

1963  
May 9,  
June 4

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P. I. KOLIAS  
v.  
THE POLICE

[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

PERIKLIS IOANNOU KOLIAS,

*Appellant,*

v.

THE POLICE,

*Respondents.*

(Criminal Appeal No. 2637)

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*Criminal Procedure — Practice — Appeal — Further evidence—Formal application necessary—Absence of notice of opposition to such application should not be taken that the application is being consented to by the other side—Application for further evidence refused on the ground that such evidence was readily available for presentation to the trial Court—And that there is no explanation accounting for counsel's failure to put it in at the trial—The Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) section 25 (3).*

*Criminal Procedure—Appeal—Facts not put before the trial Judge should not be introduced on appeal otherwise than upon an order of the High Court allowing such fresh evidence to be adduced.*

*Road Traffic—Driving a motor vehicle whilst being intoxicated contrary to sections 7 (1) (2) and 13 of the Motor Vehicles and Road Traffic Law, Cap. 332 as amended by Law No. 2 of 1962—Driving a motor car with defective brakes, contrary to Regulations 50 (n) and 66 of the Motor Vehicles Regulations, 1959, and section 13 of Cap. 332 (supra)—Sentence—Disqualification from holding or obtaining a driving licence—Period of disqualification reduced.*

Cases referred to :

*Simadhiakos v. The Police*, 1961 C.L.R. 64 ;

*Maroulla Christou v. The Police* (Criminal Appeal No. 2344 decided on the 25th April, 1961, *unreported*) *distinguished*.

**Appeal against sentence.**

The appellant was convicted on the 16th April, 1963, at the District Court of Limassol (Cr. Case No. 2530/63) on two counts of the offences of: 1. Driving motor-car whilst being intoxicated, contrary to ss. 7 (1) (2) and 13 of the Motor Vehicles and Road Traffic Law, Cap. 332, as amended by Law 2 of 1962 and ; 2. Driving motor-car with defective brakes, contrary to Regulations 50 (n) and 66 of the Motor Vehicles Regulations, 1959, and section 13 of the Motor

Vehicles and Road Traffic Law, Cap. 332, as amended by Law 2/62 and was sentenced by Limnatis D.J. to pay £40 fine on count 1, £2 fine on count 2, and he was further disqualified from holding or obtaining a driving licence for a period of twelve months.

C. Phanos for the appellant.

K. C. Talarides for the respondents.

*Appeal allowed.*

The facts sufficiently appear in the judgments of the court delivered on the 9th May, 1963 and 4th June, 1963, respectively, by :

9th May, 1963.

WILSON, P. : This is an appeal from the sentence imposed by the District Court of Limassol on April 16th, 1963, after the accused pleaded guilty to driving a motor-car whilst being intoxicated, and driving a motor-car with defective brakes. He was sentenced to a fine of £40 in respect of the first offence and a fine of £2 in respect of the second offence. He was also disqualified from holding or obtaining a driving licence for a period of 12 months from the same date.

The ground of appeal is that the sentence of disqualification for a period of 12 months is excessive because there exist special reasons which do not justify such disqualification. Before us the counsel for the appellant rested his appeal mainly upon a ground which was not put before the trial Judge. After listening to argument we have come to the conclusion that we cannot give effect to the submissions of counsel on this second point.

He has referred us to the decision of this Court *Maroulla Christou v. The Police*, (Criminal Appeal No. 2344 dated 25.4.61) in which the Court did hear submissions of the counsel which were not put before the trial Judge.

It may be pointed out, however, in that case the Court was moved by an undertaking which was given by counsel for the appellant in respect of something that would be done if the appeal was allowed and not in respect of evidence which was in existence and could have been placed before the trial Court. The argument here is in respect of past events the evidence of which must be put before the Court on a proper application, properly served and on the basis of affidavits which may be served upon the counsel for the Republic. The Court will then have to consider this

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application when the appeal comes up, or on special application, if it is desired, to adduce additional evidence so that when the appeal comes up for hearing we are in a position to dispose finally of the case.

The affidavits must contain statements of the facts which it is desired to put before the Court and, equally importantly, an explanation why they were not put before the trial Court. There must be a full disclosure of the circumstances which would justify in hearing further evidence of the appeal.

In this case we propose to allow the appellant the opportunity to take this procedure, if he so desires, and we would like an indication of counsel whether he wishes of such an opportunity. If he does, further directions will be given.

*Mr. Phanos* : I do apply on behalf of my client for leave to make this application.

COURT : Very well. Leave is granted. You should serve the proper notice on the Attorney-General and proper material to support it.

We shall adjourn therefore until the 4th of June, 1963, at 10 o'clock.

*4th June, 1963.*

WILSON, P. : This is an appeal from the sentence of disqualification for a period of 12 months imposed by the District Court of Limassol on April 16th 1963. The accused was convicted on a plea of guilty on two counts : 1. Driving a motor car whilst being intoxicated, contrary to sections 7 (1) (2) and 13 of the Motor Vehicles and Road Traffic Law, Cap. 332, as amended by Law 2 of 1962 ; and 2. Driving a motor car with defective brakes, contrary to Regulations 50 (n) and 66 of the Motor Vehicles Regulations, 1959, and section 13 of the Motor Vehicles and Road Traffic Law, Cap. 332, as amended by Law 2 of 1962.

In respect of count 1, he was fined £40 or 4 months' imprisonment. In respect of count 2, he was fined £2 or 14 days' imprisonment. He was also disqualified from holding or obtaining a driving licence for a period of 12 months from the above-mentioned date. He was acquitted and discharged on a third count in respect of which no evidence was offered, namely, failing to sound his horn.

It is only from that portion of the sentence disqualifying him from holding or obtaining a driving licence for a period of 12 months that this appeal is taken.

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The ground of appeal is that the sentence in this respect is excessive because there exist special reasons which do not justify such disqualification order.

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Before us, the appellant's case was very ably presented and it was urged that we should take into account certain facts which were not before the trial Judge. This was on May 9th, 1963, and resulted in a direction being given by this Court that notice of an application to adduce further evidence before us should be served on the Attorney-General and that material in support of it should also be served upon him. Included in that material it was directed that there should be an affidavit, or affidavits, containing a statement of facts which it was desired to put before the Court, and equally importantly the reasons why they were not put before the trial Court. It was also directed that there must be a full disclosure of the circumstances which would justify hearing further evidence on the appeal. It was intended that the case should finally be disposed of when the appeal should next come up for hearing.

The necessary notice was served on the Attorney-General and an affidavit made by the appellant in support of it. The appeal came on to-day for further hearing.

It was contended on behalf of the appellant that in the absence of any notice of opposition to the application served and filed on behalf of the Attorney-General the Court should take the applicant's application as being consented to, and for that reason the Court should receive the further evidence tendered in the form of the appellant's affidavit.

After hearing argument we are unable to say that the application in this criminal appeal in the absence of notice of filing an intention to oppose it cannot be opposed because the material before us, in our view, does not show proper grounds upon which we can receive the further evidence tendered.

As has been said in other cases, this is an appellate Court and all the proper evidence must be put before the trial Court. That is the intention of our system.

The affidavit in this appeal clearly indicates that the evidence which it is now sought to put before this Court

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was readily available for presentation to the trial Court. There is no affidavit by the appellant's advocate accounting for his failure to put it in at the trial.

We are unable to accept the appellant's affidavit, as sufficient in this case, because he is a layman who could not be expected to know what evidence would properly be required to be placed before the trial Court. It is the responsibility of his advocate to ascertain the facts that are relevant to the case and to see that they are put before the trial Judge. In this case it was apparently his failure to do so which has caused the appellant's difficulty. This is not a proper case in which we can give effect to this application.

In so saying we draw the attention again to section 25 of the Courts of Justice Law, which gives this Court very wide powers and it is in no way declining in this case to exercise them. There must be some rules by which to abide, and reference is made merely to a decision in Criminal Appeal No. 2298\* where the law has been well stated in the majority judgments. We are in no way departing from them. In the final analysis each case must stand on its own facts. It is very difficult to draw a line between the cases in which we ought to permit the facts which ought to have been put before the trial Court to be put before us and those in which we ought not to do so. All we can say that in this case there is no sufficient reason given for the failure to put all of the evidence which was available before the trial Court.

Having said that much we, therefore, dismiss the application to adduce additional evidence.

We now have to consider the appeal on the merits as disclosed by the record. I emphasize that in this case, some information in addition to that in the copies of the records in the files of the Members of the Court appears from perusing the original information and other original papers in the file. Having perused them and considering all aspects of this case, we allow the appeal to the extent of reducing the disqualification from a period of 12 months to a period of 6 months from the date of conviction.

Certain other points were raised by counsel for the Republic with respect to the law regarding disqualification. We leave them for further consideration at a future date if the occasion arises.

*Appeal allowed.*

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\* *Simadhiakos v. Police*, 1961 C.L.R. 64.