1984 November, 29

[L. LOIZOU, HADJIANASTASSIOU AND DEMETRIADES, JJ.]

SAVVAS PATIKKIS,

Applicant,

v.

THE MUNICIPAL COMMITTEE OF NICOSIA,

Respondents.

(Case Stated No. 184).

Practice—Case Stated—Industrial Disputes Court—Statement of case not embodying the facts as found and accepted by the trial Court on the evidence but embodying a narration of the evidence itself—And questions of law, on which the opinion of the Supreme Court was sought, not clearly formulated—Within province of trial Court to make findings of fact after a proper evaluation of the evidence—Impermissible for Court of Appeal to adjudicate on a matter which has not been adjudicated upon on its merits by the trial Court—Case remitted to trial Court with a view to stating the facts as found by the trial Court and formulating the questions of law in a clear and precise way—Regulation 17(2) *of the Arbitration Tribunal Regulations,* 1968.

This was an appeal, by way of case stated, against the decision of the Industrial Disputes Court whereby it was held that the termination of the employment of the appellant was made on ground specified in s.5 (στ)(i) of the Termination of Employment Law, 1967, i.e. that the conduct of the employee was such that it was rendered clear that the relationship of employer and employee could not reasonably be expected to continue.

The case was stated under the provisions of regulation 17(2) of the Arbitration Tribunal Regulations, 1968, as amended, which provides as follows: "The case shall be stated in accordance with form 5_____".

The said form 5 in its third paragraph provides as follows:

"The facts found by me were".

Though the above paragraph 2 of the case stated covered fourteen pages it was difficult to discern a statement of any fact found by the trial Court upon the evidence; it was, instead, a narration of the evidence itself.

Held, that the mode of the statement of the case in so far as its paragraph 3 is concerned does not merely suffer from an irregularity of form which could be waived; but the total absence of findings of fact by the trial Court after a proper evaluation of the evidence, a matter which is entirely within the province of the trial Court, renders the task of this Court very difficult; that it should be borne in mind that under s.12(13)(b)(ii) of The Annual Holidays with Pay Law, 1967 (as set out in s.3 of Law 5 of 1973) an appeal to the Supreme Court, by way of case stated, lies only on a question of law and this Court cannot adjudicate on the question of law unless all the factual issues are resolved by the trial Court. Because if this Court proceeds to adjudicate on a matter which has not already been adjudicated on its merits by the trial Court it will be usurping the functions of the Court of first instance, a course which is impermissible (see, *Djeredjian (Import-Export) Ltd. (in Liquidation under Supervision of the Court) Through its Liquidators (a) Chr. P. Mitsides (b) Nicos Chr. Lacoufis* v. *The Chartered Bank* (1965) 1 *C.L.R.* 130); that, therefore, in view of the above the best and only course is to remit the case back to the trial Court with a direction that paragraph 3 of the case should be stated in accordance with the regulations and embody only the facts as found and accepted by the trial Court on the evidence and not merely a narration of the evidence itself.

Held, further, that the questions of law on which the opinion of the Supreme Court is sought have not been clearly formulated; accordingly this part of the case stated, too, has been formulated in a defective manner and it is directed that the question of law should be formulated in a clear and precise way (observations of A. Loizou J. in *Cleanthis Christofides Ltd.* v. *The Fund for Redundant Employees and Another* (1978) 1 C.L.R. 208 at p. 214 and in *Constantinidou* v. *Woolworth* (1980) 1 C.L.R. 302 at p. 313 adopted).

Case remitted to trial Court.

Cases referred to:

Caledonian Insurance Co. v. *Eracleous and Others* (1979) 1 C.L.R. 328;

Kika v. *Lazarou and Another* (1981) 1 C.L.R. 632;

Christofides v. *Constantinou and Another* (1982) 1 C.L.R. 123;

HadjiPapatryfonos v. *Partaki and Another* (1982) 1 C.L.R. 355;

Meshiou v. *Eleftheriou* (1982) 1 C.L.R. 486;

Djeredjian (Import-Export) Ltd. v. *The Chartered Bank* (1965) 1 C.L.R. 130;

Cleanthis Christofides Ltd. v. *The Fund for Redundant Employees and Another* (1978) 1 C.L.R. 208 at p. 214;

Constantinidou v. *Woolworth* (1980) 1 C.L.R. 302 at p. 313.

Case Stated.

Case stated by the Chairman of the Industrial Disputes Court relative to his decision of the 16th May, 1981 in proceedings under sections 3 and 9 of the Termination of Employment Law, 1967 (Law No. 24 of 1967) instituted by Savvas Patikkis against the Municipal Committee of Nicosia whereby his application for compensation and payment of wages for unlawful dismissal, was dismissed.

E. Efstathiou, for the appellant.

K. Michaelides, for the respondents.

Cur. adv. vult.

L. Loizou J. read the following judgment of the Court. This is an appeal, by way of case stated, against the decision of the Industrial Disputes Court whereby it was held that the termination of the employment of the appellant was made on a ground specified in s.5(στ)(i) of the Termination of Employment Law 1967, i.e. that the conduct of the employee was such that it was rendered clear that the relationship of employer and employee could not reasonably be expected to continue.

The case was stated under the provisions of regulation 17(2) of the Arbitration Tribunal Regulations, 1968, as amended,

which provides as follows: "The case shall be stated in accordance with form 5_____".

The said form 5 in its third paragraph provides as follows:

"3. Τὰ διαπιστωθέντα ὑπ' ἐμοῦ πραγματικὰ γεγονότα ἦσαν:"

(The facts found by me were:)

Going through the above paragraph of the case stated which covers fourteen pages it is difficult to discern a statement of any fact found by the trial Court upon the evidence; it is, instead, a narration of the evidence itself. And the question arises whether, in view of the mandatory language of regulation 17(2) and paragraph 3 of form 5 and the absence of any findings of fact by the trial Court made after an evaluation of the evidence, this Court can proceed and adjudicate on the case stated.

In *Caledonian Insurance Co. Ltd.* v. *Andreas Eracleous and Others* (1979) 1 C.L.R. 328 it transpired during the hearing of the appeal that certain matters on which the trial Court did not consider it necessary to pronounce turned out to be relevant for the purpose of the determination of the appeal. It was held by the Court of appeal at p. 334:

"We would, indeed, have been much happier if we could have put an end to this litigation as a whole by delivering a final judgment, at this stage, in this appeal; but, in respect of some of the issues referred to above, which the trial Court has not resolved, we do not seem to have before us all the relevant material and sufficient arguments; also, notwithstanding our wide powers on appeal, both under section 25 of the Courts of Justice Law, 1960 (Law 14/60), as well as under rule 8 of Order 35 of the Civil Procedure Rules, we should avoid determining this case in effect as a trial Court rather than as an appeal Court, because as has been pointed out in *Djeredjian (Import-Export) Ltd. (in Liquidation under Supervision of the Court) Through its Liquidators* (a) *Chr. P.: Mitsides* (b) *Nicos Chr. Lacoufis v. The Chartered Bank*, (1965) 1 C.L.R. 130 (at p. 133):-

'_____When we are called upon to go into the facts and merits of the case and then adjudicate on a matter which has not already been adjudicated on its merits in a lower Court then we are of the opinion that we are usurping the functions of the Court of first instance and we are not acting in our capacity as an appellate Court' ".

and at p. 335:

"Before concluding this judgment we would like to state that we have considered whether we might, at least, have pronounced now on the issue as to whether the trial Court rightly treated Inman as an insured, and not as an authorised driver, under the policy issued by Caledonian, the appellants. In spite of the fact that we have heard lengthy arguments on this point, we have decided in the end to refrain from expressing any opinion as regards this issue, because it is in a certain way related to the finding of the trial Court that Inman was an insured, and not an authorised driver, under the insurance cover accorded to him by Seven Provinces, and though this finding was, initially, challenged, too, by means of a cross-appeal, which was filed by counsel appearing for the Seven Provinces, eventually, as was stated already in this judgment, the cross-appeal was abandoned and dismissed, thus rendering it impossible for us to deal in a complete manner with this particular aspect of the present case.

In the light of all the foregoing we have decided to order a new trial ab initio, on all issues, of this case, before, necessarily, a differently constituted bench; such new trial should take place with all possible expediency so as to avoid any further delay in putting an end to this litigation".

In *Kika* v. *Lazarou and Another* (1981) 1 C.L.R. 632, a running down case, the crucial issue on which depended the trial Court's finding as to whether the appellant was solely responsible for the accident or, on the contrary, he was not at all responsible, or only partially responsible, was whether he actually saw the respondent standing in the road and making to him a signal to stop. The trial Court reached the conclusion that "the defendant either saw the plaintiff or, even if he did not actually see

him, he ought to have known of his presence there because he used the road a few hours earlier_____".

The Court of appeal held: (at p. 634)

"In our opinion on the basis of an in the alternative and uncertain finding like the above no safe conclusion could have been reached regarding the liability of the appellant, or any contributory liability of the respondent or any liability of the respondent-third party for not taking all necessary steps to make the road-block, and the soldiers manning it, visible at night-time. We therefore, have to order a retrial of this case before, necessarily, a differently constituted bench".

In *Christofides* v. *Constantinou and Another* (1982) 1 C.L.R. 123 a retrial on the issue of liability was ordered "in view of the failure of the trial Judge to sum up and evaluate the evidence before him and his failure to duly reason his findings".

In *Zenon HadjiPapatryfonos* v. *Eleni Partaki and Another* (1982) 1 C.L.R. 355 a retrial was ordered because the trial Judge, inter alia, failed to evaluate the evidence in its entirety. And, in *Meshiou* v. *Eleftheriou* (1982) 1 C.L.R. 486 a retrial was ordered on the ground that the trial Judge failed to make the necessary overall assessment of the evidence and especially to evaluate the real evidence.

The relevant passage is to be found at pp. 490-491:

"The failure of the trial judge to make the necessary overall assessment of the evidence, especially his omission to evaluate in the proper perspective the real evidence, renders his findings vulnerable to the extent that it would be unsafe to rely upon them as proven facts. Of especial significance is his failure to direct his attention to the real evidence. It has been said time and again that in road accident collisions, real evidence is of great assistance, as more often than not it offers an insight into what happened. Common experience tells us that in road accident collisions, the parties immediately involved thereto are apt to form a mistaken impression about a variety of facts, including their position on the road, not least because of the great speed with which events develop. Real evidence, on the

other hand, is not dependent on the impressions of the parties, and in appropriate circumstances, it may offer reliable evidence as to what happened. After all, we are dwelling on the theme of negligence where a momentary inattention or ditraction may be the agent of the collision. Real evidence may guide us to the ascertainment of the true facts surrounding a collision.

The judgment of the trial Court is vulnerable on another score, as well. The trial Judge failed to appreciate or evaluate the implications arising from the fact that the respondent did, on any view of the evidence, overtake the saloon car from a distance that was too close, increasing thereby the likelihood of danger to other users of the road. This is a consequential consideration, more so in view of the absence of any obstacle or hindrance to the use of the remaining patch of the road.

In the light of the above, we are of the view that the findings of the trial Court cannot be safely relied upon. In the face of this reality, the disinclination of the Court of Appeal to interfere with the findings of the trial Court, recedes in view of a real likelihood that such findings may have been arrived at, either in disregard to or without a proper evaluation of the evidence.

What should be done in the circumstances: We cannot sustain the submission of learned counsel for the appellant and find for his client. For, the findings of the Court do not rest on inferences from primary facts, but on a combination of primary facts, involving, inter alia, the credibility of witnesses and inferences drawn therefrom. In our judgment, the only alternative is to order a retrial before another judge, and we so order".

The mode of the statement of the case in so far as its paragraph 3 is concerned does not merely suffer from an irregularity of form which could be waived; but the total absence of findings of fact by the trial Court after a proper evaluation of the evidence, a matter which is entirely within the province of the trial Court, renders the task of this Court very difficult. For it should be borne in mind that under s.12(13)(b)(ii) of The Annual Holidays with Pay Law, 1967 (as set out in s.3 of Law

5 of 1973) an appeal to the Supreme Court, by way of case stated, lies only on a question of law and this Court cannot adjudicate on the question of law unless all the factual issues are resolved by the trial Court. Because if this Court proceeds to adjudicate on a matter which has not already been adjudicated on its merits by the trial Court it will be usurping the functions of the Court of first instance, a course which is impermissible. (See, *Djeredjian (Import-Export) Ltd. (in Liquidation under Supervision of the Court) Through its Liquidators (a) Chr. P. Mitsides (b) Nicos Chr. Lacoufis v. The Chartered Bank* (1965) 1 C.L.R. 130 to which reference has been made earlier on in this judgment).

In view of the above this Court considers that the best and only course is to remit the case back to the trial Court with a direction that paragraph 3 of the case should be stated in accordance with the regulations and embody only the facts as found and accepted by the trial Court on the evidence and not merely a narration of the evidence itself.

It may perhaps be pertinent to refer, by way of analogy, to rule 12 of the Criminal Procedure Rules which deals with the question of a case stated in criminal cases. It provides that "_____the case shall state the facts as found by the trial Court upon the evidence and not the evidence itself".

But the case as stated suffers from another defect, namely, the questions of law on which the opinion of the Supreme Court is sought have not been clearly formulated. We may refer especially to question 6 and to question 3 which in effect repeats question 2.

On this issue we may usefully refer to and adopt the observations of A. Loizou, J. in *Cleanthis Christofides Ltd.* v. 1. *The Fund for Redundant Employees*, 2. *Yiannakis Florides* (1978) 1 C.L.R. 208 at p. 214:

> "We avail ourselves of this opportunity to point out for the guidance of the Courts and Tribunals that it is absolutely necessary that when asked under the Law to state a case, the specific questions for which the opinion of this Court is sought, must be clearly and separately set out so that the very purpose of stating a case, i.e. of having well defined

> legal issues, can be achieved. Fortunately, however, in this case, the matter was really confined to the interpretation of the terms 'employer' and 'employee' to be found in section 2 of the Termination of Employment Law, 1967, Law No. 24/67, as amended by Law No. 17/68".

and in *Constantinidou* v. *Woolworth* (1980) 1 C.L.R. 302 at p. 313:

> "Before examining them, we wish to point out that it is very desirable that in a case stated the question submitted for the decision of this Court should be clearly formulated and embodied in the submission of the case as not all grounds of appeal raised by counsel are necessarily points that can be raised by way of a case stated under the law".

and the learned Judge cites the *Christofides* case (supra).

Looking at question of law 6 it states "The decision of the Court is contrary to the provisions of s.5 of Law 24/67–79 or the rules of natural justice, or ultra vires the powers of the Court?" Such a question of law far from being a specific and clear formulation of the question on which the opinion of the Supreme Court is sought is also misconceived.

Therefore, this part of the case stated, too, has been formulated in a defective manner and it is hereby directed that the questions of law should be formulated in a clear and precise way.

In the result we direct that the case be remitted back to the trial Court and be dealt with as indicated in this judgment.

We make no order as to costs.

Case remitted back to trial Court. No order as to costs.