

[TRIANTAFYLIDIS, P., STAVRINIDES, L. LOIZOU, JJ.]

PHOTINI POLYCARPOU GEORGHADJI AND ANOTHER,
Appellants,
v.
THE REPUBLIC,
Respondent.

1970
Nov. 6,
1971
Aug. 10
—
PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

(*Criminal Appeals Nos. 3211 and 3212*).

Criminal appeal—Ruling by Assize Court refusing application to enter an appearance in Criminal proceedings with the right to summon witnesses and with the right to speak—Only watching brief to counsel allowed—No appeal lies against such ruling—Section 25(2) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) and section 131(1) of the Criminal Procedure Law, Cap. 155—Cf. clauses 107, 108 and 109 of the Cyprus Courts of Justice Order in Council, 1882; section 157(1) of Cap. 155, supra—Cf. Article 30.1 and 2, and Article 155.1 of the Constitution—Cf. Article 6(1) of the European Convention on Human Rights.

Criminal Appellate Jurisdiction of the Supreme Court—Such jurisdiction is to be exercised only as and when laid down by statutory (or constitutional) provisions—But there is no such provision conferring on the Supreme Court jurisdiction to entertain appeals against rulings of the kind involved in the present appeals—Courts cannot invent a right of appeal where none is given nor will they usurp an appellate jurisdiction where none is created.

Constitutional law—Section 25(2) of the Courts of Justice Law, 1960 not contrary to Article 30.1 and 2, and Article 155.1, of the Constitution.

Constitutional law—Article 188.4 of the Constitution—Powers of the Court to modify legislative provisions so as to bring them into conformity with the Constitution—Provisions of the Criminal Procedure Law, Cap. 155 in section 131(1) etc. cannot be modified so as to provide for a right of appeal.

Constitutionality of legislation—Judicial control—Principles applicable in approaching issue of unconstitutionality of legislation.

1970
Nov. 6,
1971
Aug. 10
—

PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

Human Rights—Right of appeal—It does not seem to be imperative to provide for a right of appeal in relation to all decisions of trial Courts—Article 6(1) of the European Convention on Human Rights.

On October 30, 1970, during the hearing by an Assize Court in Nicosia of criminal case No. 6971/70—(*The Republic v. Charitonos and Others*)—and after all the evidence for the prosecution had been heard, three of the four accused had given evidence and the fourth had made an unsworn statement from the dock, counsel appeared for the first time on behalf of the present Appellants and applied to the Assize Court that the Appellants be permitted “jointly or separately” to enter an appearance in the proceedings through counsel with the right to summon witnesses and the right to speak.

The Appellants are, respectively, the wife and the brother of the deceased Polycarpos Georghadjis who is referred to in the particulars of a count for conspiracy, which is one of the counts in relation to which the said four accused were being tried.

The Assize Court refused the application of the Appellants, but allowed them to retain counsel for a watching brief; it is against this ruling of the Assize Court that the Appellants took the present appeals.

Dismissing the appeals, the Supreme Court:—

Held, (1). Having considered all that has been submitted by learned counsel on the issue of jurisdiction of this Court to entertain an appeal against a ruling of this kind, we are of the view that no appeal can be made to this Court against such a ruling.

(2) We, therefore, have to dismiss these appeals; and we need not, in the circumstances, pronounce upon the substance of the matter itself.

(3) (a) In approaching the issue before us we have borne in mind that the Courts cannot invent a right of appeal where none is given nor will they usurp an appellate jurisdiction where none is created (see *Healey v. Ministry of Health* [1954] 3 All E.R. 449). And we take the view that the criminal appellate jurisdiction of the Supreme Court is to be exercised only as and when laid down by statutory provisions (see *Christofi v.*

The Police (1970) 2 C.L.R. 117). As at present advised, we are not inclined to regard the case *The Attorney-General of the Republic v. Enimerotis Publishing Co. Ltd and Others* (1966) 2 C.L.R. 25 as authoritatively establishing that an appeal lies otherwise than as provided by statute.

(b) And there is no statutory or constitutional provision conferring on the Supreme Court jurisdiction to entertain an appeal such as the present ones. (See section 25(2) of the Courts of Justice Law, 1960 and section 131(1) of the Criminal Procedure Law, Cap. 155, which are not contrary to Articles 30.1 and 155.1 of the Constitution).

(4) It might, also, be usefully stated in connection with the human rights aspect of the matter, that under Article 6(1) of the European Convention on Human Rights (which is now part of our law), it does not seem imperative to provide for a right of appeal in relation to all decisions of trial Courts (see the decision of the European Court of Human Rights in the case "*Relating to certain aspects of the laws on the use of languages in education in Belgium*" in the (1968) Yearbook of the European Convention of Human Rights p. 832, at p. 864). It is to be noted that the said Article 6(1) of the Convention corresponds to Article 30, paragraph 2, of our Constitution (*i.e.* Article 30.2).

Appeals dismissed.

Semle: The appropriate way of questioning a ruling of the trial Court such as the one involved in these appeals would be by application to the Supreme Court for an order of mandamus (*cf. Enimerotis case, supra*, at pp. 31–32 per Stavrinides, J.).

Cases referred to:

Christofi v. The Police (1970) 2 C.L.R. 117;

Rodosthenous and Another v. The Police, 1961 C.L.R. 50;

Varellas and Others v. The Police, 19 C.L.R. 46;

The Police v. Nikola and Others, 7 C.L.R. 14, at p. 15;

Petri v. The Police (1968) 2 C.L.R. 1, at p. 5;

Xenophontos v. Charalambous, 1961 C.L.R. 122;

1970
Nov. 6,
1971
Aug. 10
—

PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

1970
Nov. 6,
1971
Aug. 10
—
PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

The Attorney-General of the Republic v. Enimerotis Publishing Company and Others (1966) 2 C.L.R. 25; and at pp. 31–32;

The Attorney-General of the Republic v. Ibrahim, 1964 C.L.R. 195, at p. 232;

Board for Registration of Architects and Civil Engineers v. Kyriakides (1966) 3 C.L.R. 640, at p. 654;

Pelides and The Republic and Another, 3 R.S.C.C. 13, at p. 18;

Djirkalli and The Republic, 1 R.S.C.C. 36, at p. 40;

The Republic and Loftis, 1 R.S.C.C. 30;

Healey v. Ministry of Health [1954] 3 All E.R. 449;

See the decision of the European Court of Human Rights in the case “*Relating to certain aspects of the laws on the use of languages in education in Belgium*” in the (1968) Yearbook of the European Convention on Human Rights p. 832, at p. 864.

Appeal.

Appeal by Photini Polycarpou Georghadji and Another against the ruling of the Assize Court of Nicosia (A. Loizou, P.D.C., Stravrinakis and Stylianides, D.JJ.), given on the 30th October, 1970, refusing an application by the Appellants, made in the course of the hearing of Criminal Case No. 6971/70—*The Republic v. Charitonos and Others*—whereby they sought permission “jointly or separately to enter an appearance through Counsel with the right to summon witnesses and the right to speak”.

A. Triantafyllides with M. Christofides for the Appellants.

L. Loucaides, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following reasons for judgment were delivered by:—

· TRIANTAFYLLIDES, P.: On the 6th November, 1970, we gave judgment in these two appeals, as follows:—

“ On the 30th October, 1970, during the hearing by an

Assize Court in Nicosia of criminal case No. 6971/70— (*The Republic v. Charitonos and Others*, the hearing of which is still continuing)—and after all the evidence for the prosecution had been heard, three of the four accused had given evidence and the fourth had made an unsworn statement from the dock, counsel appeared for the first time on behalf of the present Appellants and applied to the Assize Court that the Appellants be permitted 'jointly or separately to enter an appearance through counsel with the right to summon witnesses and the right to speak'.

The Appellants are, respectively, the wife and the brother of the late Polycarpos Georghadjis, who is referred to in the particulars of a count for conspiracy, which is one of the counts in relation to which the said accused are being tried.

The Assize Court refused the application of the Appellants, but allowed them to retain counsel for a watching brief; against this ruling of the Assize Court the present appeals have been made.

Having considered all that has been submitted by learned counsel on the issue of the jurisdiction of this Court to entertain an appeal against a ruling of this kind we are of the view that no appeal could be made to this Court against such a ruling.

We, therefore, have to dismiss these appeals; and we need not, in the circumstances, pronounce upon the substance of the matter itself.

We reserve our reasons for this judgment until a later date, but we thought that we should announce at once our view regarding the fate of these appeals, as there does exist, as pointed out by counsel for the Appellants, some urgency, in the sense that the Assize Court is resuming its hearing of the case concerned on the 9th November, 1970".

We shall now proceed to give our reasons for the above judgment:—

As has been stated in the judgment delivered by Vassiliades, P. in the case of *Christofis v. The Police* (1970) 2 C.L.R. 117

1970
Nov. 6,
1971
Aug. 10
—
PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

1970
Nov. 6,
1971
Aug. 10

—
PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

the effect of section 25(2) of the Courts of Justice Law, 1960 (14/60) is that, save as otherwise provided by the said section (in relation to conviction or sentence), an appeal from a decision of a Court exercising criminal jurisdiction lies only subject to the provisions of the Criminal Procedure Law (Cap. 155).

Sub-section (1) of section 131 of Cap. 155 lays down that " Subject to the provisions of any other enactment in force for the time being, no appeal shall lie from any judgment or order of a Court exercising criminal jurisdiction except as provided for by this Law .

Having not been referred, by learned counsel for the Appellants, to any provision in Cap. 155, or in any other enactment, enabling an appeal to be made against the ruling of the Assize Court, which is the subject-matter of these appeals, we reached the conclusion that the Supreme Court has no jurisdiction to deal on appeal with such ruling.

Counsel for the Appellants submitted that we possessed jurisdiction to entertain these appeals even in the absence of any specific statutory provision to that effect. He contended in this respect that though no provision for an appeal against a decision refusing bail exists in the relevant Part—Part V—of Cap. 155 yet such an appeal was entertained, after the coming into force of Law 14/60, in the case of *Rodosthenous and Another v. The Police*, 1961 C.L.R. 50.

We are of the view that this submission is not a valid one, for the following reason:—

In the earlier case of *Varellas and Others v. The Police*, 19 C.L.R. 46, which was an appeal against refusal of bail pending the commencement of a preliminary inquiry, there was examined the question of the jurisdiction to entertain an appeal of that nature and the conclusion was reached that there existed such jurisdiction; in this respect there was referred to, *inter alia*, the case of *The Police v. Nikola and Others*, 7 C.L.R. 14, which was a case in which an appeal had been made against refusal of bail by a magistrate after an accused person had been committed for trial by an Assize Court; the following is stated in the judgment in the *Nikola* case (at p. 15):—

" The power to admit to bail is given by Secs. 107, 108 and 109 of the Cyprus Courts of Justice Order, 1882.

By Sec. 108, 'Every person charged with any offence except high treason or murder, who can find sureties sufficient in the opinion of the Court to secure his appearance when it is required, may be bailed at any stage of the proceedings, if in its discretion the Court thinks proper to bail him'.

And by Sec. 109 'when the preliminary enquiry is finished the accused may be admitted to bail or set at liberty on his own recognizance'.

And the last sentence of Sec. 108 says that 'Any person charged with any offence other than high treason may be admitted to bail by order of the Supreme Court'.

These provisions give the Magistrate an absolute discretion as to granting or refusing bail; and they also give the Supreme Court an unlimited power to bail in every case."

Section 108 of the Cyprus Courts of Justice Order, 1882, which is referred to in the above-quoted passage, makes provision analogous to that to be found in section 157(1) of Cap. 155, as this section was construed and applied by this Court, in relation to bail, in the case of *Petri v. The Police* (1968) 2 C.L.R. 1, at p. 5.

So, it cannot be said that in the *Rodosthenous* case (*supra*) an appeal against a refusal of bail was entertained without statutory provision existing for the purpose, as required under section 131(1) of Cap. 155.

It is, also, interesting to note that soon after the *Rodosthenous* case there was examined, again, in the case of *Xenophontos v. Charalambous*, 1961 C.L.R. 122, the question of the right of appeal under section 25(2) of Law 14/60 and it was held that as the general right of appeal provided for by section 25(2) is qualified therein by the words "subject to the provisions of the Criminal Procedure Law" it was not possible to appeal against an acquittal by a District Court without the sanction of the Attorney-General, which is required by virtue of section 131(2) of the Criminal Procedure Law (Cap. 155).

In approaching the issue before us we have borne in mind, also, that the Courts cannot invent a right of appeal where none is given nor will they usurp an appellate jurisdiction

1970
Nov. 6,
1971
Aug. 10

—
PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

1970
Nov. 6,
1971

Aug. 10

—

PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

where none is created (see *Healey v. Ministry of Health* [1954] 3 All E.R. 449).

A case in which a decision of a District Judge regarding an adjournment of the hearing of a criminal case was dealt with on appeal, though no express statutory provision appears to exist in relation to an appeal of this kind, is that of *The Attorney-General of the Republic v. Enimerotis Publishing Co. Ltd. and Others* (1966) 2 C.L.R. 25. It is clear, however, from the judgment of one of us, Stavrinides, J., in that case (see at pp. 31–32) that the question of the jurisdiction of the Supreme Court to entertain an appeal of this nature had not been raised on that occasion; and, actually, in the said judgment the opinion was expressed that “the proper way of questioning the order of adjournment was by application for an order of mandamus”. The main judgment in that case was given by Vassiliades, J., as he then was, who, later on, when the issue of the criminal appellate jurisdiction of the Supreme Court was raised and considered in the *Christofi* case (*supra*), joined in the unanimous view that such jurisdiction is to be exercised as and when laid down by statutory provisions. As at present advised, we are not inclined to regard the *Enimerotis* case as authoritatively establishing that an appeal lies otherwise than as provided for by statute.

Counsel for the Appellants has argued that section 25(2) of Law 14/60 is, as framed, unconstitutional, because it is contrary to Articles 155.1 and 30.1 of the Constitution.

Article 155.1 provides that the highest appellate Court in the Republic shall have jurisdiction to hear and determine, subject to the provisions of the Constitution and of any Rules of Court made thereunder, all appeals; and Article 30.1 provides that no person shall be denied access to the Court assigned to him by or under the Constitution.

It appears to us, bearing also in mind the purpose intended to be served, in the constitutional framework, by Article 155.1, that it does not exclude the possibility that the right of appeal may be regulated by statutory provision.

As stressed in the case of *The Attorney-General of the Republic v. Ibrahim*, 1964 C.L.R. 195, at p. 232, it is a basic principle of Constitutional Law that the utmost restraint should be exercised by Courts in approaching the issue of the alleged

unconstitutionality of a statute and that, in case of doubt, a Court should lean in favour of the validity of such statute, because a statute is presumed to be constitutional until the contrary is proved beyond all reasonable doubt (see, also, on this point, the case of *The Board for Registration of Architects and Civil Engineers v. Kyriakides* (1966) 3 C.L.R. 640, at p. 654). We have not been satisfied to that extent that the inclusion of the phrase "subject to the provisions of the Criminal Procedure Law" in section 25(2) of Law 14/60 has rendered it unconstitutional.

Counsel for Appellants has submitted, in the alternative, that even if section 25(2) is not unconstitutional, then the relevant provisions of Cap. 155, to which such section refers, must be applied, by virtue of Article 188.4 of the Constitution, with such modifications as may be necessary to bring them into accord with Article 155.1; in other words, to treat the relevant provisions of Cap. 155 as permitting an appeal against the ruling of the Nicosia Assize Court which has led to the filing of the present appeals.

The term "modification" in paragraph 4 of Article 188 is defined in paragraph 5 of the same Article as including "amendment, adaptation and repeal"; and though in the case of *Pelides and The Republic and Another*, 3 R.S.C.C. 13, at p. 18, it was held that the notion of adaptation is not restricted "to mere amendments consequential upon the conflict of a provision of law with the Constitution" but "involves a process of recasting in order to bring a provision of law into accord with the Constitution while preserving, at the same time, its object and effect as much as possible" we do not think that it is allowed, under Article 188.4, to amend the relevant provisions of Cap. 155 to such an extent as to introduce therein an entirely new, independent, provision affording a right of appeal against a ruling such as the one which is now before us (see in this respect the case of *Djirkalli and The Republic*, 1 R.S.C.C. 36, at p. 40). The case of *The Republic and Loftis*, 1 R.S.C.C. 30, is clearly distinguishable from the cases now under determination as then there was adapted, by way of modification under Article 188.4, an already existing legislative provision, section 205, of the Criminal Code (Cap. 154).

Regarding, next, the contention that section 25(2) of Law 14/60 is contrary to Article 30.1 of the Constitution, in our opinion there could only arise any conflict with such Article

1970
Nov. 6,
1971
Aug. 10
—
PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

1970
Nov. 6,
1971
Aug. 10

—
PHOTINI
POLYCARPOU
GEORGHADJI
AND ANOTHER
v.
THE REPUBLIC

if we were to hold that the appellate process under Article 155.1 could not be regulated by statutory provision; but, as already stated, this is not, in our view, the position.

It might, also, be usefully stated, in connection with the human rights aspect of the matter, that it does not seem to be imperative to provide for a right of appeal in relation to all decisions of trial Courts. Article 6(1) of the European Convention on Human Rights provides, like Article 30.2 of our Constitution, that in the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a hearing by a tribunal established by law. In relation to this Article of the Convention, which since the ratification by Cyprus of the Convention forms part of the law of this country, it has been held by the European Court of Human Rights in the case "*Relating to certain aspects of the laws on the use of languages in education in Belgium*" (see the 1968 Yearbook of the European Convention on Human Rights p. 832, at p. 864) that it "does not compel States to institute a system of appeal Courts. A state which does set up such Courts consequently goes beyond its obligations under Article 6".

For all the above reasons we reached the view that we possessed no jurisdiction to entertain the present appeals and, therefore, that we could not consider the merits thereof; and we dismissed them accordingly.

Appeals dismissed.