1989 August 4

[A LOIZOU P DEMETRIADES KOURRIS JJ]

SOTERIS GEORGIOU ATHINIS,

Appellant,

v

THE REPUBLIC,

Respondents

(Application in Criminal Appeal No 4867)

Appeal — Fresh evidence — The necessary prerequisites that must be satisfied before leave to adduce such evidence is given — The evidence could not have been obtained with reasonable diligence for use at the trial it must be relevant to the issues, it must be credible and it must be such as, if accepted it would create a reasonable doubt as to the guilt of the appellant

Jurisprudence — Stare decisis doctrine of — Observations regarding binding force of decisions of Court of Appeal in criminal and in civil cases

This is the second application filed by the appellant for leave to adduce fresh evidence at the hearing of the appeal The facts need not be summarized The application was dismissed on the ground that the evidence, sought to be adduced, could have been obtained with reasonable diligence for use at the trial

Application dismissed

Cases referred to

R v Taylor [1950] 2 All E R 170

Kambule v R [1950] A C 379,

R v Norman [1924] 2 K B 315,

Simadhiakos v The Police, 1961 C L R 64,

Kolias v The Police (1963) 1 C L R 52,

Pounkkos (No 2) v Fevzi, 1962 C L R 283,

Felekkis v The Police (1968) 2 C L R 151,

Petri v The Police (1968) 2 C L R 40,

Anstidou v The Police (1973) 2 C L R 244,

Zevedheos v The Republic (1978) 2 C L R 47,

Constantinides v The Republic (1978) 2 C L R 337,

R v Parks [1961] 3 All E R 633,

Skone v Skone and Another [1971] 2 All E R 582

Application.

Application by the appellant for leave to adduce further evidence.

Chr. Pourghourides, for the applicant.

M. Kyprianou, Senior Councel of the Republic for the respondent.

A. LOIZOU, P.: The judgment of the Court will be delivered by Mr. Justice A. KOURRIS.

KOURRIS, J.: This is an application to hear further evidence under Section 146(b) of the Criminal Procedure Law, Cap. 155, and under Section 25(3) of the Courts of Justice Law, 1960, (14/

This is the second application filed by the appellant asking the Supreme Court to hear further evidence under the same Section of the Criminal Procedure Law, and under the same Section of the Courts of Justice Law 1960.

The appellant was convicted by the Assize Court of Limassol by majority, together with accused 1, who is not an appellant before this Court, on the following four counts:-

Count 1: Conspiracy to commit a felony, i.e. to cause the death of Yiannakis Omirou, of Limassol;

Count 2: Attempt to kill Yiannakis Omirou, of Limassol;

Count 3: Attempt to destroy the property by explosives, i.e. by putting explosive substances on the driver's seat of motor car JZ 725; and,

Count 4: Possessing explosives substances without licence from the inspector of explosives.

Appellant, on 14.4.1987, was sentenced to four years' imprisonment on count 1; six years' imprisonment on count 2; three years' imprisonment on count 3 and, four years' imprisonment on count 4. Sentences of imprisonment to run concurrently.

The appellant appealed against his conviction and during the hearing of the appeal, as a result of some observations made by one of the judges, counsel for the appellant applied for an adjournments so that he could cause careful examination of Exhibits 62 and 37 and he stated that after such examination the

appellant might seek the leave of the Court to produce fresh evidence in connection with the said exhibits. The adjournment was granted and counsel for the appellant filed in due course an application in which he applied that the Supreme Court hear fresh evidence namely of R.F. Ruddick, Advisor in Medical Photography to the London Hospital Medical College.

The facts relied upon were set out in the affidavit of the brother of the appellant, namely Melios Athinis, stating that after careful examination Mr. Ruddick reached the conclusion that the screwdriver, exhibit 17, and the screwdriver which appeared in photograph, exhibit 62, were not one and the same thing. In other words, photograph, exhibit 62, showed another instrument than the one which was produced in Court. In paragraph 5 of the affidavit it was stated that Mr. Ruddick was of the opinion that the allegation set out in the hearing that the legs of the screwdriver was reduced from the acid is not correct.

The affiant also stated in his affidavit that, if the evidence of Mr. Ruddick were to be accepted as reliable, then the evidence of the most important witness for the prosecution, who is Popi Kanari, should be discarded.

The respondent opposed the appellant's application on the ground that the evidence sought be called was available at the trial and could have been adduced then, and that the guilt of appellant would have been established even if the evidence sought to be produced had been given together with other evidence at the trial.

The Supreme Court for the reasons given in his judgment on 19.1.1989 dismissed the application.

The present application is again based on the affidavit of the brother of the appellant stating that Mr. Ioannis M. Lovarides of Nicosia, former director of the Government Laboratory, has informed the Defence that at all meterial times there were files (λίμες) at the Government Laboratory. Furthermore, the affiant under paragraph (4) of his affidavit states that Lovarides has informed the Defence that also the ordinary file, called «ριvί», was suitable for the purposes of using it in the examination of the screwdriver.He said that this information was conveyed to the Defence from Lovariders on 10.5.1989 and tends to contradict P.W. 22 Popi Kanari, who said in her evidence before the Assize Court of Limassol as follows:-

«Εγώ δεν έχω ειδικές λίμες. Υπάρχουν ειδικές λίμες που δεν αφήνουν απομεινάρια».

By this application counsel for the applicant applies not only for an order directing that fresh evidence be given by Ioannis Lovarides but, also for an order that fresh evidence be given by R.F. Ruddick if, the Court decides to grant the relief prayed, that fresh evidence be given by Lovarides.

Again counsel for the respondent opposed the appellant's application on the same grounds, set out in the opposition to the first application, to the effect that, the evidence sought to be called was available at the trial and could have been adduced then, and that the guilt of the appellant would have been established even if the evidence sought to be produced had been given together with the other evidence at the trial.

It should be noted that the present application was filed after counsel for the appellant and counsel for the respondent completed their addresses to the Court and the case was adjourned to hear counsel for the appellant in reply.

Counsel for the applicant contended that the Court is not bound by its previous decision given on 19.1.1989* and this on the principle of stare decisis that the Court can deviate from its previous decisions. In support of his contention he cited the cases of *R. v. Taylor* [1950] 2 All E.R. 170, *Gideon Kambule v. R.* [1950] A.C. 379 and *R. v. Norman* [1924] 2 K.B. 315.

In the case of *R. v. Taylor* it was decided that, although in civil matters under the rule of stare decisis, the Court of Appeal considered itself bound by its own decisions, the same rule did not apply in criminal appeals where the liberty of the subject was concerned, and consequently, if, in the opinion of the Full Court the law had been misapplied or misunderstood, in the earlier case would reconsider the matter.

It thus, appears that a court is bound by its own decisions unless the law had been misapplied or misunderstood in an earlier case and there has been no such submission by learned counsel for the appellant.

The principles governing the exercise of the power to hear fresh evidence were expounded by this Court in several cases (see *Simadhiakos v. The Police*, 1961 C.L.R. 64; *Kolias v. The Police*, (1963) 1 C.L.R. 52; *Pourikkos (No. 2) v. Fevzi, 1962 C.L.R. 283; Felekkis v. The Police* (1968) 2 C.L.R. 151; *Petri v. The Police*,

* *Reported at p. 9 in this part infra.*

(1968) 2 C.L.R. 40; *Aristidou v. The Police*, (1973) 2 C.L.R. 244, *Zevedheos v. The Republic*, (1978) 2 C.L.R. 47; *Constantinides v. Republic* (1978) 2 C.L.R. 337.

With regard to Cyprus cases, counsel for the applicant relied on the case of *Zevedheos v. The Republic*, (1978) 2 C.L.R. 47 and *Constantinides v. The Republic*, (1978) 2 C.L.R. 337.

The facts in the Zevedheos case are different from the facts in the present case. In that case witnesses, who had given evidence in the case before the Supreme Court, gave evidence in subsequent trial and it was sought to hear such witnesses further because of such evidence.

With regard to the *Constantinides* case counsel for the appellant drew our attention to a passage adopted from the case of *R. v. Perry and Hervey.*

Also counsel for the appellant cited various English cases expounding the principles when a court can hear fresh evidence in an appeal.

The corresponding legislative provisions in England are Section 9 of the Criminal Appeal Act 1907, which was replaced later by Section 23 of the Criminal Appeal Act 1968. Such provisions are similar to but are not identical with our own relevant provisions; but guidance may be derived as the objects of the said provisions are the same.

Guidance may be derived from the case of *R.v. Parks*, [1961] 3 All E.R. 633, where the principles applicable in relation to the hearing of evidence on appeal, in a criminal case, under Section 9 of the Criminal Appeal Act, 1907, were stated to be as follows:

(i) The evidence sought to be called must be evidence which was not available at the trial;

(ii) The evidence must be relevant to the issues;

(iii) It must be credible evidence in the sense of being well capable of belief; and

(iv) The court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

The above approach is similarly applicable in civil cases (see *Aristidou v. The Police*, (supra) at page 246).

In the case of *Skone v. Skone and Another*, [1971] 2 All E.R. 582, the following was stated at page 586:

> «... to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.»

Counsel for the appellant referred us to various English authorities where the paramount consideration, whether to exercise our discretion in favour or against the appellant is how best to serve the interests of justice. But, another paramount consideration which should always be borne in mind is the need for finality in litigation.

We have carefully examined the authorities cited to us and we have carefully perused the record of the proceedings and we have borne in mind all that we have heard from counsel during their addresses to the Court. We find that one of the most vital issues in the whole trial was the connection of the instrument in question with the commission of the offence and the complicity of the appellant and the veracity of the witnesses who testified in connection with them. These witnesses were subjected to lengthy cross-examination about this piece of evidence and the possibility of evidence to contradict their statement and disprove their veracity should have been reasonably foreseen. The defendants had all the time to cause the said exhibit to have it examined by the experts at such stage of the proceedings. Also, the evidence of Lovarides which is sought to be produced under this application to hear fresh evidence was available to the Defence all the time. Therefore, the facts of this application do not satisfy the test of the authorities.

In the present case the applicant has failed to meet the first test, namely that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial and for that reason alone this application must fail.

For these reasons, the application is dismissed.

Application dismissed.