1956
October 20

ANDREAS DEMETRIADES

v.

THE QUEEN

[HALLINAN, C. J. and ZEKIA J.]
(October 20, 1956)

ANDREAS DEMETRIADES of Nicosia, *Appellant.*

v.

THE QUEEN, *Respondent.*

(Criminal Appeal No. 2067)

Criminal Law—Confession—Ruling on admissibility—Should be prima facie.

The accused was convicted of throwing a bomb. The principal evidence for the prosecution was an alleged confession. During the trial the defence objected to the admission of the confession on the ground of duress. The trial judge after hearing prosecution evidence that the statement was voluntary ruled that it was admissible and said "there is not the slightest doubt in my mind that this statement was taken in an absolutely correct manner..." He refused on the hearing of this objection to hear the accused.

Upon appeal,

Held: (1) Before a confession is admissible the prosecution must prove affirmatively that it was voluntary; (2) in criminal trials without a jury as in Cyprus, a judge should confine his ruling on the admissibility of a confession to the question as to whether there is *prima facie* evidence that the confession is voluntary; although before giving his ruling he has a discretion to hear the defence; (3) at the conclusion of the trial, in the light of the whole evidence, a Court should regardless of its ruling on admissibility be free to decide how far the confession was voluntary and what weight be attached to it; (4) in the present case, the trial Judge appeared satisfied not *prima facie* but in truth and in fact that the confession was voluntary without having heard the defence. This was an irregularity of sufficient gravity to warrant a re-trial.

Appeal by the accused from the judgment of the Special Court of Nicosia (Case No. 855/56).

M. A. Triantafyllides with *C. Phanos* for the appellant.

H. G. A. Gosling, Crown Counsel, for the respondent.

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

HALLINAN, C. J.: In this case the appellant was found guilty of throwing a bomb and under Regulation 52(b) of the Emergency Powers (Public Safety and Order) Regulations, 1955, was sentenced to 12 years imprisonment.

The evidence on which the conviction mainly rested was that of the confession made by the appellant and recorded by Inspector Fullerton. The defence objected

to the admission of this statement on the ground that it was made under duress. After hearing the prosecution's evidence as to the voluntary nature of the confession the learned trial judge made the following ruling: "There is not the slightest doubt in my mind that this statement was taken in an absolutely correct manner as far as it could be taken and I have no hesitation whatsoever in overruling the objection." Defence counsel then said, "I think the accused has got to be examined before Your Lordship's ruling"; to which the Court replied, "I do not wish to hear anything more on the point. From my reading of the subject there is not the slightest doubt in my mind and I do not wish to hear the accused." After the midday adjournment Crown Counsel directed the attention of the Court to the following passage contained in Archbold, 33rd Ed., 413:

> "The proper course where objection is raised as to the admissibility of an alleged confession is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not. The prisoner is not, strictly speaking, entitled to give evidence at that stage of the proceedings (*R.* v. *Baldwin*, 23 Cr. App. R. 62), but the judge may, in his discretion, permit him to do so; and where a dispute arises as to the admissibility of a statement by the prisoner, it is proper to allow the prisoner to be called as a witness on the issue of admissibility, if the justice of the case makes it desirable that this should be done: *R.* v. *Cowell*, 27 Cr. App. R. 191."

After this passage was read the learned trial judge said, "I was quite conversant with that passage which I think is on p. 412 and it is on the basis of that, that I gave my ruling."

The grounds of this appeal are that in refusing to hear the evidence of the appellant before making his ruling the trial judge either made an error in law or acted in such a way as to make the subsequent conviction and sentence a miscarriage of justice. Counsel for the Crown at the hearing of the appeal agrees with the defence and has submitted that on a proper view of the cases cited in the passage in Archbold (*R. v. Baldwin*, 23 Cr. App. R. 62 and *R.* v. *Cowell*, 27 Cr. App. R. 191) the trial judge before making his ruling as to the voluntary nature of confession must hear both sides; therefore, the trial had been irregular and counsel invited this Court either to order a new trial or to hear fresh evidence.

We are unable to accept Crown Counsel's submission that a trial Court must allow an accused person to give evidence if he so wishes before a ruling is made on the admissibility of the confession. At the trial of Cowell (according to the judgment in the Court of Appeal at p. 600),

"Counsel for the prisoner, bowing to what he understood to be laid down in *R.* v. *Baldwin*, himself hesitated as to whether he should call the prisoner."

The doubt which the Court in Cowell's case had about the decision in Baldwin's case was not whether an accused person is entitled as of right to give evidence before a ruling on the admissibility of a confession is made, but whether his evidence at that stage can be taken at all. In our view there is nothing in Cowell's case to support the proposition that an accused person is entitled as of right to give evidence before a ruling is given. What the Court of Appeal in Cowell's case said, is this:

"What *R.* v. *Baldwin* decided, this Court is of opinion that, in such circumstances, it is proper to allow the calling of the prisoner himself as a witness if the justice of the case requires that it should be done."

This clearly leaves the matter to the judge's discretion as is stated in Archbold's reference to Cowell's case.

The general principle concerning the admissibility of confessions is contained in *R.* v. *Thompson* (1893) 2 Q.B. and is summarised at p. 408 of Archbold, 33rd Ed. as follows:

"In order to be admissible a confession must be free and voluntary, and unless it be shown affirmatively on the part of the prosecution that it was made without the prisoner's being induced to make it by any promise of favour, or by menaces, or undue terror, it should not be received in evidence against him."

The question that arises in this appeal is: What is meant by the expression "shown affirmatively"? Does it mean that a judge must be satisfied after hearing all available evidence on both sides relating to the voluntary nature of the confession, or can he make his ruling if the Crown lead sufficient *prima facie* evidence that the statement was voluntary? We are disposed to adopt the latter view which was that taken by Humphreys J. in Cowell's case. In the course of his ruling he said:

"It may be that what a judge has to be satisfied of is that there is *prima facie* evidence before him that a statement is admissible in that it was not made as a result of any inducement or threat, and that it was made after the proper caution, if a caution was necessary in law in the circumstances. If, on the other hand, the law is—but I do not think this is so—that the judge must be satisfied that in truth and in fact the statement was made not as the result of any improper inducement, then, for my own part, I fail to see how any judge, either to his own satisfaction or to that of others, could decide such a question without hearing both sides."

Of course criminal trials in England before a judge and jury differ from trials in Cyprus at Assize Courts or in the Special Court where a judge or a bench of judges are both judges of law and fact. In England, when an objection is raised to the admissibility of a confession, argument and evidence is heard in the absence of the jury; the jury, the ultimate judges of fact, are quite unprejudiced by what took place upon the hearing of the objection and it is open to the jury on the whole of the evidence to conclude that the confession was improperly taken or for other reasons should be disregarded. In Cyprus, however, the judge or bench of judges who rule on the admissibility of the confession are the persons who eventually decide the case as a whole, including the weight that is to be given to a confession admitted in evidence.

In Cyprus, therefore, we consider it appropriate and proper that a judge should confine his ruling to the question as to whether there is *prima facie* evidence that the confession is voluntary, although before giving his ruling he has a discretion as to whether or not he will hear the evidence of the other side. Generally speaking, it is not desirable for the trial Court in Cyprus to go exhaustively into the voluntary nature of the confession when an objection to its admissibility is raised. To do so is to conduct a trial within a trial which not only interrupts and complicates the usual procedure of hearing the whole case for one side and then the whole case for the other, but also may result in the Court coming to a decisive conclusion on a vital aspect of the case before it has had an opportunity of considering this vital question in relation to the evidence as a whole.

We do not wish to preclude a trial Court absolutely from hearing the evidence of the accused or his witnesses when an objection is taken to the admissibility of a confession, but in general we consider it advisable that the Court on the hearing of the objection should confine itself to the issue as to whether the Crown has established a *prima facie* case for its admission. Even where the Court allows the accused to give or call evidence upon objection taken to the admissibility of a confession, the trial Court must always bear in mind that in Cyprus the judge is both judge and jury and the Court must keep an open mind until the end of the case in this sense: That although it may, after hearing certain evidence, have formed an opinion on an aspect of the case, it must always be prepared to alter that opinion when at the conclusion of the evidence, and having heard both sides, it comes to give its verdict. A Court which has admitted a confession as voluntary may, at the conclusion of the trial on considering all the evidence, decide that the confession was improperly obtained, or may disregard it or attach little weight to it in whole or in part for some other reason.

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Applying these principles to the circumstances of the present case it would appear that the learned trial judge did not consider himself concerned merely with a question of *prima facie* evidence; it must be inferred from his language that he was satisfied in truth and in fact that the statement was not made as a result of any improper threat or inducement, although he had not heard the other side. At the conclusion of the prosecution's case, the accused made an unsworn statement. It may be that the defence felt that the judge had already made up his mind as to the voluntary nature of the confession and there was no use in exposing the appellant to cross-examination when the vital issue had already been decided against him.

This in our view constitutes an irregularity of sufficient gravity to warrant a retrial and we order that this case be sent back to the Special Court for a new trial before another judge.

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SHERIFE SAMI
v.
ARIF HIKMET DIRDIR

[HALLINAN, C. J. and ZEKIA, J.]
(October 26, 1956)

SHERIFE SAMI of Polis, *Appellant,*

v.

ARIF HIKMET DIRDIR of Limassol, *Respondent.*

(Turkish Family Court Appeal No. 1/56)

Turkish Family Law — Divorce — Adultery — Ill-treatment— Connubial life so strained as to make life of spouses impossible — Adjudication on more serious matrimonial offence—Maintenance for wife and child—Compensation and maintenance — Turkish Family (Marriage and Divorce) Law, 1951, sec. 25 (f), 31 and 33.

The plaintiff sued his wife in the Turkish Family Court for divorce and his wife counter-claimed for divorce on three grounds: adultery, ill-treatment, and (under section 25 (f) of the Turkish Family (Marriage & Divorce) Law, 1951), that connubial life was so strained that their life together was impossible. The plaintiff's case failed. On the counter-claim, the evidence of adultery was not strong but there was considerable evidence of brutal ill-treatment of the wife by the husband. The trial Court granted the wife a divorce on the third ground, i.e. under para. (f) of section 25.

The husband was not owner of any substantial movable or immovable property but he received £45 salary. He married the defendant when she was 16. She had lived with him for 10 years and born him a child now in her care. Under sec. 31 of the Law of 1951, the trial Court awarded the defendant £150 compensation and £5 a month maintenance which under sec. 31 can only last one year.

Upon appeal by the defendant, the Supreme Court,

Held: (1) When a claim for divorce is based on several grounds the Court should adjudicate on the more serious