1977 January 14

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, MALACHTOS, JJ.]

IOANNIS ZEVEDHEOS,

Appellant,

v.

THE REPUBLIC,

Respondent.

(*Criminal Appeal No.* 3737).

Criminal Procedure—Appeal—Further evidence on appeal—Principles applicable—Evidence given in a subsequent trial, by witnesses who have given evidence in this case, sought to be adduced for the purpose of showing that it was unsafe to rely on their evidence—Not treated as evidence relevant to outcome of appeal—Paramount consideration being how best to serve the interests of justice—Leave to recall for further evidence the said witnesses granted.

The appellant was convicted on three counts of the offence of having had unlawful carnal knowledge of a female under the age of thirteen years and was sentenced to seven years' imprisonment. One of the essential ingredients of the offence was the exact age of the complainant, who has been found to be under thirteen years on the basis of the totality of the evidence adduced at the trial, but mainly on the evidence of herself and of her father.

After the appellant had appealed against both his conviction and sentence he applied for leave to produce as evidence, for the purpose of the appeal, the transcript of the evidence given by the complainant and by her father, in a case tried subsequently by a differently constituted Assize Court and in which another accused was charged with having committed exactly the same offence against the complainant.

In arguing the application Counsel for the appellant asked the Court either to take into account the evidence of the aforesaid

witnesses given in the subsequent case or, in the alternative, to hear such witnesses further because of such evidence.

Held, (1) we have no difficulty in excluding the first alternative; we do not think that in the circumstances of the present case we can treat evidence given in a subsequent trial as evidence relevant to the outcome of this appeal.

(2) As regards the second alternative, the paramount consideration in a situation like the one with which we are dealing in the present case is how best to serve the interests of justice, and, having taken into account all relevant factors, we have decided to grant the application of the appellant to the extent of recalling for further evidence before us the complainant and her father—pp. 50–55 *post*). (See *R.* v. *Hullett*, 17 Cr. App. R. 8, *R.* v. *Thomas*, 43 Cr. App. R. 210, *R.* v. *Flower and Others*, 50 Cr. App. R. 22, section 146 (b) of the Criminal Procedure Law, Cap. 155 and section 25 (3) of the Courts of Justice Law, 1960 (Law 14/60).

Application partly granted.

Cases referred to:

Simadhiakos v. *The Police*, 1961 C.L.R. 64;
Arestidou v. *The Police* (1973) 2 C.L.R. 244;
R. v. *Hullett*, 17 Cr. App. R. 8;
R. v. *Thomas*, 43 Cr. App. R. 210 at pp. 213–214;
R. v. *Flower and Others*, 50 Cr. App. R. 22 at pp. 28, 30–31.

Application.

Application for leave to adduce further evidence in an appeal against conviction and sentence by Ioannis Zevedheos who was convicted on the 18th June, 1976, at the Assize Court of Larnaca (Criminal Case No. 3993/76) on three counts of the offence of unlawfully having carnal knowledge of a girl under the age of thirteen contrary to section 153 of the Criminal Code, Cap. 154 and was sentenced by Pikis, Ag. P.D.C., Artemis and Constantinides, D.JJ. to concurrent terms of 7 years' imprisonment on each count.

A. Koukounis, for the appellant.
Gl. Michaelides, for the respondent.

Cur. adv. vult.

The following decision was delivered by:-

TRIANTAFYLLIDES P.: The appellant was convicted on June 18, 1976, on three counts charging him with having had unlaw-

ful carnal knowledge of a girl under the age of thirteen years, contrary to section 153 of the Criminal Code, Cap. 154, and was sentenced to seven year's imprisonment on each count, the sentences to run concurrently.

One of the essential ingredients of the offence in question is the exact age of the complainant, who has been found to be under thirteen years on the basis of the totality of the evidence adduced at the trial, but mainly on the evidence of herself and of her father.

The appellant has appealed against both his conviction and the sentences passed upon him.

His counsel has applied, on November 15, 1976, for leave to produce as evidence for the purposes of this appeal the transcript of the evidence given, in October 1976, by the complainant, Chamboula Zacharia, and by her father, Zacharias Zaopodas, in a case which was tried subsequently by an Assize Court differently constituted and in which another accused was charged with having committed exactly the same offence against the complainant in the present case.

It has been contended, in this respect, on behalf of the appellant, that in the evidence given in that other case both the complainant and her father stated things which show that it was unsafe to rely on their evidence as regards the issue of the age of the complainant in the present case. In the alternative, we have been asked to recall for further evidence before us these two witnesses.

Our relevant powers are to be found not only in section 146 (b) of the Criminal Procedure Law, Cap. 155, which enables us during the hearing of an appeal, and at any stage thereof before final judgment, to hear further evidence, but, also, in section 25 (3) of the Courts of Justice Law, 1960 (Law 14/60), which reads as follows:-

> " 25 (3) Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby the High Court on hearing and determining any appeal either in a civil or a criminal case shall not be bound by any determinations on questions of fact made by the trial

Court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence and, where the circumstances of the case so require, re-hear any witnesses already heard by the trial Court, and may give any judgment or make any order which the circumstances of the case may justify, including an order of re-trial by the trial Court or any other Court having jurisdiction, as the High Court may direct."

The powers of this Court to receive further evidence on appeal, especially after the enactment of section 25 (3), above, have been examined at length in a series of cases, such as *Simadhiakos* v. *The Police*, 1961 C.L.R. 64, and *Arestidou* v. *The Police*, (1973) 2 C.L.R. 244.

On this occasion we are not concerned really with hearing further evidence on appeal in the sense of it being evidence not given at the trial, but we are asked to take into account evidence given in a subsequent case by witnesses who have testified at the trial in the present case, or, because of such evidence, to hear such witnesses further for the purposes of this appeal.

We have no difficulty in excluding the first alternative; we do not think that in the circumstances of the present case we can treat evidence given in a subsequent trial as evidence relevant to the outcome of this appeal.

As regards the second alternative, we have to examine whether it is proper to adopt the course suggested by counsel for the appellant. It is useful to refer, in this connection, to three cases which were decided in England: The first one is *R.* v. *Hullett*, 17 Cr. App. R. 8, where it was allowed to recall, on appeal, a witness after the appellate Court had been informed that the evidence given at the trial by her was based on a mistake; the report of this case is quite short and it is worth quoting it in full:

"Appellant was convicted, at the County of London Sessions, on June 15th, 1922, of inflicting grievous bodily harm on one Mrs. Joyce, and sentence was postponed by the Deputy-Chairman till the next sittings. In the meanwhile an important witness, Alice Jones, a girl about 17 years old, had gone to the police and explained that her

statement at the trial that she heard defendant say, at the time of the assault, 'I have bitten off her finger', was due to a mistake. She appealed by leave against the conviction; sentence had been again postponed.

Witnesses who had been summoned to this Court were ordered to leave the Court.

Hinde, for the appellant, who was not in custody, called the detective to whom Alice Jones had made two written confessions that her evidence was false, but did not propose to call Alice Jones, as she was a witness for the prosecution.

The Court wished to hear her, whereupon.

Huntly Jenkins, for the respondent, called her, and

Alice Jones being sworn, was told by the Court that she need not incriminate herself of perjury. She stated that before the trial Mrs. Joyce had told her—and written it down—that defendant at the time of the altercation had said as stated above, and she (Alice Jones), believing that this was true and that she had to say so in Court, had said so accordingly. She had not meant to tell a lie and did not know she was doing so. She had been present at the altercation, but had not heard defendant use the words.

The LORD CHIEF JUSTICE: The appellant was a woman of good character, but the respondent was not. Besides her recantation to-day, Alice Jones had made two statements to the police withdrawing the damning part of her evidence. Hence she was an unsatisfactory witness, and as it could not be said that without her testimony the jury must have convicted—though no doubt they might—the conviction must be quashed."

In *R.* v. *Thomas*, 43 Cr. App. R. 210, it was sought to call further evidence on appeal because allegedly the evidence of the complainant at the trial was false and had been admitted by her, subsequently, to be false; Ashworth J. said the following (at pp. 213-214):-

" We deal first with the question of additional evidence. It became clear at an early stage of the hearing before us

that part of this evidence related to matters which were said to have occurred after the appellant's conviction and sentence; such evidence could not, therefore, have been laid before the jury at the appellant's trial. On the other hand, the other part of the proposed evidence related to matters which were said to have occurred before the appellant's trial. So far as the latter part of the proposed evidence was concerned, no procedural difficulty arose: section 9 of the Criminal Appeal Act, 1907, expressly provides for the reception of such evidence. But in regard to evidence relating to matters which have occurred since an appellant's conviction the Act contains no express provision and notwithstanding the decision in *ROBINSON* [1917] 12 Cr. App. R. 226; [1917] 2 K.B. 108, we are inclined to think that when a convicted person desires to rely upon such evidence, his proper course is to lodge a petition with the Home Secretary, so that, if thought fit, action may be taken in accordance with the provisions of section 19 of the Act. In the present case we decided to hear the evidence de bene esse and to postpone any ruling as to the Court's power or discretion to receive it. Having heard the evidence, we were of opinion that it was not of sufficient weight or reliability to be acceptable and that, in so far as it could have been laid before the jury at the appellant's trial, it would not have affected their conclusion. Accordingly, it is unnecessary to express any further opinion as to the circumstances in which this Court either can or should receive evidence of events occurring after a conviction."

In *R.* v. *Flower and others*, 50 Cr. App. R. 22, the Court of Criminal Appeal allowed a witness, who had admitted subsequently that she had given false evidence, to be recalled and be heard further; it is useful to quote the following two passages from the judgment of Widgery J., as he then was (at p. 28 and at pp. 30–31):–

" On its face the affidavit discloses, first, that her evidence identifying Eric Flower was a lie, and secondly, if one reads between the lines, that she had been subject to police pressure from Inspector Mellor in order to induce her to give that evidence. The affidavit was laid before this Court and an application was made that she should give

evidence. Here the Court, applying the established principles applicable at that stage, took the view that the evidence disclosed in Mrs. Brown's affidavit was relevant and that it was, on its face, credible. As is well-known, the Court at that stage does not decide whether the evidence tendered is true. Its sole concern is to inquire whether it is credible on its face or capable of being believed, and being satisfied that such was the case leave was given to call Mrs. Brown.

.....

By leave of the Court three witnesses were called for the Crown in rebuttal. (His Lordship referred to their evidence in detail and continued): Having heard the evidence, the Court must next decide on the proper approach to it. When this Court gives leave to call fresh evidence which appears at the time of the application for leave to be credible, it is still the duty of the Court to consider and assess the reliability of that evidence when the witness appears and is cross-examined, and this is particularly true where evidence is called in rebuttal before this Court. Having heard the fresh evidence and considered the reliability of the witness, this Court may take one of three views with regard to it. If satisfied that the fresh evidence is true and that it is conclusive of the appeal, the Court can, and no doubt ordinarily would, quash the conviction. Alternatively, if not satisfied that the evidence is conclusive, the Court may order a new trial so that a jury can consider the fresh evidence alongside that given at the original trial. The second possibility is that the Court is not satisfied that the fresh evidence is true, but nevertheless thinks that it might be acceptable to, and believed by, a jury in which case, as a general proposition, the Court would no doubt be inclined to order a new trial in order that that evidence could be considered by the jury, assuming the weight of the fresh evidence would justify that course. Then there is a third possibility, namely, that this Court, having heard the evidence, positively disbelieves it and is satisfied that the witness is not speaking the truth. In that event, and speaking generally again, no new trial is called for because the fresh evidence is treated as worthless and the Court will then proceed to deal with the appeal as though the fresh evidence had not been tendered.

It is contended before us by Mr. McKinnon that different considerations arise where the fresh evidence consists of a witness going back on the account which he gave at the trial as opposed to a fresh witness who was not called at the trial at all. Mr. McKinnon contends that even if we were utterly to disbelieve the evidence which Mrs. Brown gave in this Court, we ought still to order a new trial because it would have been established that she was an unreliable witness and the jury, so he says, should be given an opportunity to reconsider her evidence in this light. It is to be observed, if that is the correct approach, the function of this Court in assessing the credibility of fresh evidence largely disappears, and, if any key witness has second thoughts after the trial, a quashing of the conviction would be almost bound to follow, because if this Court believes the witness, it would itself be bound to set the conviction aside, whereas if it disbelieves the witness it would have to send him back discredited, with a view to his being disbelieved by the jury at a new trial. If the witness's new version of the case is disbelieved, this may very well show he is now unreliable, but it is a fallacy to assume from this that he was also unreliable at the trial. Witnesses may have second thoughts for a variety of different reasons. Some become emotionally disturbed, others brood on the effect of their evidence, whilst others are subject to more tangible pressures to induce them to depart from the truth. It is the witness's state of mind at the trial which matters and this ought to be judged by reference to the circumstances prevailing at that time. It is trite to say that every case depends on its own facts, but in our view there is no general requirement for a new trial merely because the witness's account in this Court differs from that given in the Court below. So much depends in every case upon the reason, if any, given by the witness for having changed his or her testimony."

It appears that the paramount consideration in a situation like the one with which we are dealing in the present case is how best to serve the interests of justice, and, having taken into account all relevant factors, we have decided to grant the application of the appellant to the extent of recalling for further evidence before us the complainant and her father. Counsel

for the respondent has said that in case we were to adopt such a course he wishes to call, too, some relevant evidence and, in particular, a school-teacher who used to teach the complainant when she was a pupil at the elementary school of Tripimeni village, and who was not available at the trial, because he could not be traced at the time as he had become a displaced person due to the Turkish invasion of Cyprus in 1974. We are prepared to allow counsel for the respondent to call the said school-teacher, but as he has not been called at the trial, and this is an Assize Court case, counsel for the respondent should make available to counsel for the appellant a summary of his proposed evidence, and a copy of it should be given to the Registrar of this Court.

Application partly granted.