is no provision in section 85(1) and (4) for recalling and further cross-examining witnesses who had already given evidence.

Counsel for the appellant then applied for an inspection by the court of the locus and in particular the house of the appellant where the alleged offence had taken place. Counsel for the respondent, on the other hand, strongly objected to such course and the Court ruled against such inspection.

After hearing the evidence of the appellant and one witness called by the defence, the learned trial Judge found the appellant guilty on the new count and sentenced him to three months imprisonment. Before concluding his judgment the learned trial Judge reverted to the reasons given by him why he regarded that the procedure under section 85(1) and (4) of Cap. 155 was the proper one in the circumstances of the case and said the following in this respect:

«Before I conclude my judgment I feel I must comment upon the observation of Defence Counsel regarding the procedure of s. 85(1) and (4) of Cap. 155 which was followed by the stage of the submission for the prima facie case and I have this to say:

(a) S 83 does not apply here as the charge is not defective but the evidence was simply insufficient for this offence for the reasons given in the ruling.

(b) Consequently s. 84 does not apply as well.

(c) As regards s. 85(1) and (4) once the ruling on the prima facie submission was in favour of the accused and the accused was not called upon to make his defence I say that the case must be considered as concluded there and then and that's why the provisions of s. 85 were followed instead of those of s. 83 and s. 84, and I consider it to be the proper thing to do in the circumstances because of the provisions of the case of *Hadjisolomou - v - The Republic*, 1964 where an almost similar procedure was recommended at the stage of the submission of no prima facie case.

(d) Even if s. 85 was not applicable here, the formula followed did not deprive the accused or prejudiced him in making his defence as he was allowed and indeed he gave evidence, he called witnesses for his defence.»

Counsel for the appellant in his six-paged notice of appeal has not only set out the grounds of appeal relied upon but has given also full particulars of the irregularities which, he alleges, had led to substantial miscarriage of justice in the case under consideration.

At the hearing of this appeal counsel for the appellant did not appear as notice of the appeal had not been served on him in time. Bearing, however, in mind that the grounds of appeal and any argument in support of them appeared sufficiently in the notice of appeal prepared by counsel for the appellant and that by adjourning the hearing of the appeal, the appellant might have completely served his term of imprisonment, in fairness to the appellant and with his consent, we decided to hear the appeal on the material placed before us by his counsel, which was adopted by the appellant.

The material ground on which the appeal turns, is whether the trial Court correctly relied on section 85(1) and (4) in the circumstances of the present case or whether the provisions which should have been relied upon were those under sections 83 and 84.

Sections 83, 84 and 85 of Cap 155, which are material to the present case, provide 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

(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 connection therewith as having been filed in the altered form.

84. (1) When a charge or information is altered as in 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

(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

(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 witness with reference to such alteration

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

(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

(3) If a person is proved to have done any act with the intent 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 notwithstanding that he was not charged with such last-mentioned offence, be convicted of the same

(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, 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 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 »

As it appears in the text and pointed out also in a series of cases of this Court the requisites which have to be satisfied before section 85(4) can be applied are -

(a) It must be established by evidence that the accused has committed an offence not contained in the charge or information

(b) The accused cannot be convicted without amending the charge or information

(c) The accused must not upon his conviction on the new offence be liable to a greater punishment than if he were convicted on the charge or information as it stood, in other words that the punishment provided by law for the added offence must not exceed that of the original offence

(d) That the accused would not be prejudiced by the amendment in his defence

(see, inter alia, *Chrysostomou v The Police*, 24 C L R 192 at p 194, *Fourri & Others v Republic* (1980) 2 C L R 152 at p 177 and *Panayides & Others v Police* (1985) 2 C L R 147 at p 163, in all three of them s 85(4) was considered)

On the question as to when a charge or information may be considered as defective so that the provisions of s 83 and 84 can be applied, useful guidance may be derived from Archbold's Criminal Pleading, Evidence and Practice, 40th ed p 52, para 53 where it is stated as follows

«(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 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

evidence given at the trial: *R. v. Hall* [1968] 52 Cr. App. R. 528; *R. v. Johal and Ram**.»

The object of the provisions of sections 83, 84 and 85 of Cap. 155 was correctly stated by Vassiliades P. in the case of *Mehmet v. The Police* (1970) 2 C.L.R. 62 in which at pp. 68 and 69 we read the following:

«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 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.»

In that case after witnesses for the prosecution and the appellant gave evidence and the trial was concluded, the trial Judge in making his findings, after he had dealt with the evidence and made his assessment of the testimony before him, proceeded to amend the charge so as to confine the particulars in the counts to the established facts and he convicted the appellant on the amended charge. The trial Judge did not say whether in amending the charge he was making use of the provisions of section 83 or 85. The Court of Appeal in dismissing the appeal ruled that the case clearly came under the provisions of section 85(1) and that the Judge could have convicted the appellant on the counts as they were originally framed stating at the same time that certain of the allegations in the particulars had not been established, and concluded as follows (at p. 68):-

«If what has been proved was sufficient to support the count upon which the accused was charged the Judge could convict without making any amendment.»

Similarly in the cases of *Chrysostomou v. The Police*, 24 C.L.R.

* *[1972] 56 Cr. App. R. 348.*

192 and *Hji Solomou v. The Republic*, 1964 C.L.R. 170, the provisions of section 85 came up for consideration by the Court of Appeal. In the *Chrysostomou* case the appellant was originally charged with the offence of discharging a loaded firearm with intent to alarm. After the witnesses for the prosecution and defence were heard and the trial was concluded, the trial Judge acting under section 85(4) directed a new count to be added charging the appellant with failing to keep his firearm in safety, acquitted him on the original count and found him guilty on the other count. The Court of Appeal found that the trial Judge did not go wrong in doing so and dismissed the appeal affirming the conviction.

In the *Hji Solomou* case the original charge upon which the appellant was committed for trial was one of premeditated murder. At the close of the case for the prosecution counsel for the defence submitted that no case had been made out against the appellant sufficiently to require him to be called upon for his defence. The Assize Court gave its ruling and ordered the substitution for the charge of premeditated murder of a count charging the appellant with homicide under section 205 of the Criminal Code on which he found the accused guilty. From what appears in the judgment of the Court of Appeal the Assize Court made use of their powers under section 83(1) of the Criminal Procedure Law and the requirements of section 84 were duly complied with and the case reached in due course the stage of judgment. Vassiliades, J. in delivering the judgment of the Court of Appeal, had this to say at p. 175: -

> «Apart of other considerations arising in the circumstances of this particular case, it would seem that at that stage of the proceedings, the elements of the crime charged, could hardly be treated severally. If at the conclusion of the trial, the Court were to take the view that 'part only of the charge ..... was proved' and that 'the part so proved constitutes an offence', the accused could be convicted of the offence which he was proved to have committed 'without altering the charge or information', as provided in section 85(1) of the Criminal Procedure Law. With the whole evidence in their hands, the Court would then be in a position to decide the case before them, on its merits; and not merely determine the prima facie aspect of part of the count charged.»

The provisions of all three sections 83, 84 and 85 came up

recently for consideration by the Supreme Court in the case of *Pouris and Others v The Republic* (1983) 2 C L R 148 The appellants in that case were charged and tried on the basis of an information containing four separate counts in relation to the premeditated murders of four persons After having heard the evidence for the prosecution 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 but proceeded to amend the charge by directing that two new counts be added charging the accused with offences related to carrying on war - or a warlike undertaking, purporting to act under the provisions of section 83 of Cap 155 Therefore the Court applied the provisions of section 84 by allowing the accused to have a number of witnesses, who had given evidence, recalled and cross-examined in respect of the new counts Triantafyllides, P in delivering the judgment of the Court of Appeal after expounding on the principles in relation to the notion of what amounts to a defective charge or information and after making extensive reference to the English case law on the matter of the corresponding section 5(1) of the Indictments Act, 1915, in England, and after pointing certain differences between section 83 and 84 and the English Act, concluded as follows at p 167 -

«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 »

And went on as follows at pp 167-168 -

«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 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.»

The question also arose in that case before the Supreme Court, as in the present case, as to whether the amendment was justified, in view of the fact that the views of defending counsel had not been sought before the amendment of the indictment.

After making reference to the English authorities and in particular to the case of *R. v. Gregory*, [1972] 1 W.L.R. 991, Triantafyllides, P. said the following at p. 161:

«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 abundantly clear from the above authorities that the provisions of section 83 come into operation at any stage of the proceedings and in any case before the conclusion of the trial (vide *Pouris* case (supra)). When the trial is concluded and the Court has evaluated the evidence before it, coming both from the prosecution and the defence, it may, at the stage of making its findings on the facts, if it comes to the conclusion that part only of the charge or information has been proved, and the part so proved constitutes an offence, convict the accused, without altering the charge or information, of the offence which he is proved to have committed, under sub-section (1) of section 85; or if the court is of the opinion that it has been established by evidence that the accused has committed an offence or offences not contained in the charge or information, it may direct that a new count be added to the charge or information charging the accused with such offence or offences and the Count may give its judgment thereupon, as if the said count or counts had formed part of the

original charge or information, in accordance with sub-section (4) of section 85 and subject to the requisites set out therein.

In the present case the trial had not been concluded and the question arose at the close of the case for the prosecution after a submission was made by counsel for the appellant that a prima facie case had not been made out against the appellant sufficiently to require him to be called upon and make his defence. The only section which could be invoked at that stage of the proceedings was section 83(1) and not section 85(4) which is only applicable in cases where the trial has been concluded.

In the circumstances of the case under consideration we have reached the conclucion that the learned trial Judge wrongly applied the provisions of section 85(4) and that he misinterpreted the decisions in the case of *Chrysostomou* and *HadjiSolomou* and wrongly considered that the dicta in those cases supported his view that in the circumstances of the present case the provisions of section 85(1) and (4) were applicable. The learned trial Judge by adopting the procedure under section 85(1) and (4) and not that of sections 83 and 84 deprived the appellant of the advantages of section 84 and in particular sub-section (4) of section 84 enabling the appellant to have the witnesses, whose depositions were taken at the preliminary inquiry and had been put in as evidence at the trial, recalled and cross-examined on the new count added.

In the result we have reached the conclusion that the wrong application of the law has led to substantial miscarriage of justice and in the exercise of our powers under section 145(1)(b) of the Criminal Procedure Law, Cap. 155, we allow the appeal and quash the conviction of the appellant.

Appeal allowed.
Conviction quashed.