1968
Nov. 22,
Dec. 23
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ANDREAS
STAVROU
ZANETTOS
v.
THE POLICE

[VASSILIADES, P., TRIANTAFYLLIDES AND JOSEPHIDES, JJ.]

ANDREAS STAVROU ZANETTOS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3032)

Criminal Law—Abduction of a girl under sixteen years contrary to section 149 *of the Criminal Code, Cap.* 154—*When the father of such girl is living normally with his family, the girl is deemed to be in the custody or protection of her father (and not of her mother)—And it is the taking out of the girl against the father's will that has to be established so that the offence can be considered as proved—But in this case no such evidence was adduced at the trial by the prosecution—The prosecution, apparently, thought that it was sufficient to establish that the taking of the girl took place against the will of the mother—Conviction, therefore, has to be quashed.*

Criminal Procedure—Appeal—New trial—Power of the Court of Appeal to order new trial laid down by statute: Section 145 (1) (*d*) *of the Criminal Procedure Law, Cap.* 155 *and section* 25 (3) *of the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960)—*This power is discretionary—Principles governing its exercise—Whether the Appellate Court has power to order a new trial in order to fill a gap left by the prosecution at the trial.*

New trial—Power of the Appellate Court to order a new trial—See above under Criminal Procedure.

Criminal Procedure—Appeal—Further evidence on appeal—Principles on which the Court will act—Whether it is open to the prosecution to call further evidence on appeal—Question left open—The Courts of Justice Law, 1960 (*Law of the Republic No.* 14 *of* 1960) *section* 25 (3).

Fresh or further evidence on appeal—See under Criminal Procedure immediately above.

Appeal—New trial—Further evidence—See above.

Abduction—Abduction of an unmarried girl under sixteen years—Section 149 of the Criminal Code, Cap. 154—Ingredients of the offence—See above under Criminal Law.

In this case the appellant was convicted of the abduction on the 3rd May, 1968, of a girl under sixteen contrary to section 149 of the Criminal Code, Cap. 154 and sentenced to six months' imprisonment. He now appeals against his conviction on the ground that there was no evidence that the taking of the girl took place against the will of her father who at the material time had the custody and care of the girl. The prosecution sought to fill the gap left at the trial by applying to the Supreme Court for leave to adduce fresh evidence on that point under section 25 (3) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) and section 145 (1) (d) of the Criminal Procedure Law, Cap. 155. The Court, acting on the principles laid down in *Kolias* v. *The Police* (1963) 1 C.L.R. 52 refused such leave and, eventually, allowed the appeal, refusing to order a new trial.

Section 149 of the Criminal Code reads :

" 149. Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanour."

Held, I. As to the application by the prosecution for leave to adduce further evidence :

(1) We think that the matter is covered by the decision in *Kolias* v. *The Republic* (1963) 1 C.L.R. 52, which case rests to a considerable extent on the principles adopted in *R.* v. *Parks* [1961] 1 W.L.R. 1484 ; 46 Cr. App. R. 29. The evidence was available at the time, was within the knowledge and reach of the prosecution and no explanation for not calling the evidence at the trial was given.

(2) In the circumstances, we find it unnecessary even to deal with the question which might arise in another case, of whether it is open to the prosecution to call further evidence on appeal by applying under section 25 of the Courts of Justice Law (*supra*). We leave the matter entirely open.

Held, II. As to the merits

Per TRIANTAFYLLIDES, J., (VASSILIADES, P., *and* JOSEPHIDES, J., *concurring*)

(1) On the proper construction of section 149 of the Criminal Code (*supra*) when the father of a girl under sixteen is living normally with his family such girl is deemed to be in the custody or protection of her father, and it is a taking of the girl against *his* will that has to be established so that the offence can be proved

(2) But in this case there is no such evidence on record, apparently it was thought by the prosecution that it was sufficient to establish that the taking of the girl took place against the will of her mother

(3) The appeal must, therefore, be allowed.

Held, III As to the question whether or not a new trial should be ordered

Per TRIANTAFYLLIDES, J., (VASSILIADES, P., *concurring*)

(1) The power of this Court to order a new trial is laid down by statute Section 145 (1) (d) of the Criminal Procedure Law, Cap. 155 and section 25 (3) of the Courts of Justice Law, 1960 (*supra*) As to the principles which should govern, in general, the exercise of such power, which is discretionary, it suffices to say that a new trial should not be ordered if such a course would not be in the interests of justice

(2) And in the present case there do exist circumstances which render it contrary to the interests of justice to order a new trial (Editor's Note Those circumstances are set out in the penultimate paragraph of the judgment delivered by the learned justice, *post*)

Per JOSEPHIDES, J.

(1) Undoubtedly the power of this Court to order a new trial either under section 145 (1) (d) of the Criminal Procedure Law, Cap. 155, or section 25 (3) of the Courts of Justice Law, 1960 (*supra*), is discretionary

(2) Assuming, without deciding, that this Court has power to order a new trial in order to fill a gap left by the prosecution

at the trial—a matter which I would leave entirely open—I do not think that, in the circumstances of this case, I would be prepared to exercise my discretion to order a new trial.

Appeal allowed; conviction quashed.

Cases referred to :

Kolias v. *The Police* (1963) 1 C.L.R. 52 ;

R. v. *Parks* [1961] 1 W.L.R. 1484 ; 46 Cr. App. R. 29.

Appeal against conviction.

Appeal against conviction by Andreas Stavrou Zanettos who was convicted on the 10th September, 1968 at the District Court of Nicosia (Criminal Case No. 17400/68) on one count of the offence of abduction of a girl under 16, contrary to sections 149 and 35 of the Criminal Code Cap. 154 and was sentenced by Vakis, D.J., to six months' imprisonment.

L. Clerides with *C. Indianos*, for the appellant.

L. Loucaides, Counsel of the Republic, for the respondents.

The following ruling was delivered by :

VASSILIADES, P. : We find it unnecessary to hear counsel for the appellant on the application of the prosecution to adduce further evidence. We think that the matter is covered by the decision in *Kolias* v. *The Police* (1963) C.L.R. Vol. 1, p. 52. That case rests to a considerable extent on the principles adopted in *R.* v. *Parks* [1961] 1 W.L.R. p. 1484 ; also reported in 46 Criminal Appeal Reports p. 29.

It is sufficient for the purposes of the application before us to say that applying those principles, we do not feel inclined to allow the application of the prosecution to adduce further evidence. The evidence was available at the material time, was within the knowledge and reach of the prosecution and no explanation for not calling the evidence at the trial, was given. In the circumstances, we find it unnecessary even to deal with the question which might arise in another case, of whether it is open to the prosecution to call further evidence on appeal by applying under section 25 of the Courts of Justice Law. We leave the matter entirely open.

Application refused.

VASSILIADES, P. : I shall ask Mr. Justice Triantafyllides to deliver the first judgment.

TRIANTAFYLLIDES, J.: In this case the appellant was charged, originally, on two counts : One for abduction, on the 3rd May 1968, of a girl under sixteen, contrary to section 149 of the Criminal Code (Cap. 154), and the other for defilement, on the said date, of the same girl, contrary to section 154 of the Criminal Code.

He was acquitted on the second count, but he was convicted on the first count and was sentenced to six months' imprisonment commencing as from the 10th September, 1968 ; he has been in prison since then.

Section 149 of Cap. 154 reads as follows :

> " 149. Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanour."

I take the view that, for the purposes, and on a proper construction, of this section, when the father of a girl under sixteen is living normally with his family such girl is deemed to be in the custody or protection of her father, and it is a taking of the girl against *his* will that has to be established so that the offence can be proved.

On the basis of the material which counsel for the respondents has very fairly placed before the Court, in the course of the hearing of this appeal, there is no doubt that at the material time the father of the girl—who is the subject of the charge under section 149- was living normally with his family and it was in him that was vested the custody or protection of the girl, in the sense of section 149.

The father was never called as a witness before the trial Court, nor even a statement was ever obtained from him by the Police ; apparently it was thought by the prosecution that it was sufficient to establish that the taking of the girl took place against the will of her mother.

In the circumstances I fail to see how the conviction of the appellant can be upheld, once an essential element of the offence has not been proved before the trial Court ; and it has, therefore, to be set aside.

A question which has given me some difficulty is whether or not a new trial should be ordered : The power of this Court to order a retrial is laid down by statute ; both by section 145 (1) (*d*) of the Criminal Procedure Law (Cap. 155) and by section 25 (3) of the Courts of Justice Law, 1960, (Law 14/60). I do not think that I need deal fully with the principles which should govern, in general, the exercise of this power, which is discretionary ; it suffices to say that a new trial should not be ordered if such a course would not be in the interests of justice ; and in the present case there do exist circumstances which render it contrary to the interest of justice to order a new trial.

Such circumstances are that there has taken place a substantial error in a material respect in the conduct of the proceedings against the appellant before the trial Court, and this error has not been sufficiently accounted for ; furthermore, the girl, herself, has turned out to be a witness hostile to the prosecution, and the same applies to her mother who was called as a witness in the place of her father ; lastly, the appellant has already served three and a half months out of the sentence of six months which was imposed on him.

In the result I would allow the appeal, without making any order for a new trial.

VASSILIADES, P.: I agree and I do not think that I have anything useful to add to the reasons leading to the result of this appeal.

JOSEPHIDES, J.: I also agree that the appeal should be allowed. Undoubtedly the power of this Court to order a new trial, either under the provisions of section 145 (1) (*d*) of the Criminal Procedure Law, Cap. 155, or section 25 (3) of the Courts of Justice Law, 1960, is discretionary. Assuming, without deciding, that this Court has power to order a new trial in order to fill a gap left by the prosecution at the trial—a matter which I would leave entirely open—I do not think that, in the circumstances of this case, I would be prepared to exercise my discretion to order a new trial.

VASSILIADES, P. : In the result the appeal is allowed, the appellant is discharged and the conviction quashed.

Appeal allowed ; conviction quashed.