

1979 June 25

[TRIANTAFYLIDIS, P., A. LOIZOU, MALACHTOS, JJ.]

GEORGHIOS ECONOMIDES,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No. 4043.*)

Criminal Procedure—Appeal—Evidence by commission abroad—Section 61 of the Criminal Procedure Law, Cap. 155—An appeal can be made only against an order for the taking of such evidence, and not, also, against a decision refusing to allow the adoption of such a course—Cf. section 149(6)(a) and (c) of Cap. 155.

5

This was an appeal against a decision by means of which the trial Judge has refused to make an order, under section 61* of the Criminal Procedure Law, Cap. 155, for the taking abroad by commission of the evidence of four defence witnesses.

On the question whether an appeal can be made against a refusal to grant an order under section 61, or whether such appeal can only be made when an order has been issued under it for the taking of evidence abroad pursuant to its provisions:

10

Held, that when section 61 is read as a whole it emerges clearly that the provision in the second part of the section, for an appeal from any order made thereunder, refers only to an appeal against an order provided for in the first part of the same section, namely

15

* Section 61 reads as follows:

“Any Court may, in any criminal proceedings in which it appears necessary for the purpose of justice to do so, make any order for the taking of evidence on oath before any officer of the Court or any other person or persons and at any place within or without the Republic, of any witness or person, and may order any evidence so taken to be filed in the Court and may empower either the prosecutor or the accused to produce such evidence on such terms as such Court may direct. An appeal shall lie from any order made under this section to the Supreme Court and shall be brought by notice of appeal given to the Chief Registrar and to the other party within ten days from the date of the order and the Supreme Court may set aside, confirm or amend such order”.

an order for the taking of evidence by commission, and not also, against a decision refusing to allow the adoption of such a course (cf. section 149(6)(a) and (c) of Cap. 155); and that, accordingly, the appeal must be dismissed for lack of jurisdiction.

5

Appeal dismissed.

Per curiam:

10

The appealed from decision may be challenged, if necessary, by means of an appeal against the final outcome of the criminal trial in the course of which such decision has been given.

Cases referred to:

Makris and Another v. The Police, 19 C.L.R. 21.

Appeal.

15 Appeal by Georghios Economides against the decision of the District Court of Nicosia (Criminal Case No. 12565/79) dated the 26th May, 1979, (Artemides, D.J.) whereby the trial Judge refused to make, under section 61 of the Criminal Procedure Law, Cap. 155, an order for the taking abroad by commission of the evidence of four defence witnesses.

20

M. Christofides, for the appellant.

C. Kypridemos, Counsel of the Republic, for the respondents.

25 TRIANTAFYLLIDES P. gave the following judgment of the Court. The appellant, who is the accused in criminal case No. 12565/79, in the District Court of Nicosia, has appealed against a decision, dated May 26, 1979, by means of which the trial Judge has refused to make, under section 61 of the Criminal Procedure Law, Cap. 155, an order for the taking abroad by commission of the evidence of four defence witnesses.

30

We have had to examine as a preliminary issue whether an appeal can be made against a refusal to grant an order under section 61, above, or whether such appeal can only be made when an order has been issued under it for the taking of evidence abroad pursuant to its provisions. This section reads as follows:-

35

“ Any Court may, in any criminal proceedings in which it appears necessary for the purpose of justice to do so,

make any order for the taking of evidence on oath before any officer of the Court or any other person or persons and at any place within or without the Republic, of any witness or person, and may order any evidence so taken to be filed in the Court and may empower either the prosecutor or the accused to produce such evidence on such terms as such Court may direct. An appeal shall lie from any order made under this section to the Supreme Court and shall be brought by notice of appeal given to the Chief Registrar and to the other party within ten days from the date of the order and the Supreme Court may set aside, confirm or amend such order".

The only reported case in relation to section 61, above, to which we have been referred is that of *Makris and another v. The Police*, 19 C.L.R. 21, where an order was granted by a trial Court for the taking of evidence abroad and an appeal was made against it; therefore, this case cannot be of any real assistance to us regarding the particular aspect of the interpretation of section 61 with which we are concerned in the present proceedings.

In order to construe correctly section 61 it is important to note that in such section there are specifically stated the powers of the Supreme Court when an appeal has been made against an order issued under this section, that is this Court "may set aside, confirm or amend such order"; and it is useful to compare this wording of section 61 with the corresponding wording of section 149(6) of Cap. 155, whereby the same powers with which this Court is vested by means of the above wording of section 61, are given to it, in relation to a Case Stated, by virtue of paragraph (a) of section 149(6), namely to "set aside, confirm or amend the decision" concerned.

It is to be noted, however, that further powers of this Court are enumerated in, particularly, paragraph (c) of section 149(6), and, as a result, this Court, in dealing with a Case Stated, may make an affirmative order contrary to the one which has been made by a trial Court, that is in case of an acquittal at the trial this Court may convict and pass sentence; on the other hand, there is nothing in section 61 which enables this Court to make on appeal an affirmative order contrary to that made by the trial Court, in other words to grant an order for the taking of evidence by commission when such an order has not been made

by the trial Court; it can only set aside, confirm or amend such an order if it has been made by the trial Court.

Moreover, when the said section 61 is read as a whole it emerges clearly that the provision in the second part of the section, for an appeal from any order made thereunder, refers only to an appeal against an order provided for in the first part of the same section, namely an order for the taking of evidence by commission, and not, also, against a decision refusing to allow the adoption of such a course.

10 For all the foregoing reasons we have decided to dismiss this appeal for lack of jurisdiction to entertain it, but, of course, the now appealed from decision of the trial Court may be challenged, if necessary, by means of an appeal against the final outcome of the criminal trial in the course of which such decision has been
15 given.

Appeal dismissed.