[O' BRIAIN, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

1961
May 17

NICOS CHR. HADJI ANTONI,
Appellant (Defendant),

v.

APHRODITI N. VASSILIADOU,
Respondent (Plaintiff).

(*Civil Appeal No.* 4330).

NICOS CHR. HADJI ANTONI
v.
APHRODITI N. VASSILIADOU

Appeal—Findings of fact of trial courts—Powers of the High Court in its appellate jurisdiction to review such findings—And to rehear witnesses—The Courts of Justice Law, 1960 (*Law of the Republic No.* 14 *of* 1960), *section* 25(3)—*Onus on the party attacking the finding to show that the interests of justice require that witnesses be reheard.*

Appeal—Retrial—Grounds for ordering new trial—The Courts of Justice Law, 1960, *section* 25 (3)—*Civil Procedure Rules, Order* 35, *r.* 9 — *The Criminal Procedure Law, Cap.* 155, *section* 145(1)(d).

Held: (1) Following previous decisions of this Court in the matter, especially the judgment in *Simadhiakos v. The Police* (Criminal Appeal No. 2298 decided on the 20th April, 1961; *Note:* Now reported in this Volume at p. 64 *ante*), the Court is of opinion, in this case, that it has not been shown that the reasoning behind the finding of the trial judge is unsatisfactory, or that he found anything that was not warranted by the evidence. The onus is upon the appellant, the party attacking the finding, of showing that the interests of justice require that all or some of the witnesses be reheard. This, the appellant failed to do.

(2) The principles upon which an appellate court will order a retrial are well settled. It is not necessary to recapitulate them, but the fact that the trial judge after a patient hearing, not making an error in point of law, but in observing the demeanour of the witnesses, comes to the conclusion that certain witnesses' evidence is preferable to that of others, is emphatically not a ground for ordering a retrial.

Appeal dismissed with costs.

Cases referred to :

Simadhiakos v. The Police, Criminal Appeal No. 2298 decided

on the 20th April, 1961, reported in this volume at p. 64 *ante*.

Appeal.

Appeal against the judgment of the District Court of Famagusta (Kourris, D.J.), dated the 21st January, 1961 (Action No. 924/60) whereby judgment was given for the plaintiff for £25 with costs on the scale between £10.- and £25.- by virtue of a bond issued on the 30th December, 1956, and payable in three, monthly instalments.

N. Zomenis for the appellant.

P. Eleftheriou for the respondent.

The facts sufficiently appear in the judgment of the Court delivered by:—

O' BRIAIN, P. : In this case the defendant appeals from the judgment given in the Action on the 21st January, 1961, by the District Court of Famagusta. In his notice of appeal he asks for a rehearing of the witnesses on the grounds that the judgment is erroneous, and Mr. Zomenis (advocate for appellant-defendant) has informed this Court that the error is one of fact and that he has no complaint regarding any error, in point of law, on the part of the learned trial judge. In addition to asking for the rehearing of the witnesses, the appellant, by leave of this Court, has amended his Notice of Appeal to ask, alternatively, for an order directing a retrial in this action before the District Court.

This is one more case in which the interpretation and application of section 25 of the Courts of Justice Law, 1960, have come up for consideration. As, I think, the Court has said in some of the earlier cases, in this difficult and rather important matter the Court relies very largely upon the Bar for assistance. We have to decide the law, but it is quite impossible to decide many matters of law without hearing them thoroughly argued pro and con.

As I have mentioned earlier this morning, this section has been considered by this Court in several judgments. In some of them different members of the Court have expressed different views, and the matter has, up to a point, been quite thoroughly considered and debated. This, I believe, is the

first case in which a formal application has been made to the Court by the appellant in the Notice of Appeal, to re-hear witnesses. Of the judgments already delivered that in the case of *Simadhiakos v. The Police* (Criminal Appeal No. 2298) seems the closest in point. That was a case in which the finding of the trial judge, a single judge, of the District Court, on a question of the credibility of witnesses was attacked. Two witnesses were involved on that issue — the accused and the chief witness for the prosecution. The learned trial judge, having accepted the evidence of the young soldier, who was called by the prosecution rejected the testimony of the prisoner. The prisoner appealed to this Court and strenuously contended that he was entitled to a rehearing of his evidence and that of the soldier by this Court in order to determine finally their respective credibility. In that case I dissented, but the majority of the Court held against the appellant and dealt with this matter, which, in a way, is rather relevant to the present case. In the judgment of my learned brother Vassiliades, J., at page 21 of the transcript dealing with this point, he says:—

> "Secondly, I read the provisions of sub-section (3) to mean that this Court on hearing an appeal has the power to review the whole evidence without feeling fettered by determinations on questions of fact made by the trial court ; but in doing so, the Court should still be guided by the principles which have grown and develop in the light of practical experience, as to the value of trial court findings.
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> Before such findings are disturbed, the appellate Court must be satisfied to the extent of reaching a decision, (unanimous or by majority) that the reasoning behind a finding is unsatisfactory ; or that the finding is not warranted by the evidence considered as a whole. And the onus, in my opinion, must rest on the appellant, both in civil and in criminal appeals, to bring this Court to such decision ; or else, the trial court findings remain undisturbed as part of the case.
>
> It should be for the party attacking a finding, or asking the Court to exercise the powers under section 25, to show that the interests of justice in the case under consideration, require the taking of such course".

And Josephides, J., in his judgment at page 27-28 says:—

"With these considerations in mind I am of the opinion that only in special circumstances should the High Court act upon the power of rehearing a witness given in section 25(3), and forming its own conclusions of fact, such as where a trial court consisting of two judges and constituted under the provisions of paragraph 3 or 4 of Article 159 of the Constitution, or a Full Court composed of two judges under the provisions of section 22(1) of the Courts of Justice Law, 1960, differ on a question of credibility of a material witness ; or, where this Court, after reading the record of the evidence and hearing counsel's submissions, feels doubt about the determinations of primary facts made by the trial court. But this Court should not rehear a witness in every case in which there is conflicting testimony, because to do so would be to usurp the function of the trial court. The High Court should not normally substitute itself for the trial court and retry the case. That is not our function. If the circumstances of the case justify such a course this Court has power to order a retrial by the trial court or any other court having jurisdiction in the matter, under the provisions of section 25(3) of the Courts of Justice Law, section 145(1)(d) of the Criminal Procedure Law, Cap. 155, and in civil cases under 0.35, r.9 of the Civil Procedure Rules".

The Court is unanimously of opinion, in this case, that it has not been shown that the reasoning behind the finding of the learned trial judge in this case is unsatisfactory, or that he found anything that was not warranted by the evidence. The onus is upon the appellant, the party attacking his finding, of showing that the interests of justice require that all the witnesses or some of them be reheard. This the appellant has failed to do.

That leaves the matter of a retrial which is the alternative asked for here. The principles upon which an appellate court in this country or in England will order a retrial of an action such as this are well settled. It is not necessary to recapitulate them in this case, but the fact that the trial judge after a patient hearing, not making any error in point of law, but in observing the demeanour of the witnesses, comes to the conclusion that certain witnesses' evidence is preferable to that of others, is emphatically not a ground for ordering a retrial either in this country or in England. Accordingly

this Court is of opinion that it would not be proper either to rehear the witnesses or to order a retrial.

This appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

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