1989 January 19

(A. LOIZOU, P., DEMETRIADES, KOURRIS, JJ.)

SOTERIS GEORGHIOU ATHINIS,

Appellant,

v.

REPUBLIC,

Respondent.

(Application in Criminal Appeal 4867).

Criminal Procedure — Appeal — Adducing fresh evidence before the Court of Appeal — The necessary prerequisites — The evidence could not have been available at the trial, it must be relevant, it must be credible, though not incontrovertible, and it must be such, as if admitted and considered along with the other evidence, it will create a reasonable doubt as to the guilt of the appellant.

The appellant seeks leave to adduce expert evidence relating to one of the exhibits, i.e. a screw driver. The evidence of the expert is to the effect that the exhibit is not the same as the screw - driver shown in exhibit 62. If this evidence is accepted, then argued counsel for the appellant the evidence of Popi Kanari, who testified as expert for the prosecution, should be discarded.

Having stated the necessary prerequisites for allowing fresh evidence to be adduced on appeal, the Court,

Held, dismissing the application: (1) One of the most vital issues at the 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. The need to undermine such witnesses' veracity should have been foreseen and, therefore, the exhibit should have been examined in time by the experts for the defence.

(2) In the light of the above facts, this case does not satisfy the test of the authorities.

Application dismissed.

Cases referred to:

Simadkiakos 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; 5

Petri v. The Police (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. The Republic (1978) 2 C.L.R. 337;

R. v. Parks [1961] 3 All E.R. 633; 10

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

Application.

Application by counsel for the appellant to hear further fresh evidence under section 146(b) of the Criminal Procedure Law, Cap. 155 and under section 25(3) of the Courts of Justice Law, 15 1960 (Law No. 14 of 1960).

Chr. Pourgourides, for the appellant.

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

A. LOIZOU P.: The Judgment of the Court will be delivered by 20 Mr. Justice Kourris.

KOURRIS J.: This is an application to hear further evidence under s.146(b) of the Criminal Procedure Law, Cap. 155 and under s.25(3) of the Courts of Justice Law, 1960, (14/60).

The appellant was convicted by the Assize Court of Limassol by 25 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; 30
Count 3: Attempt to destroy property by explosives, i.e. by putting explosive substances on the driver's seat of motor car JZ 725 and
Count 4: possessing explosive substances without licence from the inspector of explosives.

Appellant, on 14.4.1987, was sentenced to 4 years' imprisonment on count 1; 6 years' imprisonment on count 2; 3 years' imprisonment on count 3 and 4 years' imprisonment on count 4. Sentences of imprisonment to run concurrently.

5 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 adjournment so that he could cause careful examination of exhibits 62 and 37 and he stated that after such examination the 10 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 15 Photography to the London hospital Medical College.

The facts relied upon are set out in the affidavit of the brother of the appellant stating that after careful examination Mr. Ruddick reached the conclusion that the screw driver, exhibit 17 and the screw driver which appears in photograph exhibit 62, are not one 20 and the same thing. In other words, photo exhibit 62 shows another instrument than the one which was produced in Court. In paragraph 5 of the affidavit it is stated that Mr. Ruddick is of the opinion that the allegation set out in the hearing that the length of the screw driver was reduced from the acid is not correct.

25 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 Kanaris should be discarded. Finally, in paragraph 9, it is stated that it will come out that the appellant was framed for these offences.

30 On 24.5.1988, the brother of the appellant swore a supplementary affidavit in which he attached the final report of the said Ruddick, concluding that «Although the screw drivers are of a similar type, the screw driver shown in photograph RFR/1 is not the screw driver which I examined and the photograph is RFR/2».

35 The respondents opposed the appellant's application on the ground that the evidence sought to 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 the other evidence at the trial.

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*, (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. The Republic*, (1978) 2 C.L.R. 337).

The corresponding legislative provisions in England are s.9 of the Criminal Appeal Act 1907, which was replaced later by s.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 s.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 p. 246).

In the case of *Skone v. Skone and Another*, [1971] 2 All E.R. 582, the following was stated at p. 748:-

> «The following conditions must be fulfilled in order to render it proper to allow the hearing of evidence on appeal:
>
> ... that the evidence could not have been obtained with reasonable diligence for use at the trial; second, 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 5 consideration which should always be borne in mind is the need for finality in litigation.

We have very carefully examined the authorities cited to us by both sides and we have carefully perused the record of the proceedings. In our case, perusing the record of the proceedings, 10 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 cross-examined at length about this piece of the 15 evidence and the possibility of evidence to contradict their statement and disprove their veracity should reasonably have been foreseen, and the exhibit should have been examined by the experts at such stage of the proceedings. Therefore, the facts of these applications do not satisfy the test of the authorities.

20 In the present case the appellant 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.

25 *Application dismissed.*