

[ZEKIA, J. and ZANNETIDES,J.J.]

1956
Dec. 29
1957
Jan .24

M. SHEFIK HIFZI, *Appellant,*

v.

THE MAYOR, DEPUTY MAYOR, COUNCILLORS
AND TOWNSMEN OF KYRENIA, *Respondent.*

SHEFIK HIFZI
v.
THE MAYOR
AND
OTHERS OF
KYRENIA

(*Criminal Appeal No.2073*)

*Street and Buildings Regulations –Conditions imposed in permit –Street
an Buildings Regulations (made under Cap 165), regulation 13,
proviso to paragraph (3) (c)*

*Building – Balcony – Conditions in permit – Balcony not projecting
beyond street alignment – Streets and Buildings Regulations,
regulation 13.*

*Construction of regulation – Proviso to regulation – Construed together
with main part of regulation – Streets and Buildings Regulations,
regulation 13, proviso to paragraph 3 (c)*

The appellant was, *inter alia*, convicted of the offence of contravening the conditions imposed by the appropriate authority, by building a balcony at a distance smaller than 3 ½ feet from the boundary of the adjoining plot, contrary to the provisions of paragraph (3) (c) of Regulation 13 of the Streets and Buildings Regulations (made under Cap. 165). Paragraph 3 (c) of Regulations 13 reads as follows: –

“(3) Where a projection is at a permitted height –

.....

(c) canopies and balconies, where the width of the street–

(i) does not exceed 18 feet, may project not more than 2 feet;

(ii) exceeds 18 feet, but does not exceed 20 feet, may project not more than 2 ½ feet;

(iii) exceeds 20 feet, may project not more than 3 feet:

Provided always that no canopy or balcony shall be at a dispute smaller than 3 ½ feet from the boundary of any adjoining plot;”

Held: that, as a proviso qualified or limited a section which it followed, and it had to be construed together with the main part of the section to which it was appended, the limitation imposed by the proviso to paragraph (3) (c) of Regulation 13 applied to canopies or balconies projecting beyond the street alignment; and that since the balcony erected by the appellant did not project beyond a street alignment , the limitation imposed by the proviso was inapplicable, and the conviction must be set aside.

Jennings v. Kelly (1940) A.C. 206, at page 229; and *In re Tobrisky Ex parte The Board of Thrade* (1947) Ch. 565, at page 568, referred to.

1956
Dec. 29
1957
Jan.24

Conviction and sentence est aside.

(Note: The portion of the judgment which deals with the Points referred to in headnote is at pages 4 and 5).

SHEFIK HIFZI
v.
THE MAYOR
AND
OTHERS
OF
KYRENIA

Cases referred to:

- (1) *Jennings v. Kelly* (1940) A.c. 206.
- (2) *In re Tabrisky Ex parte The Board of Thrade* (1947) Ch. 565.

Appeal against conviction.

The appellant was convicted on the 1st December, 1956, at the District Court of Kyrenia (Criminal Case No. 793/54) an three counts, of the offence of contravening the conditions prescribed in a building permit, and was sentenced by Attalides, D.J., to pay a fine of £15 on each count, and ordered to pull down the offending balcony.

A.E.E. Reade with *O. Orek* for the appellant

D.G. Demtriades for the respondents.

The fact sufficiently appear in the judgment of the Court which was delivered by:

ZEKIA, J.: The appellant in this case along with other two co-owners have been convicted for certain alleged contraventions of conditions prescribes in a building permit issued by the appropriate authority of Kyrenia, that is, by the Municipal Council of Kyrenia in respect of the erection of a balcony within the municipal limits of Kyrenia town. They have been convicted on three counts:

- (a) for building a balcony projecting over a street with a height of less than 12 feet above the street;
- (b) for building the said balcony with a projection of more than three feet over the street; and
- (c) by building the said balcony within a distance smaller than 3 ½ feet from the boundary of the adjoining plot.

The conditions imposed in the permit were based on Regulation 13 of the Streets and Buildings Regulations. Regulation 13 reads as follows:—

“(13.— (1) Save as provided in this regulation, no part of a building may project beyond the street alignment.

(2) No projection shall be permitted which is at a height of less than 12 feet above the street and no oriel (commonly known as kiosk) shall be constructed where the width of the street is less than 20 feet.

1956
Dec. 29
1957
Jan .24

(3) Where a projection is at a permitted height—

- (a) cornices may project not more than 2 feet;
- (b) lamps, clocks and signs, inclusive of any framework or other construction to which or by means of which they are attached to the building, may project not more than 2 feet;
- (c) canopies and balconies, where the width of the street –
 - (i) does not exceed 18 feet, may project not more than 2 feet;
 - (ii) exceeds 18 feet, but does not exceed 20 feet, may project not more than 2 ½ feet;
 - (iii) exceeds 20 feet, may project not more than 3 feet:

SHEFIK HIFZI
v.
THE MAYOR
AND
OTHERS OF
KYRENIA

Provided always that no canopy or balcony shall be at a distance smaller than 3 ½ feet from the boundary of any adjoining plot;”

It is clear that count (1) is based on regulation 13(2); count (2) on Regulation 13 (3)(c)(iii) and count (3) on the proviso attached to Regulation 13 (3) (c). It is not dispute that the width of the balcony in question is over3 feet, that is about 6 feet, and its height from the ground underneath in parts less than 12 feet and its eastern side of the balcony only 1 foot away from the boundary of the adjoining plot. What is in dispute is whether the ground falling underneath the balcony is a street within the meaning of section 2 of the Streets and Buildings Regulation Law, Cap. 165. The definition of the street in the said Law is given as –

“street” includes any road, bridle-path, pathway, blind alley, passage, footway, pavement or public square.

It is obvious that this case stands or falls—at least as far as the two first counts are concerned—on one issue, namely, whether the balcony complained of constitutes a projection beyond the street alignment or not. It was, therefore, material to ascertain the nature of the ground falling immediately under the said balcony. Evidence was heard in the Court

1956
Dec. 29
1957
Jan .24

SHEFIK HIFZI
v.
THE MAYOR
AND
OTHERS
OF
KYRENIA

below and further evidence was allowed before this Court with a view to ascertaining the category of the space projected over by the balcony under consideration. Mr. Harrop, the Director of Lands and Surveys, stated on oath before us that the balcony in question does not project over a street and that the space underneath the balcony can only be described as land and does not in any sense bear the resemblance of a road, pathway, etc. described under the definition of “street” in the relevant Law. He further stated that there is a cobbled ramp which might have the appearance of a passage, but that ramp is beyond the space projected over by the balcony. The space beneath the balcony—which is limited to the area between two buttresses supporting the wall of the house of the appellants—together with the cobbled ramp are Government property and have not been assigned to the public. In the light of this evidence it is clear that the Court below was wrong in its finding that the balcony erected by the appellant was projecting beyond the street alignment and was contravening conditions attached to the permit which conditions were formulated on the assumption that the balcony was to overhang a street. We think, therefore, that the convictions on count 1 and 2 cannot stand.

Coming to count 3: Can a conviction on count 3 stand independently of the fact that the balcony in question was not projecting over a street? It is clear from the evidence that the eastern part of the balcony is only a foot away from the boundary of an adjoining plot and it offends against the proviso in Regulation 13 (3) (c) cited above which reads: –

“Provided always that not canopy or balcony shall be at a distance smaller than 3 ½ feet from the boundary of any adjoining plot.”

Can we consider that this proviso can be put into operation independently of the sub-section (c) to which it is attached and which sub-section presupposes a canopy or balcony projecting over a street? Count 3, no doubt, is based on this proviso and the effect to be given to this proviso depends on the construction to be placed on it. A proviso is, as a rule, in the nature of an appendage. It has not got a separate existence. It qualifies or limits a section or sub-section which it follows and it has to be construed together with the main part of the section to which it is appended. When this is done one would find no difficulty that the limitation intended to be imposed by this proviso was to applying cases where canopies and balconies were created with projections over a street and since in this case the balcony complained of does not project over a street alignment the limitation imposed by the proviso under consideration is rendered inoperative. In *Jennings v. Kelly* (1940) A.C. 206, at page 229, Lord Wright dealing with the construction of proviso said: –

“The proper course is to apply the board general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest. I do not think that there is any other rule even in the case of a proviso in the strictest or narrowest sense. Still less, where, as here, the introduction of the second part by the word “provided” is a strict inapt.”

In re Tabrisky Ex parte The Board of Trade (1947) Ch. 565, at page 568, Lord Greene said:—

“It is common learning that the object of a proviso is to cut down or qualify something which has gone before. The thing which has gone before is the general power to give a discharge, absolute or suspended, and to impose conditions of the widest possible kind. It would be contrary to the ordinary operation of a proviso to give it an effect which would out down those powers beyond what compliance with the proviso renders necessary.

What the proviso does is this. It does not give powers: it qualifies powers already given and provides that in the exercise of those powers the court shall be subject to certain limitations...”.

It is clear from the authority last quoted that a proviso cannot be interpreted so as to have greater effect or scope than what the foregoing enacting part renders necessary.

We think, therefore, that a conviction based on a proviso which is dependent on a sub-section which pre-supposes balconies projecting over a street, in the absence of such a projection, cannot stand. For these reasons the appeal is also allowed on the last count. Conviction and sentence including order of demolition set aside.

Conviction and sentence set aside.

Demolition order set aside.

1956
Dec. 29
1957
Jan .24

SHEFIK HIFZI
v.
THE MAYOR
AND
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KYRENIA