1982 December 21

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

RENA PAVLIDOU AND ANOTHER,
Appellants-Defendants,

v.

ELISAVET YEROLEMOU AND OTHERS,
Respondents-Plaintiffs.

(*Civil Appeal No.* 5673).

Civil Procedure—Appeal—Further evidence—Principles on which received—Evidence sought to be adduced could have been made available at the trial—Application refused—Order 35, *rule* 8 *of the Civil Procedure Rules and section* 25(3) *of the Courts of Justice Law,* 1960 (*Law* 14 *of* 1960).

By means of two applications the appellants in this appeal applied for leave to adduce further oral evidence at the hearing of the appeal and for leave to produce documentary evidence to prove certain facts at the hearing of the appeal. It was the allegation of the appellants that both the oral and documentary evidence sought to be adduced was in respect of facts which arose after the judgment under appeal was delivered.

Held, that all proper evidence must be put before the trial Court and the Supreme Court sitting as an appellate Court shall not allow evidence to be adduced which should have been adduced at the trial had reasonable diligence been exercised; that the oral evidence sought to be adduced is not evidence on matters which occurred subsequently to the trial and it is evidence which could have been made available at the trial; that, the documentrary evidence referred to in the second application is evidence the existence of which was within the knowledge of the applicants; accordingly the applications must fail.

Applications dismissed.

Cases referred to:

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

Kolias v. *Police* (1963) 1 C.L.R. 52 at p. 56;

HjiSavva and Others v. *Panayiotou* (1966) 1 C.L.R. 6 at p. 7;
Pourikkos (No.2) v. *Fevzi*, 1962 C.L.R. 283;
Braddock v. *Tillotson's Newspaper Ltd.* [1950] 1 K.B. 48 at p. 50;
Felekkis v. *Police* (1968) 2 C.L.R. 15;
Ashiotis v. *Weiner* (1966) 1 C.L.R. 274;
Papadopoulos v. *Kouppis* (1969) 1 C.L.R. 584;
Paraskevas v. *Mouzoura* (1973) 1 C.L.R. 88;
Moumdjis v. *Michaelidou and Others* (1974) 1 C.L.R. 226;
Evdokimou v. *Roushias* (1975) 1 C.L.R. 304;
Kyriacou v. *C.D. Hay & Sons* (1978) 1 C.L.R. 100.

Applications.

Applications by appellant for leave to adduce further oral evidence at the hearing of the appeal and for leave to produce documentary evidence to prove certain facts.

Ph. Clerides, for the appellants.

J. Erotocritou, for respondent-plaintiff in Action No. 4707/71.

A. Dikigoropoulos, for respondent-plaintiff in Action No. 4968/71.

E. Efstathiou, for respondent-plaintiff in Action No. 4993/71.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The decision of the Court will be given by Mr. Justice Savvides.

SAVVIDES J.: At this stage we have to deal with two applications of the appellant. The one for leave to adduce further oral evidence at the hearing of this appeal and the other for leave to produce documentary evidence to prove certain facts at the hearing of this appeal.

It is the allegation of the appellants in support of these applications that both the oral and documentary evidence sought to be adduced is in respect of facts which arose after the judgment under appeal was delivered.

Counsel for respondents opposed both these applications on the ground that the witness sought to be called before the Court of Appeal was or could be made available for testimony before

the trial Court and in consequence the facts sought to be proved by this witness are not facts which arose after the judgment. Also, that the documentary evidence was in the possession of the appellants long before the trial.

Both applications are based on Order 35, rule 8 of the Civil Procedure Rules, the material part of which reads as follows:

> "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Trial Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court".

This rule when it was made, corresponded to rule 4 of Order 58 of the then Rules of the Supreme Court in England (new rule 10 of Order 59).

There is also further provision under section 25(3) of the Courts of Justice Law, 1960 (Law No. 14/60) which is empowering the Supreme Court to re-hear any witness already heard by the trial Court or hear or receive further evidence. Section 25(3) reads as follows:

> "Notwithstanding anything contained in the Criminal Procedure Law or in any other Law or in any Rules of Court and in addition to any powers conferred thereby the High Court on hearing and determining any appeal either in a civil or a criminal case shall not be bound by any determinations on questions of fact made by the trial Court and shall have power to review the whole evidence, draw its own inferences, hear or receive further evidence, and, where the circumstances of the case so require, re-hear any witness already heard by the trial Court, and may

give any judgment or make any order which the circumstances of the case may justify, including an order of retrial by the trial Court or any other court having jurisdiction, as the High Court may direct".

As to the object of the introduction of this section, in the case of *Simadhiakos* v. *The Police*, 1961 C.L.R., Vassiliades, J. (as he then was), after examining the historical grounds which necessitated in his opinion its introduction under the Constitution of Cyprus, a Constitution providing for courts of first instance based on communal basis, Greek–Cypriot and Turkish–Cypriot and mixed courts with a Court of Appeal presided over by a neutral with two Greek–Cypriots and one Turkish–Cypriot High Court Judges as members, had this to say at page 86:

"With these considerations in mind one may see, clearly, in my opinion, the mischief for which the old law did not provide; and for which the legislature apparently intended to provide a cure by section 25. Bearing in mind, (as they must be assumed to have been) the existing difficulties in the law dealing with trial court findings on appeal, (as I have endeavoured to show earlier in this judgment) enhanced and increased to a possibly dangerous point, by the unusual structure of courts composed upon a communal basis, in a state where the two component communities do not always see eye to eye, the legislature apparently thought fit to make express provision in the section dealing with appeals, that the High Court, as the central and final source of civil and criminal justice, shall not be bound by any determinations on questions of fact made by the trial courts; nor, for that matter, be fettered by dictums and decisions in this connection, made by the Courts or Judges in England, under very different circumstances. 'The High Court.....shall not be bound by any determinations on questions of fact made by the trial court', in the context of section 25(3) does not, in my opinion, mean 'shall ignore' or 'shall disregard'. It means that the High Court shall not be bound to take at its face value every such determination, but shall be entitled to go into the reasoning behind it, and enquire as to its correctness, in the circumstances of the case in hand, as shown by the evidence".

And he concludes as follows:

> "It is equally clear in my mind, that while the legislature intended to settle in unequivocable language the revisional powers of the Court of Appeal, they did not aim at any substantial alteration in the law. Trial court findings continue to be the valuable conclusion reached by one or more trial judges, subject only to unfettered investigation and criticism on appeal, where only if the circumstances of the case so require, the Court can rehear any witness already heard, or order a retrial".

In that case the Court was dealing with an application for rehearing of a witness already heard before the trial Court in the exercise of the powers given under section 25(3) and which, application, was refused. Josephides, J. in the same judgment in dealing with the powers under section 25(3) had this to say at page 93:

> "It will be observed that this section empowers the High Court to re-hear any witness already heard by the trial court 'where the circumstances of the case so require'. This is a new power given to this Court which was not previously possessed by the Supreme Court of Cyprus, and for this reason I am of the view that we should be very careful in laying down any principles on which the Court would act in deciding whether to re-hear a witness or not. Undoubtedly the legislature has armed this Court with the widest possible powers for the purposes of reviewing the whole evidence and 'where the circumstances of the case so require' re-hearing any witnesses already heard by the trial court, and in a proper case this Court would not refuse to make use of the powers which are contained in section 25(3)".

In *Kolias* v. *The Police* (1963) 1 C.L.R. 52 at p. 56 the Supreme Court in dealing with the powers of the Court under section 25, had this to say (per Wilson, P.):

> "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 the evidence which was available before the trial Court".

The discretion of the Supreme Court in allowing fresh evidence to be called on appeal, and the principles underlining the exercise of such discretion, have been examined and affirmed in a number of cases since the enactment of Law 14/60 till to-day. Such principles may be briefly summarised to the effect that all proper evidence must be put before the trial Court and the Supreme Court sitting as an appellate Court shall not allow evidence to be adduced which should have been adduced at the trial had reasonable diligence been exercised.

In *Kolias* v. *The Police* (supra) at p. 55, the following is reported:

"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".

In *Andromachi Ioannou Hji Savva and four others* v. *Andreas Panayiotou* (1966) 1 C.L.R. 6 at p. 7, the position was summarised as follows:

"Coming to the application to adduce fresh evidence, the requirements for granting leave to adduce fresh evidence have not been fulfilled. In the first place the Court is not satisfied that the proposed evidence, for what it is worth, could not have been adduced at the trial had reasonable diligence been exercised; and, the nature of the fresh evidence, as has been explained to us, very likely would not have been admissible if it was tendered. We, therefore, dismiss this application as well, and we call on the counsel for the appellant to address us on the appeal".

In *Yiannakis Kyriacou Pourikkos (No. 2)* v. *Mehmet Fevzi*, 1962 C.L.R. 283, the Court in dismissing an application for calling of additional evidence on appeal, had this to say (per Wilson P. at p. 285):

> "For the reasons now to be given, however, the application cannot be granted.
>
> In the first place the evidence now sought to be introduced was essentially part of the plaintiff's case and the witness who could give it was available for the trial. He ought to have been called then, and when he was not he cannot be recalled in reply. As is well known, the plaintiff may not split his case e.g. *Jacobs* v. *Tarlton* [1848] 11 Q.B. 421".

Reference is made in that case to the following exposition of the practice of the Court of Appeal in England by L.J. Tucker in *Braddock* v. *Tillotson's Newspapers Ltd.* [1950] 1 K.B. 48 at p. 50.

> "It has been the invariable practice of the Court of Appeal in this country to confine the admission of fresh evidence, in circumstances such as this to evidence which could not reasonably have been discovered before the trial, and to evidence which, if believed, either would be conclusive or, as has been said by some judges, to evidence which would lead to the reasonable probability that the verdict would have been different".

And the judgment in *Pourikkos* case (supra) concludes as follows:

> "We adopt the law as stated by Tucker L.J. In the present case the plaintiff has failed to meet the first test namely that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial and for that reason alone his application must fail.
>
> This is sufficient to dispose of the application. However, reference must be made to one more point. The plaintiff's counsel submitted section 25(3) of the Courts of Justice Law, 1960, applied and permitted him to place before us the evidence he now seeks to adduce. To this there is a very short answer. This statutory provision was

never intended to relieve a plaintiff at trial from the duty of placing before the Court all available relevant evidence".

The view expressed in the last sentence of the above judgment was adopted and applied in *Felekkis* v. *The Police* (1968) 2 C.L.R. 151.

The same principles were also considered in a number of other cases before this Court, such as *Ashiotis* v. *Weiner* (1966) 1 C.L.R. 274, *Papadopoulos* v. *Kouppis* (1969) 1 C.L.R. 584, Paraskevas v. Mouzoura (1973) 1 C.L.R. 88, *Moumdjis* v. *Michaelidou and Others* (1974) 1 C.L.R. 226, *Evdokimou* v. *Roushias* (1975) 1 C.L.R. 304, *Kyriacou* v. *C.D.Hay & Sons* (1978) 1 C.L.R. 100.

In *Moumdjis* v. *Michaelidou and Others* (supra), A.Loizou, J. in giving the reasons of the Court refusing the appellant's application for leave to adduce fresh evidence, is reported at p. 229 to have said the following:

"We heard extensive argument in support of this application, at the end of which we found it unnecessary to call on the other side and we dismissed same. The reason for doing so is that the fresh evidence sought to be adduced was all along available to the appellant, and if the three defendants or any one of them had, in the opinion of counsel for him, something significant to say and it was considered as an essential part of his case, they should have been summoned to give evidence in the first place. Counsel should not have taken it for granted that his adversary would call such evidence. Failing to do so does not justify this Court to allow its reception as fresh evidence on appeal. Furthermore, there has been nothing to show that the interests of justice justify the exercise of our discretion in favour of allowing such fresh evidence, a course to be sparingly followed, and this only when, there are circumstances that justify such a departure from the notion of finality of trials".

And after making reference to a number of cases of our Supreme Court, he concluded as follows: (p. 230)

"We need not go extensively into these principles, suffice it to say that for all intents and purposes these witnesses

were available throughout the trial and it has not been shown that their evidence could not have been obtained with reasonable diligence for use therein".

In the same judgment at pages 230, 231, reference is made to some English cases as follows:

"In the case of *Skone* v. *Skone & Another* [1971] 2 All E.R. 582, the dicta of Lord Loreburn, L.C., in *Brown* v. *Dean* [1908-1910] All E.R. Rep. 661 at p. 662, and of Lord Denning, L.J., in *Ladd* v. *Marshall* [1954] 3 All E.R., 745 at p. 748, were applied in the first-mentioned case. Lord Hodson at p. 586 quoted with approval the passage from the judgment of Lord Denning, L.J., in the last-mentioned case laying down a good test applicable where evidence is sought to be admitted concerning matters which occurred before the date of the trial. He said—

'. .....to justify the reception of fresh evidence or a new trial three conditions must be fulfilled: First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, although it need not be incontroversible'.

This test is applicable in this country both under Order 35, rule 5 of the Civil Procedure Rules and under section 25(3) of the Courts of Justice Law, 1960".

In the case of *Evdokimou* v. *Roushias* (supra), the Supreme Court refused an application for allowing further evidence to be called on appeal on the question of damages awarded in a traffic accident case, on the allegation of further developments concerning the state of health of the appellant. Triantafyllides, P., after reviewing a number of cases of this Court and also of English cases, on the matter, concluded as follows:

"It is clear from the wording of the above quoted rule 8 that as regards matters occurring subsequently to the trial it is not necessary to put forward special grounds

justifying the calling of further evidence on appeal, and, actually, this was the view taken in *Paraskevas* v. *Mouzoura* (1973) 1 C.L.R. 88 (see, further, the English cases of *Mulholland and Another* v. *Mitchell* [1971] 1 All E.R. 307, 309, and *McCann* v. *Sheppard and Another* [1973] 2 All E.R. 881, 888).

The principles governing the hearing of further evidence on appeal, and in particular concerning events which have supervened after the trial and the delivery of the judgment appealed from, have been reviewed at length in the case of *Paraskevas*, supra; useful reference may be made, also, to *Agrotis* v. *Salahouris*, 20 (I) C.L.R. 77, 79, to *Papadopoullos* v. *Kouppis* (1969) 1 C.L.R. 584, 586, and *Moumdjis* v. *Michaelidou and Others* (1974) 1 C.L.R. 226".

Reverting now to the case before us and after considering all the facts, we have reached the conclusion that the evidence sought to be adduced is not evidence on matters which occurred subsequently to the trial. The oral evidence of Mrs. Erotocritou could have been made available at the trial; after all, she was counsel conducting the case before the trial Court.

As to the documentary evidence referred to in the second application, it is evidence the existence of which was within the knowledge of the applicants and this is clear from paragraph 8 of the affidavit of Rena Pavlidou in support of this application, whereby she admits that the notice of assessment had not been produced at the trial because it was misplaced and could not be traced.

In the light of the exposition of the law as above, and our findings on the matter, both these applications are dismissed with costs in favour of the respondents in this appeal.

Applications dismissed with costs in favour of respondents.