1984 January 25

[HADJIANASTASSIOU, SAVVIDES, PIKIS, JJ.]

N.K. SHACOLAS (MERCHANTS) LIMITED,
Appellants-Plaintiffs,

v.

UNIVERSAL LIFE INSURANCE CO. LTD.,
Respondents.

(*Civil Appeal No.* 6520).

Judge—Conduct of—Discourtesy—Trial of Civil Action—Discourtesy complained of had no repercussions upon the outcome of the case—Court of appeal not entitled to order a retrial.

The appellants moved the Court to order a retrial in order to remedy the inbalance in the scales of justice, unfairly tipped against them because of an improper remark allegedly made by the Judge to their Counsel in the course of his final address. The record of the Court was incomplete in that, in accordance with settled practice not to print the addresses of Counsel, in order to make possible its quick preparation, it did not reproduce details of the addresses made; and the appellants took no steps to have the record completed. The Court of Appeal, however, decided to deal with the appeal, because assuming that the complaint was well founded it could have no bearing on the outcome of the appeal for the reason that appellants were not challenging the outcome of the case.

Held, that interference by this Court is warranted only where judicial intervention is of a kind that is apt to have a bearing on the outcome of a case; that if the outcome is not challenged, as in the present case, ordering a retrial would be futile; that the discourtesy complained of, if it occurred, manifestly had no bearing on the judgment of the Court and no such suggestion was made; that, certainly, there was no interference with the elicitation of the facts of the case; that only in a most exceptional case, hard to contemplate or envisage at present, would this Court be justified to order a retrial when the outcome is not

questioned or disputed: and that in the absence of any suggestion that the discourtesy complained of had any repercussions upon the fact finding process, or upon the outcome of the case, the appeal must be dismissed.

Per curiam. Nothing said in this judgment should be construed as condoning discourtesy on the part of judges to counsel or anyone for that matter witnesses or members of the public. Discourtesy lowers the dignity of the Court and may weaken confidence in the patience of the judiciary to transact judicial business in a climate of calm essential for the administration of justice. Patience combined with firmness are the two essential attributes for robust judgmentship.

Appeal dismissed.

Cases referred to:

Thompson v. Judicial [1968] 2 All E.R. 419;

Reg. v. Hircock [1970] 1 Q.B. 67.

Jones v. National Coal Board [1957] 2 All E.R. 155.

R. v. Cleaver 37 Cr. App. R. 37.

R. v. Sussex Justices ex parte McCarthy [1924] 1 K.B. 256.

King v. Essex Justices ex parte Perkins [1927] 2 K.B. 475.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Artemides, Ag. P.D.C.) dated the 22nd December, 1982 (Action No. 3662/80) whereby plaintiffs' action for the sum of £5,000.- against the defendants due under a life insurance policy in respect of the late Takis Mouxiouris was dismissed.

P. Ioannides for *T. Papadopoulos*, for the appellant.

St. Nathanael for *L. Demetriades*, for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Mr. Justice Pikis.

PIKIS J.: We are moved to order a retrial in order to remedy the inbalance in the scales of justice, unfairly tipped against the appellants because of an improper remark, allegedly made

by the Judge to counsel for the appellants in the course of his final address. In the contention of the appellants the improper remark was made in response to the development of an argument in relation to a legal point reflecting, apparently, the Judge's poor view of the tenability of the argument raised. The remarks complained of were to the following effect: "Mr. Ioannides, what you are saying is nonesense". The record of the Court is incomplete. It does not reproduce details of the addresses made, in accordance with settled practice not to print the addresses of counsel, in order to make possible the quick preparation of the record of the Court. Appellants took no steps to have the record completed. In the absence of the completed record, we cannot discern what really happened, whether the offensive comment allegedly made had in fact been made, or the circumstances or context in which it had been made. Only in the most exceptional cases, and this is not one of them, will the Court look to anything outside the printed record (see. *Thompson* v. *Andrews* [1968] 2 All E.R. 419). The responsibility of the appellant to see that the transcription of the proceedings is complete, particularly the parts relied upon as hurting the rights of the appellant, was stressed, inter alia, in *Reg.* v. *Hircock* [1970] 1 Q.B. 67. Nevertheless, we decided to deal with the appeal; for assuming the complaint to be well founded, it can have no bearing on the outcome of the appeal for the reasons given below.

It is the case for the appellants that the improper remarks defeated, independently of their repercussions upon the outcome of the case, appellants' right to a fair trial. Therefore, we must set aside judgment and order the holding of a fair trial afresh. He relied on two lines of authority, converging upon common ground in requiring that a trial must be fair in substance and appearance. The first line of argument arises from cases establishing that excessive intervention by a Judge to a degree jeopardising the party's right to develop his case before the Court, justifies quashing the verdict because of fear of injustice. The first case, regarded as authoritative on the subject of judicial intervention, is that of *Jones* v. *National Coal Board* [1957] 2 All E.R. 155, where the Court of Appeal ordered a retrial because of excessive intervention on the part of the Judge with the cross-examination of witnesses and development of plaintiff's case, a widow claiming damages under the *Law Reform Act*,

1934, and the *Fatal Accidents Act*, 1846–1908, against the employers of her deceased husband. The interventions took place at the stage of cross-examination of defendants' witnesses and during counsel's development of the case of his client before the Jury. The interventions were of a kind disparaging to the case of the plaintiff manifested in a manner constituting an interference with the fact-finding process constitutionally entrusted to the Jury. In such circumstances, serious doubts were raised as to the fairness of the trial. Lord Denning, who delivered the unanimous judgment of the Court, discussed the role of a Judge within the context of a trial modelled on the adversary system, and reminded of Lord Bacon's admonition that "Patience and gravity of hearing is an essential part of justice ". By the same logic and on the strength of the same principle, the Court of Criminal Appeal quashed the conviction of the accused in *R.* v. *Clewer*, 37 Crim. App. Rep., 37. As in the case of *Jones*, supra, defending counsel was repeatedly and unjustifiably interrupted during the cross-examination and examination-in-chief of witnesses and with the development of accused's case before the Jury. Remarks made by the trial Judge, namely that counsel for the defence "was raising a dust storm"—implying that defence counsel was raising false issues—might convey to the Jury the impression that the Judge was convinced of the appellant's guilt, thereby improperly intermeddling with the Jury's fact-finding task.

The second line of authority pursued is less relevant. It revolves round judicial decisions set aside because of the presence, at the time of judicial deliberation, of persons that had no right to be there. In such circumstances, justice did not appear to be done (see, *Rex* v. *Sussex Justices ex parte McCarthy* [1924] 1 K.B. 256, and *The King* v. *Essex Justices ex parte Perkins* [1927] 2 K.B. 475). Here, there is no suggestion that the Judge allowed anyone to interfere in his judicial functions or rested his judgment on anything other than the facts before him.

In the course of argument, I pointed out to counsel for the appellants there is a third line of authority, making a clear distinction between judicial intervention entailing the disparagement of litigants' case, on the one hand and, the discourtesy by the Judge to counsel, on the other. Counsel acknowledged

there is such authority and was kind enough to draw our attention to the decision of the Court of Appeal in *R.* v. *Hiscock* [1970] 1 Q.B. 67, though he argued it has no relevance to the case in hand. The distinction was drawn in these terms by Widgery, L.J., at p. 72 — letter 'E':

> "There is, in our judgment, a very important distinction between conduct on the part of the presiding judge which may be regarded as discourteous and may show signs of impatience—and, indeed, conduct which cannot be commended in any way—but which does not in itself invite the jury to disbelieve the defence witnesses, and conduct which positively and actively obstructs counsel in the doing of his work. The distinction is between that type of case first mentioned and the type of case in *Reg.* v. *Clewer*, where there was an invitation by the judge to the jury to disregard what was being said and active, positive interference with counsel in the pursuit of his task".

The distinction is valid and rests on the premise that interference is warranted only where judicial intervention is of a kind that is apt to have a bearing on the outcome of a case. If the outcome is not challenged, as in the present case, ordering a retrial would be futile.

Counsel did not hide the fact that he has no specific complaint with the judgment of the Court, in all probability warranted by the facts of the case, largely admitted, and the state of the law on the subject of estoppel. The case concerned a claim under a group assurance policy, dismissed on the ground that the deceased was not covered by its terms. The discourtesy complained of, if it occurred, manifestly had no bearing on the judgment of the Court and no such suggestion was made Certainly, there was no interference with the elicitation of the facts of the case. Only in a most exceptional case, hard to contemplate or envisage at present, would the Court be justified to order a retrial when the outcome is not questioned or disputed. In the absence of any suggestion that the discourtesy complained of had any repercussions upon the fact-finding process, or upon the outcome of the case, the appeal must be dismissed.

Nothing said in this judgment should be construed as condoning discourtesy on the part of judges to counsel or anyone for that matter—witnesses or members of the public. Discourtesy lowers the dignity of the Court and may weaken confidence in the patience of the judiciary to transact judicial business in a climate of calm essential for the administration of justice. Patience combined with firmness are the two essential attributes for robust judgmentship. The appeal must be dismissed.

We repeat that we resolved this appeal on the assumption that the complaint was well founded. This remains an assumption for in the absence of the record, we cannot properly discern what had actually happened or the context in which it happened.

The appeal is dismissed. Let there be no order as to costs.

Appeal dismissed.