1989 February 21

(SAVVIDES KOURRIS CHRYSOSTOMIS JJ)

SAMMY IMBRAHIM IMBRAHIM ISSA AND ANOTHER,

Appellants

v

THE REPUBLIC

Respondent

(Criminal Appeals Nos 4926 4928)

Criminal Procedure — The Criminal Procedure Law, Cap 155 section 85(1) — Conviction without amending the charge or information, if part of the charge or information is proved — Quantity of drugs possessed by accused not included in the quantity referred to in the particulars of the offence — The section is not applicable ·

Criminal Procedure — The Criminal Procedure Law, Cap 155, section 85(4) — Amending charge or information by adding a charge, the Court acting ex propno motu, and then convict — Prerequisites of its application

Criminal Procedure — Appeal — Power of Court of Appeal to apply section 85(4) of the Criminal Procedure Law, Cap 155, i e amend the charge or information by adding new counts and convict upon them — In the light of section 145(1)(c) of Cap 155, this Court possesses such a power — The power can only be exercised if the prerequisites of the application of section 85(1) are satisfied

Sentence — Possessing small quantity (sample) of controlled drugs (heroin) — Sentence of 4 years' imprisonment reduced to 2 years' imprisonment

Sentence — Possessing controlled drugs (197 grams of heroin) — Trafficking in narcotics has become a serious menace — 5 years imprisonment — Rather on the lenient side

The two appellants were charged for possessing 197 grams of heroin This quantity was found by the police in two plastic bags The evidence showed that the second appellant gave a sample to the first appellant, so that the latter may find a buyer for the whole quantity The 197 grams found by the Police were found after the removal

of the sample therefrom The trial Court convicted the first appellant, in doing so it applied section 85(1)* of the Criminal Procedure Law, Cap 155 The charge was not amended

These are appeals against the conviction and sentence of 4 years' imprisonment on the first appellant and the sentence of 5 years' imprisonment on the second appellant, who was the one, who brought the drugs in Cyprus and in whose possession the whole quantity of 197 grams was found

Held, *dismissing the appeal against conviction of appellant 1* (1) When the particulars of the offence refer to a particular quantity of drugs, but the evidence shows that the accused possessed a lesser quantity, the Court may convict the accused without amending the charge under section 85(1) of Cap 155 In this case however, the sample, which the first appellant took, was not part of the 197 grams to which the particulars of the offence referred The sample was a quantity additional to that referred to in the particulars Section 85(1) was wrongly applied

(2) Can this Court amend the information by adding new counts, so as to convict the appellant for possessing the sample? The combined effect of sections 145(1)(c) and 85(4) suggests a positive reply, provided the prerequisites of the application of s 85(4) are satisfied** In these cases they are The information is amended accordingly The first appellant is convicted on the new counts

Held further, allowing the appeal of the first appellant against sentence Considering his part in the commission of the offence a sentence of 2 years' imprisonment is appropriate

Held further, dismissing the appeal against sentence of appellant 2 The sentence imposed on him is neither wrong nor manifestly excessive On the contrary it is on the lenient side

Appeal against conviction of first appellant dismised Appeal against his sentence allowed Appeal against sentence of appellant 2 dismissed

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,

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* *Quoted at p 46 post*

** *The prerequisites are analysed at pp 46-47*

Leonidou v. The Police (1987) 2 C.L.R. 96;

Rex v. Mohammed Ashraf, Justice of the Peace 1982 Vol. 146 p. 71.

Appeals against conviction and sentence.

Appeals against conviction and sentence by Sammy Imbrahim Imbrahim Issa and Another who were convicted on the 26th October, 1987 at the Assize Court of Limassol (Criminal Case No. 20577/87) on one count of the offence of unlawful possession of controlled drugs contrary to sections 2, 3, First Schedule Part I, 6(1)(2), 24(1), 30 and the Third Schedule of the Narcotic Drugs and Psychotropic Substances Law, 1977 (Law No. 29/77) as amended and section 20 of the Criminal Code, Cap. 154 and on one count of possessing controlled drugs for the purpose of supplying them to others contrary to the same legal provisions and were sentenced by Boyadjis, P.D.C., Anastassiou, S.D.J. and N. Nicolaou, D.J. to five years' imprisonment (Accused 1) and four years' imprisonment (Accused 2) on count 2 with no sentence being passed on count 1.

S. Sofroniou, for appellant in Cr. Appeal 4926.

H. Solomonides, for appellant in Cr. Appeal 4628.

R. Gavrielides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment of the Court. The appellant in Criminal Appeal No. 4926, the first appellant, has appealed against his conviction by the Assize Court of Limassol on an information charging him that:

(a) Between the 27th June, 1987, and 1st July, 1987, at Limassol did have in his possession controlled drugs of class «A» to wit a preparation of 197 grms of a powder containing 14% Diamorphine (Heroin) contrary to sections 2, 3 First Schedule, Part I, 6(1)(2), 24(1), 30 and the Third Schedule of the Narcotic Drugs and Psyhotropic Substances Law, 29 of 1977 as amended by Law 67 of 1983 and s.20 of the Criminal Code, Cap. 154.

(b) Possessing the same for purposes of supplying them to others contrary to the same legal provisions.

He has also appealed against the sentence of four years' imprisonment imposed on him on count 2. In view of the sentence imposed on count 2 the Assize Court passed no sentence on count 1.

Appellant in Criminal Appeal No. 4928, the second appellant, has appealed against his conviction and sentence for the same offence for which he was charged jointly with the previous appellant. Before the hearing of the appeal however he withdrew his appeal against conviction and pursued only the part directed against sentence. The sentence imposed upon this appellant was five years' imprisonment on count 2 and no sentence was imposed on count 1.

On the indictment before the Assize Court both appellants were jointly charged, the first appellant as accused 2 and the second appelland as accused 1. Both appellants are aliens of Egyptian origin. The first appellant has been in Cyprus for the last five years, he is 28 years old, he got married in Cyprus and was in the employment of one Costas Asprou of Limassol as a furniture carver. The second appellant is a sailor and he is aged 31. The police acting on information carried out a search into a vacant building site in Erini Street Limassol and found under the grass two plastic bags containing white powder which after analysis was found to be a powder containing 14% diamorphine (heroin). Acting on the same informaton the police arrested both appellants who made several voluntary statements to the police admitting possession of such staff.

The material facts as to the possession of this quantity of heroin besides the admissions of the two accused were as follows:

The second appellant, who was the person who brought these narcotics into Cyprus, was trying to find a buyer for the quantity of heroin found by the police. In the course of such efforts he came in touch with the first appellant to whom he gave a small sample of the drugs to find a purchaser.

The first appellant, according to his own admission, took this sample to his employer who was interested and kept it for inspection. After information received by the police from other prosecution witnesses some of whom were present when the negotiations between the appellants were taking place, including that of an accomplice who was the person who gave information to the police, the two appellants were arrested. The workshop of

the employer of the first appellant was searched but nothing was found. At the indication of the accomplice the police carried out a search in an empty building site in Limassol where they found, under the grass, the two bags containing the drugs in question the contents of which were weighed and found to be 197 grms of a power which after analysis by a government analyst was found to contain heroin mixed up with a powder to the extent of 14% heroin in the whole quantity.

The Assize Court having duly weighed the evidence adduced by the prosecution and having accepted such evidence including that of the accomplice which, having warned themselves of the fact of his involvement in the case, accepted as true and as amply corroborated by the rest of the evidence, as well as by the confessions of the appellants, found the second appellant guilty on both counts.

In a trial within trial the Court rejected the contention of both appellants that the statements containing their confessions were not admissible as having been improperly taken under threats and violence exercised on them, and found that such statements were voluntarily made by the appellants.

Concerning the first appellant, accused 2, the Assize Court made the following findings:

«We have no evidence indicating that the second accused had any control or access on exhibits 11 and 12 nor did he know where accused 1 kept or hid these exhibits .....

From what we have earlier mentioned however, the fact cannot be ignored that the second accused took from the first accused the sample of heroin and kept it till he delivered it to a third person.

The question which poses for answer in this respect is whether this sample can be the subject of possession. The only thing we know is that this sample is a sample of the quantity of heroin under exhibit 11 of the first accused and the object of the second accused of taking it was to transport it to the person whom he disclosed as being Costas Asprou to test it and decide whether he was prepared to buy a larger quantity if the quality satisfied him. We do not know the weight of the sample. Taking further into consideration that the purpose for which this sample was given was for a test by the intended buyer as well as the evidence of the government analyst, P.W.

6, concerning the manner in which this powder, exhibits 11 and 12, is likely to be used by drug addicts we can conclude that the quantity of the sample was such that could be seen, counted and certainly be used. Whether a quantity of prohibited drugs however small, even traces can be the object of possession by a person all other characteristics of possession being present is a matter to be decided by the Court on the basis of common sense.»

The Court then reviewed the legal authorities concerning possession of small quantities of drugs and concluded as follows:

«It, therefore, emanates from what we have said that the sample of heroin which the second accused had in his possession with the intent of disposing it to a third person, as he did, can be the subject of possession and that the second accused has acted in contravention of the legal provisions referred to in both counts.»

Then the Assize Court pondered on the question whether accused 2 (first appellant) could be found guilty on the two counts, in respect of the quantity contained in the sample only, under the provisions of s.85(1) of the Criminal Procedure Law, Cap. 155 without amending the charge or whether the charge should be amended under the provisions of s.85(4) by adding new counts charging the accused is respect of the sample only and find him guilty on such new counts accordingly.

The Assize Court in their judgment in this respect had this to say:

«The last question which remains to be answered is whether the charge in its present form allows the conviction of the second accused. The difficulty rests in the existing contradiction which arises from the fact that the Court has already ruled that the second accused did not possess 197 grms of the controlled drug which is referred to in the particulars of both charges. We, however, believe that the circumstances of the present case, permit the invoking of sub-section (1) of s.85 of the Criminal Procedure Law Cap. 155 as it has been explained and applied by the Supreme Court in the case of *Fatma Mehmet v. The Police* (1970) 2 C.L.R. 62. In the circumstances we do not consider that it is necessary to make any amendments to the charge under the provisions of s.83 of Cap. 155 or apply the provisions of s.85(4) of Cap. 155, something we would have proceeded to do if the case was not covered by s.85(1).

For all the aforesaid reasons we find also accused 2 guilty on both counts with the clarification which we have already made i.e. in connection only with the sample of heroin.»

The question which has to be answered in respect of such finding is whether the Assize Court correctly applied the provisions of s.85(1) of the Criminal Procedure Law in the present case.

S. 85.(1) provides as follows:

«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.»

It is clear from the wording of this section that in cases of unlawful possession, as the present one, where an accused is charged for possession of a larger quantity of the articles referred to in the charge the Court instead of amending the charge may find the accused guilty in respect of the quantity actually found in his possession.

In the present case the charge against both appellants was for possession of a particular quantity, 197 grms, of the powder containing 14% of a prohibited drug, in particular heroin, which was contained in two small nylon bags found by the Police in a vacant building site hidden under the grass and which was produced as exhibits 11 and 12. For the possession of the whole of such quantity the second appellant was found guilty. Concerning the first appellant, as already mentioned, the Court found that there was no evidence indicating that he had any control or access to such quantity and that he could not be convicted in respect of same. What the Court found was only that he was in possession of another quantity which was contained in a sample given to him by the second appellant for the purpose of finding a purchaser for it. The quantity of the sample though it might have emanated from the original quantity contained in the bags and have reduced same to that found by the police, nevertheless, it was not part of the quantity set out in the two counts nor part of the exhibits 11 and 12 produced in Court. It was an additional quantity over and above the 197 grms. Had this quantity been included in the quantity described in the two counts the Court might have exercised its power under s.85(1) and find the first appellant guilty of the charge in respect of the quantity contained in the sample without amending the charge.

We, therefore, find that, bearing in mind the time, place, circumstances, that the quantity which the Court found that the first appellant took in his possession is different from that described in counts 1 and 2 and also the aforesaid findings of the trial Court, the provisions of s.85(1) could not have been invoked and that the first appellant could not have been found guilty on counts 1 and 2 in respect of drugs mentioned therein and for which it was found that he had no connection. In the result the conviction and sentence of the first appellant on counts 1 and 2 have to be set aside.

Counsel for the respondent submitted that the first appellant could be found guilty on new counts charging him with unlawful possession of the sample and for possessing the same for purposes of supplying it to others and that this Court, in the exercise of its powers under paragraph (c) of sub-section (1) of section 145 and s. 85(4) of Cap. 155 can, in the light of the findings of the Assize Court, find the first appellant guilty on such new counts.

S 85(4) provides as follows:

«85 (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 s.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 count 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 whole of the offence must not exceed that of the original offence.

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

(See, in this respect, inter alia, *Chrysostomou v. The Police*, 24 C.L.R. 192 at p. 194; *Fourri and Others v. The Republic* (1980) 2 C.L.R. 152 at pp. 176-177; *Panayides and Others v. The Police* (1985) 2 C.L.R. 147 at pp. 162-163 and *Leonidou v. The Police* (1987) 2 C.L.R. 96 at p. 103. In the last case an exposition of the law is made as to when the provisions of s.83(1) and s.85(4) may be applied).

The powers of the Supreme Court in determining appeals appear in s.145 of the Criminal Procedure Law, Cap. 155. Under paragraph (c) of sub-section (1) it is provided that the Supreme Court in determining an appeal may set aside the conviction and convict the appellant of any offence of which he might have been convicted by the trial Court on the evidence which has been adduced and sentence him accordingly.

In exercising such power the Supreme Court must bear in mind the requisites set out in s.85(4) hereinabove. In the case under consideration from the material before us and the findings of the trial Court we are satisfied that it has been established by evidence -

(a) That the first appellant committed an offence not contained in the charge or information.

(b) The first appellant could not have been convicted without amending the charge or information.

(c) The punishment for the new offence is not greater if the appellant had been convicted on the charge or information as it stood and

(d) That the first appellant would not have been prejudiced by the amendment in his defence as the facts on which his original conviction was based were those surrounding the possession and disposition of the narcotic drugs contained in the sample.

We have considered the grounds raised by counsel for the first appellant against the findings of the trial Court as to the voluntariness of his confession and the credibility of the

accomplice but we have not been convinced that the trial Court went wrong in accepting such evidence. The Court in a well considered judgment gave ample reasoning for accepting such evidence and no valid reason has been shown for interfering with the findings of the trial Court in this respect.

We further agree with the exposition of the law by the trial Court and its finding that the quantity of the prohibited drug contained in the sample, however small, could be the subject of a charge for possession.

In the circumstances we accept the submission of counsel for the Republic that the first appellant could be convicted and sentenced on two new counts contrary to sections 2, 3, First Schedule, Part 1, 6(1)(2), 24(1), 30 and the Third Schedule of the Narcotic Drugs and Psychotropic Substances Law, 29 of 1977 as amended by Law 67 of 1983, namely, that between the 27th day of June, 1987 and the 1st day of July, 1987 at Limassol, in the District of Limassol, did unlawfully have in his possession controlled drugs of class «A» to wit a sample containing a preparation of a powder containing 14% diamorphine (heroin) (3rd count) and that at the same time and place did unlawfully have in his possession the same controlled drug for the purpose of supplying it to others (count 4). We, therefore, direct the amendment of the information by the addition of the above charges under counts 3 and 4 and we find the first appellant guilty accordingly thereon.

Though counsel for the appellant has addressed us in mitigation to the extent covering the new counts, before we pass sentence on the appellant we propose to hear his counsel if he has anything more to say

(Mr. Sofroniou addressed the Court further in mitigation.

Mr Gavrielides stated that he does not wish to add anything more to what he has already said).

COURT: We have taken into account what has been submitted by counsel for the appellants in mitigation; also their personal and family circumstances. The fact however remains that they were both found guilty of possessing and trafficking narcotic drugs of a dangerous character i.e. diamorphine (heroin).

In the case of *Rex v Mohammed Ashraf*, Justice of the Peace 1982, vol 146, p. [illegible] in which the accused, a 36 years old pedlar

in drugs was convicted to seven years' imprisonment for the possession of 52 grms of heroin and ten years' imprisonment on the basis that he was an established dealer, the Court of appeal refused to interfere with the sentence and observed that «heroin is one of the most addictive of drugs and that it had the power to destroy people both physically and morally and lead to total misery. Beginner or not, anyone who traded in dangerous drugs, particularly heroin, must expect a severe sentence. If those who dealt in, or were minded to deal in, drugs realized that they might be less inclined to indulge in this dangerous and miserable trade».

Possession and trafficking of drugs is a social menace and has created a social problem endangering the foundations of society. From the cases which appeared before the Court during the last five years it is apparent that such offences have become prevalent and notwithstanding the long terms of imprisonment imposed by the Courts such sentences have not operated as deterrent against the commission of same.

In the case of the second appellant we find that the sentence imposed by the Assize Court was neither wrong nor manifestly excessive. On the contrary it is rather on the lenient side. The second appellant brought into Cyprus the quantity of drugs for which he was convicted with the object of disposing it to others for profit. He spared no effort to find prospective purchasers and had the police not acted in time such quantity would have been disposed in the market for use by drug addicts.

In the case of the first appellant however, we find that there are good reasons for making a differentiation. These are his involvement in the case, the small quantity for which he was found guilty and the part he played in the whole case. He was not involved with the possession of the quantity for which the second appellant was convicted and his conviction is only in respect of an undefined small quantity contained in a sample taken by him from the second appellant for delivery to his employer. In his case we find that a sentence of two years' imprisonment on count 4 is a proper one in the circumstances and we order accordingly. We pass no sentence on count 3 as the facts on which it is based are in substance covered by count 4.

In the result the appeal of the first appellant against conviction on counts 1 and 2 succeeds. His conviction and sentence are set aside and the first appellant is sentenced to two years'

imprisonment on new count 4. We pass no sentence on count 3 The appeal of the second appellant against sentence is dismissed.

Appeal No. 4926 allowed and sentence reduced. Appeal No. 4928 dismissed.